

# Antitrust enforcer to allow self-assessment of competitor collaborations amidst pandemic

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Following the (thus far rarely used) “Block Exemption” procedure under Section 30 (2) of the Kenyan Competition Act, the *Competition Authority of Kenya* (“CAK”) has proposed a new set of draft Guidelines as to competitor collaborations during the COVID-19 pandemic, so as to assist with the country’s economic recovery efforts. It specifies five (5) focus sectors, namely Manufacturing, Private Healthcare, Aviation, Travel & Hospitality, and Health Research. The Guidelines are ostensibly inapplicable to firms that engage in economic activity outside these five sectors.

[Download the draft version of the PCBEG here](#)

In issuing its soon-to-be finalized guidance, the CAK wishes to provide “direction to undertakings *in making a self-assessment* as to whether the agreements, decisions or practices which they intend entering into will qualify for block exemption within the Covid-19 Economic Recovery Context without the need to seek the Authority’s intervention.” (A.(4))

A key aspect, in the view of antitrust litigator **Andreas Stargard**, is the renewed attention given to “[public-interest factors](#)” in competition law.

He believes that this concession to non-traditional competition-law theory is “necessitated by the broad economic havoc COVID-19 has wrought, including on historically peripheral-to-antitrust aspects such as overall employment, public health, *en masse* business closures, and the like, which would normally not be highly relevant factors in the strict sense of conducting a rigorous competition-law analysis.”



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Stargard continues that “Condition III of the CAK’s so-called ‘*Self-Assessment Principles*’ expressly highlights this element, namely forcing firms to evaluate whether their proposed collaboration with competitive entities is ‘in the public interest, such as creation of employment’,” citing para. 11(vii) of the draft *Block Exemption Guidelines on Certain Covid-19 Economic Recovery Priority Sectors*.

The CAK’s proposal thus strongly echoes what its regional sister authority, the [COMESA Competition Commission](#) (“CCC”) openly discussed as early as July of last year. As we wrote in our [assessment of the official CCC](#) staff’s thoughts on competition enforcement amidst the pandemic in 2020:

*The concept of non-competition factors (i.e., the public-interest element) was also raised, as there is a “growing debate on whether the pandemic may necessitate changes in [the] substantive assessment of mergers, e.g., towards more lenient consideration of failing firms.”*

As Andreas Stargard observes, “just as COVID-19 is truly global, Kenya and COMESA are likewise not alone in their quest to master the difficult balancing act between sufficiently enforcing their domestic or regional antitrust laws versus allowing reasonable accommodations to be made for necessary competitor collaborations in light of the pandemic’s impact. Indeed, other enforcers have also made accommodations for such unusual collaborative efforts, given the emergency nature of the pandemic.”

In the **U.S.**, the federal antitrust agencies have issued analogous guidance for competitors, issuing a [joint guidance document](#) specifically on health-care providers collaborating on necessary public-health initiatives. What stands out is the **agencies’ express invitation for health-care players to take advantage of the (now-expedited to 7 days’ turnaround time) business-review/opinion-letter procedures**. Mr. Stargard notes however that, unlike the Kenyan proposal of “**self-assessment**” by the affected entities, the American approach still necessitates an affirmative approach of the enforcers by the parties, seeking official sanctioning of their proposed cooperation by submitting a detailed explanation of the planned conduct, together with its rationale and expected likely effects.

By way of further example, in **Canada**, as the [OECD notes](#), the government “has developed a ‘whole-of-government action’ based on seven guiding principles including collaboration. This principle calls on all levels of government and stakeholders to work in partnership to generate an effective and coherent response. These principles build on lessons learned from past events, particularly the 2003 SARS outbreak, which led to dedicated legislation, plans, infrastructure, and resources to help ensure that the country would be well prepared to detect and respond to a future pandemic outbreak.”

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