

THE COMPETITION ACT

(No. 12 of 2010)

THE CENTRAL BANK OF KENYA ACT

(Cap. 491)

MEMORANDUM OF UNDERSTANDING BETWEEN THE
COMPETITION AUTHORITY OF KENYA AND CENTRAL BANK
OF KENYA ON EFFECTIVELY ADDRESSING COMPETITION
CONCERNS IN THE KENYAN BANKING SECTOR

IN EXERCISE of the powers conferred by section 5(3) of the Competition Act and section 3 (4) of the Central Bank of Kenya Act, the Director General of the Competition Authority of Kenya and the

Governor of the Central Bank of Kenya have signed a Memorandum of Understanding specified in the Schedule hereto in order to establish a framework for co-operation concerning their statutory mandates to effectively address competition concerns in the Kenyan banking sector, entered into on the 12th of January, 2015.

SCHEDULE

1. PREAMBLE

This Memorandum of Understanding is entered into in order to establish a framework for co-operation between the Competition Authority of Kenya and Central Bank of Kenya concerning their statutory mandates to effectively address competition concerns in the Kenyan banking sector, including the Parties concurrent mandates for the regulation, investigation, evaluation and analysis of specified matters arising or incidental to both the Competition Act and Kenyan banking legislation including: the Central Bank of Kenya Act, Banking Act, Microfinance Act, and National Payment System Act, 2011 (hereinafter referred to as “the banking legislation”).

This Memorandum of Understanding is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the two regulators to undertake their respective statutory mandates.

2. OBJECTIVE

This Memorandum of Understanding sets out a framework of co-operation between the Competition Authority of Kenya and the Central Bank of Kenya collectively referred to as “the Parties”, in their common pursuit to promote a fair, competitive, efficient and sound financial environment in Kenya.

3. DEFINITIONS

In this Memorandum of Understanding, unless the context otherwise requires, the following words have the meanings assigned to them:

“*confidential information*” means human resource, financial, legal, marketing, technical, supervisory and other knowledge and information of whatever nature disclosed to or acquired by the Regulators in the course of this Memorandum of Understanding, including all exchanged information, trade secrets both verbal and written transmitted by any means whatsoever, to the extent that such knowledge and information at the time of the disclosure or acquisition is not intended or part of public knowledge or literature.

“*financial institution*” means an entity licensed and supervised by any of the Regulators under the Regulators’ respective laws.

“*regulator*” means a public authority or government agency responsible for exercising autonomous authority over a specified sector in a regulatory or supervisory capacity.

4. REPRESENTATIVES

This Memorandum of Understanding is entered into by the duly authorized representatives of Competition Authority of Kenya and Central Bank of Kenya.

5. ESTABLISHMENT AND RESPONSIBILITIES

5.1 The Competition Authority of Kenya

The Competition Authority of Kenya is a State Corporation established by Section 7 of the Competition Act, No.12 of 2010. The Competition Authority Kenya is mandated to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct. The Competition Authority of Kenya is mandated by section 5(3) of the Competition Act to negotiate agreements with any regulatory body according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector in order to: identify and establish procedures for management of concurrent Jurisdiction; promote cooperation; provide for exchange of information and protection of confidential information; and ensure consistent application of competition principles enshrined in the Competition Act.

5.2 The Central Bank of Kenya

The Central Bank of Kenya is established by article 231 of the Constitution of Kenya and section 3 of the Central Bank of Kenya Act. Central Bank of Kenya is charged with the mandate of formulating monetary policy, promoting price stability, issuing currency and formulating and implementing policies to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems. Central Bank of Kenya is mandated to license, regulate and supervise banking and microfinance businesses; and, regulate and supervise payment systems and payment service providers. Central Bank of Kenya is mandated by section 3(4) of the Central Bank of Kenya Act to make its own rules of conduct or procedure, not inconsistent with the provisions of the Act, for the good order and proper management of the Central Bank.

6. PURPOSE

6.1 This Memorandum of Understanding is entered into in order to establish the manner in which Competition Authority of Kenya and Central Bank of Kenya will interact with each other concerning the investigation, evaluation and analysis of matters arising or incidental to the banking legislation.

6.2 This Memorandum of Understanding is entered into on the basis of mutual respect, in a spirit of goodwill and does not

affect the independence of the two regulators to undertake their respective statutory mandates.

7. INTENTION

This Memorandum of Understanding sets forth a statement of intent of the Parties to establish a framework for mutual assistance and collaboration in the following areas:

- (a) information sharing between the Parties;
- (b) competition issues related to the registration and licensing/authorisation of banks, financial institutions, payment systems and payment service providers.
- (c) coordinated review of competition issues related to emerging products in the banking and payment systems sectors;
- (d) developing a consolidated strategy to instill pro-competitive provisions and principles in policy and legislation related to the banking and payment systems sectors;
- (e) review of the banking and payment systems legal and regulatory framework to instill pro-competitive provisions and principles in the same;
- (f) enforcement of consumer protection in the banking and payment systems sectors;
- (g) investigations and enforcement actions related to allegations of anti-competitive conduct in the banking and payment systems sector;
- (h) provide procedures for accession of other Regulators to joint investigative and enforcement activities between the Parties;
- (i) joint capacity building activities between the Parties; and
- (j) other areas of mutual interest as may be agreed upon by the Parties.

8. COMMON INTERESTS

The Competition Authority of Kenya and the Central Bank of Kenya are both committed to conduct their regulatory responsibilities in the public interest. They recognize the importance of mutual consultation and cooperation across a wide range of issues relevant to competition in the banking and payment systems sectors. The Competition Authority of Kenya and the Central Bank of Kenya agree that Kenya's banking and payment system sectors should be competitive, efficient, safe and economically sustainable. In entering into this Memorandum of Understanding, Competition Authority of Kenya and Central Bank of Kenya give due recognition to the need to:

- (a) promote procedural co-operation and coordination between the Competition Authority of Kenya and Central Bank of

Kenya when dealing with cases of anti-competitive behavior in the banking and payment systems sector where they have overlapping powers;

- (b) facilitate the treatment of cases of anti-competitive behavior within the banking and payment systems sectors;
- (c) promote co-operation and coordination between the Competition Authority of Kenya and Central Bank of Kenya when dealing with merger notifications in the banking and payment systems sectors;
- (d) promote cooperation and coordination between the Competition Authority of Kenya and Central Bank of Kenya when dealing with consumer protection issues in the banking and payment systems sectors;
- (e) work together to identify and address bottlenecks that restrict entry, investment and competition in the sectors;
- (f) collaborate in the preparation of legislative proposals and regulations that are likely to affect the level of competition in markets within the banking and payment systems sectors;
- (g) improve understanding of the respective roles of the Competition Authority of Kenya and Central Bank of Kenya by stakeholders in the focus sectors;
- (h) collaborate to protect consumers of banking and payment systems products and services;
- (i) share information relevant to the exercise of their functions;
- (j) minimize the duplication of activity, wherever possible; and
- (k) ensure that a consistent and coordinated approach is taken by the Parties in dealing with competition and consumer protection-related issues in the banking and payment systems sectors.

9. SCOPE

This Memorandum of Understanding shall apply to the following within the banking and payment systems sectors:

- (a) restrictive trade practices including anti-competitive agreements, decisions, practices, and abuse of dominant position;
- (b) mergers and merger review;
- (c) control of unwarranted economic power; and
- (d) consumer protection issues.

10. STATUS OF THE PARTIES

10.1 Neither Party nor its personnel shall be considered as an official, agent, employee or representative of the other Party. Neither Party shall enter into any contract or commitment on behalf of the other Party.

- 10.2 Each Party shall carry out its own responsibilities and obligations under this Memorandum of Understanding in accordance with the national and international laws, regulations and treaties applicable to it and unless separately agreed in writing, bear its own costs in relation to implementation of this Memorandum of Understanding.
- 10.3 This Memorandum of Understanding shall not create any binding legal obligations between or amongst the Parties.
- 10.4 This Memorandum of Understanding does not amount to a delegation of any of the powers, duties or obligations of the Parties.
- 10.5 This Memorandum of Understanding does not create, directly or indirectly, any rights, obligations or liabilities enforceable by the Parties or by any third party.
- 10.6 Nothing in this Memorandum of Understanding restricts, enlarges, or otherwise modifies the respective jurisdictions of the Parties.
- 10.7 All intellectual property rights, title and interest associated with each Parties' supervisory and regulatory Know how, including without limitation, patent, trademark, copyright, trade secret rights, and moral rights shall remain in the respective party. Further, neither party will use, in any manner, including advertising or publicity or in any way related to this Memorandum of Understanding or the subject matter hereof, the name of the other party or its affiliates or any of their directors, officers, managers, employees, consultants or agents or any trade name, trademark, service mark, logo, symbol or copyright, whether any of the above are registered or unregistered, of the other Authority or its affiliates, except with the express written consent of such other party.

11. THE PARTIES RIGHTS

Within reason, each party has a right to:

- (a) make submissions or provide the other party with comments or expert reports;
- (b) participate in the other party's hearings related to competition in banking and payment systems cases;
- (c) ask for or receive optional or mandatory referrals from the other party related to competition in banking and payment systems matters.

12. COOPERATION IN AREAS OF CONCURRENT JURISDICTION

12.1 Consultation

In any circumstance in which both Parties are considering an issue or issues of competition in the banking and payment systems sectors, which is or are identical to one

another, each Party shall consult with the other before performing any function involving the determination of such issues.

12.2 Merger Control

12.2.1 Where a merger transaction requires the approval of both the Competition Authority of Kenya and Central Bank of Kenya, applicants shall submit separate and concurrent applications to the Competition Authority of Kenya and to the Central Bank of Kenya for their respective consideration.

12.2.2 Each Party shall notify the other Party when they receive a merger application.

12.2.3 The Competition Authority of Kenya shall be responsible for conducting the competition assessment for mergers, while Central Bank of Kenya shall be responsible for conducting all procedures for licensing and review of technical information relating to a merger.

12.2.4 Until and unless Central Bank of Kenya develops criteria for assessing mergers under all the statutes falling under the purview of the Central Bank, the Parties shall thereafter make independent determination on the basis of the criteria outlined in the Competition Authority of Kenya Merger Guidelines. In arriving at these determinations, the Competition Authority of Kenya and the Central Bank of Kenya may consult and or exchange information or data with each other.

12.3 Cases invoking concurrent jurisdiction

12.3.1 The Parties recognize the mutual advantage in coordinating their investigative and enforcement activities with respect to cross-sector establishments and hereby agree to undertake coordinated cross-sector investigations and enforcement.

12.3.2 Where a notification, application or complaint is lodged about anti-competitive agreements, practices, or abuse of dominance in the banking or payment systems sector; or where a Party initiates an investigation into allegations of the same; or where either party requires the other's expertise to facilitate an investigation and or determination of a matter, the following procedures shall apply:

- (a) the Party that receives the notification, application or complaint or takes cognizance of the concern through other means shall notify the other Party of the notification, application, complaint or breach warranting investigation

within seven working days of receiving the notification;

- (b) where the recipient Party does not intend to investigate, it shall notify the other party of its intention.
- (c) where the recipient Party expresses the intention to investigate the notification, application or complaint, the parties shall agree on who shall conduct the investigations and in case of disagreement on which Party to conduct the investigations, the Parties shall refer the matter to an arbitration panel as per paragraph 20 of this Memorandum of Understanding.

12.3.3 The Parties undertake to expedite consultation to avoid delays in resolution of any complaints and or conclusion of investigations in which both Parties have concurrent jurisdiction.

12.4 Forbearance to Act

12.4.1 Where one Party is satisfied that the other Party is performing functions in relation to any particular matter, the first Party may agree to forbear to perform any of its functions in relation to that same matter.

12.4.2 Where a Party intends to forbear to perform its functions in the manner described in paragraph 12.3.2 of this Article, it shall first discuss the issue with the other Party, inform it of its intention to apply forbearance, and give the other Party an opportunity to respond.

12.4.3 Either Party may request the other to exercise forbearance in any particular case. The other Party may accede to such request where it is satisfied that the requesting Party is performing functions in relation to that matter.

12.4.4 Where one Party has agreed to forbear to perform its functions in any particular matter, it may so inform any relevant third parties as it sees fit.

13. COOPERATION IN AREAS OF EXCLUSIVE JURISDICTION

13.1 Where only one Party has jurisdiction to investigate a notification, application or complaint, the other Party undertakes to facilitate the investigation by availing any information in its custody, subject to paragraphs 15 and 16 of this Memorandum of Understanding.

13.2 To the extent permitted by applicable laws, each Party will use reasonable efforts to ensure that the other Party is facilitated to effectively perform or fulfil its regulatory and supervisory functions.

- 13.3 Both Parties endeavor to take into account and as much as possible be guided by international best practice in competition and consumer protection matters in handling matters under this Memorandum of Understanding in order to ensure consistency in determination of cases.

14. ESTABLISHMENT OF JOINT WORKING COMMITTEE

- 14.1 The Parties shall establish a Joint Working Committee ("the Committee") within six months of signing this Memorandum of Understanding. The Committee will be comprised of representatives of Competition Authority of Kenya and Central Bank of Kenya as nominated by the authorities respectively, pursuant to this Memorandum of Understanding and shall function on an on-going basis.

- 14.2 The functions of the Committee shall include:

14.2.1 Management and facilitation of cooperation and consultation in respect of matters relating to competition in the banking and payment systems sectors;

14.2.2 Proposals, where necessary, for amendment or supplementation to this Memorandum of Understanding; and,

14.2.3 Advising the management of Competition Authority of Kenya and Central Bank of Kenya on issues affecting competition and consumer protection in the banking and payment systems sectors. Such advice shall include, but not limited to, the following:

- (a) cooperation and collaboration in conducting joint market studies in the banking and payment systems sectors;
- (b) mutual consultation on matters involving competition and consumer protection in the banking and payment systems sectors, including drafting of new legislation and regulations;
- (c) amendments to the relevant or applicable statutes that may be necessary from time to time;
- (d) international approaches to addressing issues of competition and consumer protection in the banking and payment systems sectors;
- (e) providing updates and sharing information on recent developments in the sectors;
- (f) exchange of staff between authorities; and

- (g) conducting joint training and workshops in areas of concurrent jurisdiction or mutual benefit.

15. INFORMATION SHARING

- 15.1 The Competition Authority of Kenya and Central Bank of Kenya shall exchange such information as may be necessary to actualize this agreement subject to the limitations imposed by legal and regulatory frameworks the Parties are subject to including the Competition Act and the banking legislation.
- 15.2 The Parties recognize the intrinsic value of the information they each hold and the potential efficiencies that can be gained from sharing the said information with each other. The Parties therefore undertake to:
 - (a) promote free access to and exchange of information in an efficient and expedient manner;
 - (b) use the information exchanged under this Memorandum of Understanding solely for the purpose for which the relevant information was sought and or disclosed;
 - (c) keep strictly confidential all information and materials exchanged pursuant to this Memorandum of Understanding. Neither party shall release any such information nor materials to third parties without prior express written consent of the other party except as may be required by law.
 - (d) inform each other of material sanctions, administrative penalties imposed, or other formal enforcement action taken, against a cross-sector establishment in any matter relating to anti-competition.
- 15.3 Each party agrees that it will, upon written request, where it agrees that the request is reasonable, provide to the other Party any information in its possession of a kind specified in the request, within fifteen days from the date the request is received. The request shall state that the information is required by the Requesting Party for the purpose of the performance of its functions, and shall describe the particular functions for which the information is required.
- 15.4 Requests for information must be made in writing (for the avoidance of doubt, "writing" includes electronic mail). In cases of urgency, requests for information may at first instance be made orally, and their responses given orally, provided that both requests and responses are subsequently confirmed in writing.
- 15.5 In the case of information supplied pursuant to this Memorandum of Understanding, the provisions of any

enactment concerning the disclosure of information by the Respondent Party shall apply to the Requesting Party.

- 15.6 The Requesting Party may ask that the request itself be considered of a confidential nature.
- 15.7 The Parties hereby commit themselves to use the information solely for the purposes described in the request.
- 15.8 Should the Requesting Party wish to use the shared information for any purpose other than the purposes expressed in the request it must first obtain the written approval of the Respondent Party.
- 15.9 Where a request for information or assistance is denied, or where assistance is not available, the requested party will provide the reasons for not granting the assistance in writing to the requesting party. Particularly in the following instances—
- (a) where the request would require the requested party to act in a manner that would violate the law;
 - (b) where the request is not made in accordance with the provisions of this Memorandum of Understanding;
 - (c) where the provision of assistance would be so burdensome as to disrupt the proper performance of the requested party's functions;
 - (d) where compliance with the request may otherwise be prejudicial to the performance by the requested party of its functions or business objectives;
 - (e) on grounds of public interest or essential national interest; and,
 - (f) where the parties after consultation, mutually agree that compliance with the request would not be in the best interests of either or both parties.
- 15.10 If the cost of fulfilling a request is likely to be substantial (i.e., entail extraordinary efforts, or is outside the ordinary course of business), the requested party may, as a condition of agreeing to give assistance, under this Memorandum of Understanding, require the requesting party to make a contribution to costs.

16. CONFIDENTIALITY

- 16.1 When exchanging confidential information, the Parties acknowledge the confidentiality provisions of the laws under which they operate. Each party shall respect the confidentiality or secrecy of information exchanged which has been obtained as a result of the other party's statutory powers or other legal obligations and relates to the affairs of any individual, business or undertaking.

- 16.2 Each party agrees not to disclose any confidential information obtained pursuant to this Memorandum of Understanding to a third party unless it has obtained prior consent of the party which has provided the confidential information. Each party shall comply with any non-disclosure obligations that are binding on the other, in particular those set out in section 20 of the Competition Act and sections 20 (3) and 27 of the National Payment System Act.
- 16.3 In no event shall any party disclose any information which is protected as confidential under either section 20 of the Competition Act or sections 20 (3) and 27 of the National Payment System Act.
- 16.4 In the event of a court order or other process which requires the recipient of Confidential Information to deliver, testify about, or otherwise disclose such confidential information, the receiving Party shall—
- (a) immediately notify the providing Party that production is being sought, and afford the providing Party the opportunity to take whatever action it deems appropriate to protect the confidential or privileged nature of the Supervisory Information;
 - (b) notify the third party seeking production of the Information that such information is confidential and that it belongs to the providing Party;
 - (c) use its best efforts to resist production of the confidential Information pending written permission of the providing Party; and
 - (d) consent to any application by the providing Party to use its own resources to intervene in any action for the purpose of asserting and preserving any privilege(s) or claims of confidentiality with respect to the confidential information.
- 16.5 The obligations created in this clause shall subsist for as long as the Confidential Information so remains, even on termination of this Memorandum of Understanding. Such information or part thereof remains confidential until—
- (a) it is or becomes part of public domain through no violation of this Memorandum of Understanding;
 - (b) it is contained in any filing or publication that is a matter of public record;
 - (c) it becomes available to the Regulators on a non-confidential basis from a source other than the Regulators or was already in their lawful possession without restriction and prior to disclosure, and which other source is not prohibited from disclosing such

information to the Regulators by a legal, contractual or fiduciary obligation.

17. CRISIS MANAGEMENT IN THE BANKING AND PAYMENT SYSTEMS SECTORS

In connection with cross-sector cooperation on crisis management:

- (a) for a cross-sector establishment affected by crisis, the Parties should consider together possible distortions to competition that may arise in response to interventions by Central Bank of Kenya in the banking and payment systems sectors, and seek potential solutions;
- (b) Parties shall endeavor to inform their counterparts, on a timely basis, to the extent permissible and appropriate, of the arrangements for crisis management developed for a specific cross-sector establishment.

18. ACCESSION OF NEW REGULATORS

18.1 An applicant for admission as a Party to this Memorandum of Understanding shall submit an application in writing to the Joint Working Committee for consideration.

18.2 The Joint Working Committee shall convene to deliberate on the application.

18.3 The Joint Working Committee may request the applicant to supply any additional information that it considers necessary to allow it to assess whether the applicant meets the criteria to be admitted as a party to this Memorandum of Understanding.

18.4 The Joint Working Committee shall make a recommendation for consideration.

18.5 Once the application for admission has been approved the Joint Working Committee shall inform the applicant in writing of the decision.

18.6 The Joint Working Committee may invite to the meetings established under this Memorandum of Understanding other regulators, government agencies and bodies, both local and international, with similar objectives in matters of mutual interest with the parties to this Memorandum of Understanding.

19. FOCAL CONTACTS

Each Party shall nominate a focal contact to liaise, communicate and respond to requests for information from the other Party for the purposes of this Memorandum of Understanding. The focal contacts should be updated when necessary.

20. SETTLEMENT OF DISPUTES

Parties undertake to use their best efforts to settle any disputes, controversy or claims arising out of this Memorandum of

Understanding or the breach, termination or invalidity thereof. In the event that amicable settlement of the dispute, controversy or claim fails the Boards of the respective parties to this Memorandum of Understanding shall constitute a joint panel to resolve the dispute failure to which the matter should be referred to an arbitration panel comprising three members, one appointed by each of the parties who shall then appoint the Chairman of the panel.

21. INCONSISTENCIES OF LAWS

In the event of a conflict between this Memorandum of Understanding and the laws applicable to any Regulator, the Parties shall resort to the dispute settlement mechanisms in paragraph 20.

22. WARRANTY DISCLAIMER AND LIMITATION OF LIABILITY

The Parties hereby disclaim and make no representations or warranties, expressed or implied, as to non-infringement, data accuracy, accuracy of informational content, data handling capabilities, or otherwise, with respect to this Memorandum of Understanding. Neither Central Bank of Kenya nor Competition Authority Kenya will be liable for, nor will the measure of damages include, any indirect, incidental, special or consequential damages, including lost profits or savings, arising out of or relating to its actions or omissions under this Memorandum of Understanding, even if the parties have been advised of the possibility of such losses or damages.

23. ENTIRE AGREEMENT

Parties agree that this Memorandum of Understanding supersedes any outstanding agreements between the parties pursuant to which the parties share information. All changes or modifications to this Memorandum of Understanding must be agreed to in writing between the parties herein. Nothing in this Memorandum of Understanding shall be deemed to neither establish any right nor provide a basis for any action, either legal or equitable by any person, or class of persons challenging an organization's action or failure to act. This Memorandum of Understanding is not legally binding and does not amount to delegation or assignment of powers.

24. DURATION, AMENDMENT AND TERMINATION

This Memorandum of Understanding may only be amended by mutual written agreement of the parties. Either party may only terminate the Memorandum of Understanding upon issuance of a sixty day notice in writing to the other party, provided, however, that such termination shall not affect the rights and obligations of the Parties with respect to confidential supervisory information shared pursuant to this Memorandum of Understanding. The initiation of arbitration or any other dispute resolution mechanism pursuant to the provisions of this Memorandum of Understanding

shall not in itself be deemed as termination of this Memorandum of Understanding or a ground for its termination.

25. EFFECTIVE DATE OF THE AGREEMENT

The Agreement shall come into force on the date on which it is signed by persons authorized to act on behalf of the two parties.

26. PUBLICATION

This agreement shall be published in the Kenya Gazette for public information as soon as it has been signed.

Made on the 23rd April, 2015.

WANG'OMBE KARIUKI,
Director-General,
Competition Authority of Kenya.

HARUN M. SIRIMA,
Deputy Governor,
Central Bank of Kenya.