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THE SENATE

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STANDING COMMITTEE ON TRADE, TOURISM AND
INDUSTRIALISATION

16/10/18

**REPORT ON THE INQUIRY INTO THE FALL OF NAKUMATT AND
UCHUMI SUPERMARKETS IN KENYA**

Clerk's Chambers
The Senate
Parliament Buildings
NAIROBI

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COMMITTEE	Tourism
CLERK AT THE TABLE	J. Mwangi

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ABBREVIATIONS AND ACRONYMS

ACA	–	Anti-Counterfeit Agency
CAK	–	Competition Authority of Kenya
CMA	–	Capital Markets Authority
CoFeK	–	Consumer Federation of Kenya
Customs	–	Customs Services, Kenya Revenue Authority
DPP	–	Director of Public Prosecutions
FY	–	Financial Year
GDP	–	Gross Domestic Product
IP	–	Intellectual Property
KACC	–	Kenya Anti-Corruption Commission
KAM	–	Kenya Association of Manufacturers
KEBS	–	Kenya Bureau of Standards
KECOBO	–	Kenya Copy Right Board
KEPHIS	–	Kenya Plant Health Inspectorate Service
KIPI	–	Kenya Industrial Property Institute
KPS	–	Kenya Police Service
KRA	–	Kenya Revenue Authority
MSLA	–	Management Services and Loan Agreement
NSE	–	Nairobi Stock Exchange
NSIS	–	National Security Intelligence Service
PCPB	–	Pest Control and Products Board
PPB	–	Pharmacy and Poisons Board
W&M	–	Department of Weights and Measures, Ministry of Trade

PREFACE

Parliamentary Committees are anchored in Article 124 (1) of the Constitution, which empowers each House of Parliament to establish Committees and make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.

Establishment and Mandate of the Standing Committee on Tourism, Trade and Industrialisation

The Standing Committee on Tourism, Trade and Industrialization is established pursuant to standing order 212 of the Senate Standing Orders and mandated *to consider all matters relating to trade, industrialization, tourism, cooperatives, investment and divestiture policies.*

The Mandate of the Committee

The Committee on Tourism, Trade and Industrialisation is mandated to consider all matters relating to trade, industrialization, tourism, cooperatives, investment and divestiture policies.

Membership

The following are Members of the Standing Committee on Tourism, Trade and Industrialisation.

1. Sen. Kiburu Charles Reubenson - Chairperson
2. Sen. Anwar Loitiptip - Vice Chairperson
3. Sen. Mwangi Paul Githiomi
4. Sen. Langat Christopher Andrew
5. Sen. Wario Golich Juma
6. Sen. Agnes Zani
7. Sen. Mwaruma Johnes
8. Sen. Masitsa Naomi Shiyonga
9. Sen. Mercy Chebeni

EXECUTIVE SUMMARY

The Standing Committee on Trade, Tourism and Industrialisation upon its motion embarked on an inquiry into the fall of the major supermarkets in Kenya. This inquiry was conducted between, 2nd May 2018 to 5th July 2018. The Committee at its meeting held on 21st March 2018 and 29th March 2018 agreed to undertake a full inquiry into the fall of the major supermarkets in the Country noting that, the retail sector contributes eight (8) per cent to the GDP and also provides employment to around eight million people. Aware that, the sector being a fundamental in achieving not only the Big Four Agenda, but also realization of the Vision 2030, it was therefore prudent to establish the reason for the fall of the major supermarkets as manifested by its failure to pay suppliers and termination of contracts without notices.

The overall objective of the inquiry is to establish clearly the reasons for the collapse of the major supermarkets and the Gaps in the industry. The specific objectives of the Inquiry was-

- i. To come up with Legislations that governs the activities of the retail trade;
- ii. Create and put in place Mechanisms on how the suppliers (distributors) and manufacturers will be paid;
- iii. Learn the best practices and experiences from other jurisdictions;
- iv. Strengthen the cooperation and partnership between the committee and the relevant Ministries, State Agencies and other Stakeholders.

KEY FINDINGS, OBSERVATION AND RECOMMENDATIONS

The Committee had sixteen (16) sittings within the Parliament Buildings during the Inquiry. The stakeholders invited for meeting during the Inquiry are as follows—

- i. The Cabinet Assistant Secretary-National Treasury;
- ii. The Cabinet Secretary, Ministry of Industry-Trade and Development;
- iii. The Chief Executive Officer and Board-Kenya Association of Manufacturers;
- iv. The Chief Executive Officer-Capital Markets Authority;
- v. The Chief Executive Officer-Retail Association of Kenya;
- vi. The Chief Executive Officer-Uchumi Supermarkets;
- vii. The Commissioner General-Kenya Revenue Authority;
- viii. The Director General-Competition Authority of Kenya;
- ix. The Executive Director-Anti-Counterfeit Agency;

- x. The Managing Director-Kenya Bureau of Standard;
- xi. The Nakumatt Administrator;
- xii. The Regional Chief Executive Officer-Jubilee Insurance;
- xiii. The Secretary General Kenya-Consumers Federation of Kenya.

The Committee in its inquiry received both the oral and written submission from the invited stakeholders, the inquiry lasted for a period of two months, which was started on Wednesday 2nd May 2018 and culminated on 5th July 2018.

The Committee made a number of key observations which included:

- a) Presence of imported goods in the supermarket shelves in lieu of the locally manufactured goods;
- b) Gross mismanagement and poor application of corporate governance due to the lack of requisite skills in retail businesses;
- c) Competition from International Supermarkets and online retailing websites;
- d) Need for legal and regulatory frameworks to monitor the performance of the retail industry; and the suppliers financial setbacks due to delayed payments by retail stores.

The Committee had several recommendations which included—

1. the amendment of the Competition Act to provide for remedies for abuse of buyer power and an avenue for resolution of complaints in the retail sector;
2. Continuously creation awareness by The Competition Authority on how to lodge of complaints under the Competition Act and also enable them to inform on the Rules and Guidelines;
3. The Ministry of Trade to proactively enact regulations to manage retailers and buyers who heavily acquire short term credit in acquisition of goods;
4. Fast tracking the development of the code of conduct by Competition Authority for self-regulation of the sector so as to supplement the enforcement initiatives provided for under the Competition Act;
5. Government to develop legal frameworks to regulate the retail trade sector instead concentrating on licensing and enforcing competition laws;
6. There is need for the development of a dedicated prompt payment regulatory framework in Kenya to address late payment;

7. The government should actualise the development of local content legal framework to facilitate the Buy Kenya Build strategy;
8. The need to strengthen the Anti-Counterfeit Agency's institutional capacity by expanding its operations to the entry points therefore justifying the need to increase their budgetary allocations;
9. The Anti-Counterfeit Act needs to be reviewed and amended to address emerging challenges in the retail sector; and needs to be a consideration to review the harmonization of regional laws on intellectual property, counterfeiting and standards.

ACKNOWLEDGEMENT

Mr Speaker.


The Standing Committee on Trade, Tourism and Industrialisation takes this opportunity to thank the offices of the Speaker and the Clerk of the Senate for support accorded in facilitating the technical and administrative work of the Committee.

The Committee is also grateful to Cabinet Secretary, the National Treasury, Cabinet Secretary, Ministry of Industrialisation and Enterprise Development, the Director General, Kenya Revenue Authority (KRA), The Director General, Competition Authority of Kenya (CAK) the Chairperson, The Kenya Association of Manufacturers (KAM), for appearing and submitting documents and reports required by the Committees during the Inquiry.

The Committee further thanks the Kenya Bureau of Standards (KEBS), the Consumer Federation of Kenya (CoFeK), Official of Nakumatt Supermarkets and Uchumi Supermarket officials for presenting their proposals on ways and means of addressing the challenges facing retail markets in Ken

Mr Speaker.


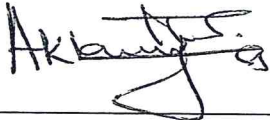


It is my pleasant duty pursuant to Standing Order 137, to table the Report of the Standing Committee on Trade, Tourism and Industrialisation on the inquiry into the fall of Nakumatt and Uchumi supermarkets in Kenya.

Signed:  Date: 11/10/2018

SEN. KIBIRU CHARLES REUBENSON, MP, CHAIRPERSON
SENATE STANDING COMMITTEE ON TRADE, TOURISM AND
INDUSTRIALIZATION

ADOPTION OF THE REPORT OF THE SENATE STANDING COMMITTEE ON TOURISM TRADE AND INDUSTRIALIZATION ON THE INQUIRY INTO THE FALL OF NAKUMATT AND UCHUMI SUPERMARKETS IN KENYA

We, the undersigned Members of the Tourism Trade and Industrialization Committee of the Senate, do hereby append our signature to adopt the report-

NAME	DESIGNATION	SIGNATURE
Sen. Kibiru Charles Reubenson-	Chairperson	
Sen. Anuar Loititip	Vice Chairperson	
Sen. Mwangi Paul Githiomi	Member	
Sen. Langat Christopher Andrew	Member	
Sen. Wario Golich Juma	Member	
Sen. (Dr.) Agnes Zani	Member	
Sen. Mwaruma Johnes	Member	
Sen. Masitsa Naomi Shiyonga	Member	
Sen. Mercy Chebeni	Member	

CHAPTER ONE

1.0 INTRODUCTION

Senate is mandated under the Constitution of Kenya to represent the counties and serve to protect the interest of the counties and their governments. The Committee on Tourism, Trade and Industry, is established pursuant to standing order 212, of the Senate Standings Orders and as set out in the second schedule of the standing orders. It is mandated to consider matters relating to Trade, Industrialization, Tourism, Cooperatives, Investment and Divestiture Policies.

Trade plays a significant role in the country's growth and development through its linkages with all the sectors of the economy. Trade supports agriculture, manufacturing and service industries by creating markets through which goods and services get to the consumer and therefore provide the channel through which effects of economic growth are transmitted to various players in the economy. Trade also plays a critical role in poverty reduction through employment creation in informal, retail, and wholesale trade.

Four major supermarkets controls namely – Tuskys, Uchumi, Nakumatt and Naivas roughly over 30 per cent of the domestic retail business with the rest going to smaller supermarkets in the country. The Government of Kenya's recent initiatives to revive *Uchumi* Supermarkets through conversion of cash advanced into share equity to restock its shelves, have nevertheless not helped much as Uchumi is unable to pay its suppliers and land lords, after it registered negative market growth, closure of branches and staff lay off.

Similarly, the collapse of Nakumatt Supermarket chain, which at its peak had over 60 branches all over East Africa, is a clear manifestation of a serious operational failure in our economic structure and fundamentals. It has joined the queue amongst retailers getting close to their deathbed, demonstrated by its failure to pay suppliers, banks, landlords, private corporations, Kenya Revenue Authority (KRA) and its employees among others. Under provision of the **Insolvency Act (Section 563)**, the Judiciary has allowed the appointment of a caretaker-administrator to run its affairs and oversee the recovery of Nakumatt Holdings, to block its liquidation.

The ripple effects of the closures of the supermarkets had far wide economic consequences in our economy. The sector holds promise to agricultural and industrial sector development

because as the country develops, efficient consumer outreach is necessary through formal retail outlets. The retail trade sector is one of the key sectors that have been singled out under **Vision 2030** as a cog for the transformation of the Kenyan economy to a trade competitive economy through efficient outlet of goods from farms and industries in Kenya as well as imported goods. It is therefore of paramount importance for my Committee to dig out legal, policy and other deep seated emerging structural and operational challenges leading to the collapse of the supermarkets, and propose policy and legislative measures to address the gaps.

For trade to be effective, therefore, it is imperative that the factors affecting the inter-relationship in the manufacturing, agriculture and service value chain are comprehensively addressed. The Senate Standing Committee on Tourism, Trade and Industry is mandated to oversee the activities of the Ministry of Trade and come up with legislation that governs the sector. It is in this regard that the Committee conducted an inquiry into the activities of the major Supermarkets in Kenya in order to get an understanding of what led to their collapse.

CHAPTER TWO

2.0 SUBMISSIONS AND GATHERING OF EVIDENCE

Having resolved to inquire into the fall of Nakumatt and Uchumi supermarkets in Kenya, the Committee commenced its Inquiry by inviting various persons of interest including Cabinet Secretaries, Directors of State Corporations, Consumer Organizations, Associations of Manufacturers and the management of the two supermarkets amongst many others.

During the meetings, written and oral evidence was adduced as recorded here-under-

2.1 MEETING WITH THE COMPETITION AUTHORITY OF KENYA (CAK)

The Director General of the Competition Authority of Kenya appeared before the Committee and started with giving background information, he stated that, the Authority was established on 1st August, 2011 by section 7 of the Competition Act, No 12 of 2010 (“the Act”). The Authority has a dual mandate of promoting and safeguarding competition in the national economy and also to protect consumers from unfair and misleading market conduct.

The Authority safeguards competition by regulating market conducts and market structure. Regulation of market conduct involves investigation into restrictive trade practices and conduct such as abuse of dominance (example, charging below variable cost), price fixing, among others and recently Abuse of Buyer Power. Regulation of market structure involves approval of mergers.

In the protection of consumers, the Authority achieves its mandate through investigation of consumer complaints relating to false and misleading representations, Health and safety of products and unconscionable conduct.

The Authority is also mandated by section 9 of the Act; to advise the Government and other Government Agencies including Sector Regulators in relation to regulations which are likely to impede Competition in the economy.

To date the Authority has handled the following matters:

No	Item	2015/2016	2014/2015	2014/2013
1.	Merger Notifications	151	148	88

2.	Restrictive trade practices	27	19	17
3.	Consumer complaints	60	28	14

Source CAK

In addition, the Authority, in actualizing its mandate has engaged in activities which has enhanced ease of doing business and investment climate in the national economy by-

- a) Opening up of the Mobile Money transfer market thus allowing agents to deal with more than one provider;
- b) Informing the adoption of interoperability in mobile money transfer markets;
- c) Creating pricing transparency in the Digital Financial Services (DFS) market mobile payments and reduction of charges for Unstructured Supplementary Services Data (USSD) by 99% per session;
- d) Facilitating entry in growing and processing of Specialty tea in various regions of Kenya;
- e) Expediting period or duration of determination of mergers down from the statutory period of sixty (60) days to forty (40) days; and
- f) Developing mergers thresholds to facilitate fast tracking of proposed mergers that have benign effect on Competition.

However, in its enforcement initiatives, the Authority has encountered emerging competition issues, in various sectors of the economy including the retail sector. The sector contributes over eight (8) per cent to the GDP and also provides employment to about eight million people. The sector is therefore fundamental to the achievement of the Big Four Agenda and ultimately the realization of Vision 2030.

2.1.1 Challenges facing the Retail Sector

In order to appreciate the emerging issues further, the Authority undertook a study into the retail sector pursuant to section 18 of the Competition Act. This study was conducted in collaboration with the University of Nairobi in early 2017.

The key findings of the study were that the retailers, specifically the branded supermarkets, were:

- i. Not paying the suppliers on time;
- ii. Issuing bad cheques;

- iii. Threatening suppliers with termination of contracts without notice; and
- iv. Unjustifiably returning goods.

The study also highlighted that some of the challenges are as a result of:

- i. Lack of good Corporate governance principles;
- ii. Lack of critical skills in key functional areas which is exacerbated by lack of a curriculum for the retail trade in our educational institutions; and
- iii. Rapid expansion funded by supplier credit. It has been indicated that 97% of the finances held by the retailers, at the Tills at any day is suppliers' money.

The above challenges amount to Abuse of Buyer Power. This has contributed to the high mortality rate of SMEs in Kenya since they are the major suppliers and also led to increase in the portfolio of non-performing loans (NPL), which may lead to macroeconomic instability.

The other findings of the study were the negative effect of private labels, sale of unsafe goods and misleading representations, particularly differentials between Tills and Shelf prices in retail stores, which the Authority has remedied.

Lastly, the study also revealed that **there is increased presence of imported goods in the supermarket shelves in lieu of the locally manufactured goods.**

2.1.2 The Authority's interventions

To remedy the challenges, as highlighted above, the Authority with the support of the National Treasury and Parliament has initiated the following:

- i. The Amendment of the Competition Act to provide for remedies for Abuse of Buyer Power and an avenue for resolution of complaints in the Retail sector, which emanate from the Abuse of Buyer Power. In order to improve the efficacy of the amendments, the Authority, in collaboration with stakeholders and other Government Agencies, is in the process of operationalizing Buyer Power Rules and Guidelines;
- ii. Towards operationalizing the Buyer Power provisions, the Authority has interacted with the Kenya Association of Manufacturers and the Suppliers Association of Kenya so as to create awareness on how to lodge complaints under the Act and also enable them to inform the Rules and Guidelines;
- iii. The Authority is also consulting with the National Treasury and other Government Agencies with the objective of deepening institutional capacity in terms of skills, organizational structure and the budget so as to enhance the enforcement of the Abuse

of Buyer Power provisions under the Act. This is expected to be actualized in the coming financial year 2018/2019;

- iv. The Authority has taken initiatives within its internal processes to fast track any transaction or application affecting the retail sector to improve the attractiveness of the sector to potential investors. This can be demonstrated by the number of days taken to finalize the following transactions:
 - a. **Tuskys/Ukwala merger:** The transaction was approved within eight (8) days.
 - b. **Choppies Enterprises Kenya Limited (CEKL) and Ukwala merger:** The transaction was approved within five (5) days.

The Authority invited the Committee to note that despite the challenges, there has been credible entry and expansion of ten (10) supermarkets namely; Choppies, Shoprite, Carrefour, Game, Souk, Tumaini, Quickmart, Maathai, Chandarana and Naivas over the last two (2) years. Therefore it is the Authority's hypothesis that the investment climate is conducive enough to attract new investment.

2.1.3 Recent Nakumatt/Tusker Mattresses Proposed Merger Transactions

The Authority in November, 2017 received an application from Tusker Mattresses Limited ("Tuskys") and Nakumatt Holdings Limited ("Nakumatt") for grant of authorization to implement a proposed merger transaction.

The transaction involved Tuskys providing Management Services and Loan Agreement ("MSLA") to Nakumatt at a fee. Various correspondences regarding the matter and meetings were held with the parties and representations made by some of the shareholders of Tuskys.

Upon interrogation, the Authority came to a conclusion that the transaction did not constitute a merger pursuant to the provisions of the Act since there was no change in control. In accordance with Section 25 of the Act, the MSLA qualified as a restrictive trade practice as per section 21 of the Act.

This decision was communicated to the parties on 17th November, 2017 and the parties were advised to file for an Exemption based on the following reasons:

- i. The ownership structure of Nakumatt Holding Limited (Nakumatt) would not change;
- ii. The MSLA only involved the provision of management services by Tuskys to Nakumatt;
- iii. The parties had not entered into a substantive Share Purchase Agreement; and
- iv. Tuskys would principally act as guarantor for the supply of goods to Nakumatt.

Subsequent to this advice, the parties applied for an Exemption Application on 20th December, 2017 and as per the requirement of section 25 (3) of the Act the Authority published a Notice in the Kenya Gazette inviting stakeholders to give their views regarding the Exemption Application.

By the time of closure of the receipt of Stakeholders Submissions, the main concerns raised were:

- i. Some of the shareholders of Tuskys opposed the proposed arrangement indicating that they had not been consulted and also indicated that Tuskys did not have the capacity to enter into the arrangement based on their liabilities; and
- ii. Nakumatt Suppliers including the Landlords expressed concern that the outstanding debt due to them had not been included in the MSLA.

After a preliminary review of the documents presented in support of the transaction, the view of the Authority was that, **Tuskys did not have the adequate capacity to support the existing debt and the sustainability of the proposed arrangement.** From this observation, the Authority's preliminary concern was that the arrangement was not meeting the thresholds of the criteria set under section 26 (3) of the Act to determine such an Exemption. In fact there were some concerns that if the transaction proceeded it would lead to systemic failure in the sector.

The magnitude of the whole transaction is highlighted very clearly in the Report that was released by the receiver Manager on 10th March, 2018. **In summary, the Report highlighted that Nakumatt had total liabilities of Kshs. 35.82 billion against assets of Kshs3.82billion.**

However, before the Authority finalized analyzing the Stakeholders submissions, Tuskys communicated regarding the suspension of the exemption withdrawing from the proposed deal.

2.1.4 Conclusion

In conclusion the Authority stated that:-

- i. There are emerging issues in the retail sector such as Abuse of Buyer Power, which was domesticated into the Kenyan law by Parliament. The Authority has been engaging National Treasury and Government Agencies in providing requisite budgetary and institutional support in order to deepen implementation of the provisions of the Act with respect to Abuse of Buyer Power;
- ii. The Authority has also engaged stakeholders in the retail sector on the proposed amendments and the mode of filing complaints to give effect to the provisions on abuse of buyer power;
- iii. The Authority will soon operationalize the Buyer Power Rules and Guidelines after consultation with the Cabinet Secretary/National Treasury and other Government Agencies in order to increase the efficacy of Abuse of Buyer Power provisions in the Act;
- iv. There has been a tremendous expansion of the number of branded Supermarkets in the recent past. However, this expansion, although anecdotal, is said to be utilizing supplier credit for expansion. It has been indicated that 97% of the monies held by the retailers at the Till at any given day, is suppliers' money; and
- v. The Supermarkets lack critical skills in key functional areas which is exacerbated by lack of curriculum for the retail trade, in our educational institutions.

There are a high percentage of imported goods in the supermarket shelves in comparison to the locally manufactured goods.

There seems to be lack of good corporate governance principles in the major supermarkets, and this may lead to their collapse resulting to further detriment in the economy.

2.1.5 Recommendations

Premised on the above and to buttress the initiatives the Government is undertaking, the Authority proposes that:

- i. The Government should come up with Regulations to manage retailers/buyers who heavily acquire short-term credit in acquisition of goods and have to sell to pay the

creditors. These regulations may guide in regard to the allowable ratio of assets and liabilities in order to ensure effective management of the retailers expanding using the suppliers' credit;

- ii. The Authority with the requisite budgetary support shall in the coming Financial Year (2018/2019) enhance its regulatory capacity in the retail sector through creation of a Department which will be focusing on implementation of a Code of Ethics for retailers, and also to adjudicate disputes arising from terms of contract between suppliers and retailers;
- iii. There is need to develop a Code of Conduct for self-regulation of the retail sector to supplement the enforcement initiatives provided under the Competition Act. This Code of Conduct can be developed by the industry players (Suppliers, Manufacturers and Retailers), using international best practice, but domesticated to suit Kenya's situation and be submitted to the Authority for approval;
- iv. The Authority will continually engage stakeholders on the issues facing the retail sector to facilitate appropriate and timely interventions.

2.2 CONSUMER FEDERATION OF KENYA (CAK)

The Consumer Federation of Kenya met the Committee and informed the members that-

2.2.1 The Fall of the major supermarkets in Kenya

The collapse of Uchumi & Nakumatt Supermarket could have been avoided if past lessons from local and foreign jurisdiction were learnt. In the 1990's, a company called Enron Corporation grew from zero to the 7th biggest company in the world in less than 10 years. When it imploded in 2004, it was found that its accounts had been manipulated by the top management with the connivance of its auditors, Arthur Andersen, then a global auditing giant, and the company's lawyers. The company collapsed, the auditors folded up and many law firms involved closed. Those culpable went to jail and paid fines of hundreds of millions of dollars.

Back home, if a company is listed at Nairobi Stock Exchange (NSA) and later found that its books are cooked, the company's management, Board, auditors and their lawyers ought to be held accountable, indicted and made to refund for all losses and shareholders' investment.

Capital Markets Authority (CMA) should also blacklist all transaction advisers of a company that collapses within three years of listing.

It is only when professional accountability is demanded or called upon that companies in Kenya will never cook their accounts again. It is sad that we have seen or seeing the collapse of Imperial Bank, Kenya Airways, Trans Century Group, Uchumi et al yet they got and are listed at Nairobi Stock Exchange.

When your business arrives at the position of superior bargaining power, in relation to suppliers, it's still wise to consider your good long term relations. Take advantage but beware that the tables always turn. And it goes without saying that you should never lose touch with your customers.

2.2.2 Reasons for the Collapse

A combination of factors including gross mismanagement, poor strategic decisions, an ambitious expansion programme, weak management, coupled with poor resource policy, unsuitable financing, tax issues and massive internal losses perpetrated by some wayward employees and suppliers are the main reasons behind the slow death of giant supermarket chains in the country.

2.2.3 Impact of the Collapse

No doubt, the death of supermarket chain will have huge ramifications for the economy given the web of supply chain networks it has established. It is comforting that the Government has taken interest in the dwindling fortunes of the supermarket chain. It should do more than standing in as a mediator between the troubled firm and its anxious creditors.

Kenyans in the informal sector are experiencing the pinch in these harsh economic times. The ripple effect of one individual losing a job is vast, their purchasing power is dented, they cannot meet their basic obligations of food, clothing and shelter and their dependents are also feeling the pinch.

While the government of the day has continued to boast of jobs creations in the informal sector, the reality is that there is an existing cash flow problem. There is little money in circulation as more and more Kenyans speculate on the current political unfolding yet a deeper look shows that the problem has been there for some time.

It is worth noting that tourism, information and communication, real estate and transport were the major drivers of job creations here with numbers showing an increase in international arrivals from 1.18 million in 2015 to 1.34 million in 2016. While the figure is impressive on paper, an interrogation of the same on the ground paints a different picture.

All over the country, businesses are closing and downsizing and salaries are increasingly being delayed. More and more Kenyans are feeling the economic pinch as depicted recently in the news showing how auctioneers are crying because their yards are full of motor vehicles reclaimed from individuals who have defaulted on payments but which no one is offering to buy even at highly subsidized prices. Even the luxury car market has not been left out. Data from the Kenya Motor Industry Association (KMI) show a decline in luxury car sales in the first six months of 2017. Jeep Grand Cherokee dropped 50% to 4 units, Porsche dropped 43.3% to 17 units and Land Rover dropped to 19.4% to 29 units sold in that period. Wherever you look, the Kenyan economy is doing badly and Kenyans are suffering.

2.2.4 Gaps in the Industry

The country has in the past months attracted at least three major international supermarkets, which have already set up operations, with another lining up to enter the market. Botswana based Choppies supermarket, French retailer Carrefour and South Africa's Game are the three outlets that have already set shop in Kenya. Choppies entered the Kenyan market slightly over a year ago after buying seven branches of a struggling local supermarket. The supermarket has since rebranded all the stores and changed the interior set up to reflect its international brand offering Kenyan consumers unique experience.

On the other hand, Carrefour, the second-largest supermarket in the world, set up from scratch two outlets in high-end malls in Nairobi namely The Hub in Karen and Two Rivers Mall in Runda. The supermarket has further accepted to take up space vacated at a mall in

middle-income neighbourhood by struggling Kenyan retail outlet Nakumatt supermarket, therefore, expanding its reach.

Tuskys Supermarket announced a 3-year plan to increase its foothold by 56.3 percent to 100 new stores in Kenya and Uganda by 2020, from 64 stores presently. The expansion plan will cost the retailer Kshs 3.0 bn anchored on technology, innovation and strategic partnerships with leading technology and related solutions providers. Other players in the market who have announced expansion plans include Naivas and international retailers such as Manix Clothes Stores, French retailer Carrefour, Botswana retailer Choppies and South Africa retailer Game.

In 2016, Kenya's retail spending hit 17.5 billion U.S. dollars as the industry expanded by 13 percent, according to a recent survey by Procter & Gamble (P&G). The survey attributed rapid expansion of the retail sector to shopping dynamics, but mainly Kenyan consumers' habit of shopping goods in bulk as opposed to when the need arises. Of the 17.5 billion dollars, supermarkets' share was 30 percent, with 67 percent going to shops and the rest to special channels like online. Henry Wandera, an economics lecturer in Nairobi, noted that foreign supermarkets are flocking into Kenya because of three reasons: a growing middle-class whose income is on the rise, the gap being left by troubled local outlets and the real estate development, in particular malls. Malls and proposed shopping complexes currently occupy more than 470,000 square meters of land in Nairobi, according to industry data.

2.2.5 Recommendations

- i. With full information of the risk to the taxpayers, injecting cash into the retail chain will no doubt go a long way to rescuing one of Kenya's signature businesses. In any case, the Nakumatt brand must surely have some value. The Government could also give a loan guarantee to enable the retailer find a lender.
- ii. The government should come up with a National Policy of a one shop in retail to enabling record tracking and evaluation of its operation in the market.
- iii. The Senate should advocate for starting a Retail Trade Regulatory Authority to man the retail sector in Kenya.

2.3 MEETING WITH THE CABINET SECRETARY MINISTRY OF INDUSTRIALISATION AND ENTERPRISE DEVELOPMENT

The Cabinet Secretary for Industrialisation and Enterprise Development Mr. Adan Mohammed met the committee and presented a brief of the general status of play of retail trade sector in Kenya as follows-

2.3.1 Importance of the Sector

The Wholesale and Retail trade sector plays a significant role in Kenya's economy as evidenced by its share in Gross Domestic Product (GDP), which is estimated at 8%. The sector among others, generate employment opportunities. The sector generated the highest number of jobs in the informal sector, in 2016, which translates to about 59.7 percent. The number of persons engaged in informal trade in the sector has grown steadily standing at 6.6 million, 7.1 million, 7.5 million, and 7.9 million in 2013, 2014, 2015 and 2016 respectively. However, a number of challenges have slowed down the momentum of the growth of the sector with a number of local major supermarkets closing shop.

Supply Value Chain

The supply value chain of consists of producers, wholesalers, distributors and retailers. The sector is mainly characterized by informality. The sector players consist of Micro, Small, Medium and Large enterprises. Most supermarkets in Kenya are in the category of medium and large enterprises.

2.3.2 Factors which influenced Closure of Major Supermarkets

- i. Gross mismanagement due to lack of requisite skills especially in family owned businesses which form the bulk of the major supermarkets in Kenya;
- ii. Inadequate strategic planning;
- iii. Poor application of corporate governance;
- iv. Multiple charges, taxes and levies imposed by County governments;
- v. Low capitalization;
- vi. High cost of finance for trade;
- vii. Weak management structures which creates high level of "shrinkage" in retail business. Unscrupulous employees often collude with suppliers to pay for goods not

delivered. The Retail Trade Association of Kenya estimates that major retailers lose Ksh.3.5bn (\$34m) worth of stock annually to theft;

- viii. Increased competition with new entrants such as Carrefour and Choppies;
- ix. Poor supply chain management, especially Nakumatt and Uchumi;
- x. E- Trading- online shopping has also given competition to traditional retail shopping. Online retailing websites that exist include Jumia, OLX and Kilimall, which have experienced an increase in traffic and revenue.

2.3.3 Impacts of Closure of the Supermarkets

a) Spill over effect on other Businesses

Reduced business, for supermarkets suppliers, through scaling down operations is due to cash flow problems and shrinking outlet for their goods. However no documentation on number of Suppliers of goods and services negatively affected.

The retailers/ supplier's engagement in some instances is informal and lacking in documentation.

Challenges in servicing loans:- in cases where loans were advanced to supply of goods and services.

The major supermarkets were anchor tenants and their closure has affected other businesses such as financial institutions, food courts, beauty shops, hospitals, taxi, entertainment joints etc.

Landlords who leased their properties for use by supermarkets are also among businesses affected due to scale down of operations and closure.

b) Job Losses

The ripple effect on the businesses associated with the supermarkets having to scale down/close their businesses has also caused laying off workers. For example, Tuskys Supermarket operates 52 stores in Kenya, employing 6,000 people. It also runs seven outlets in Uganda. If such branches were to close for one reason or another, the associated jobs will be lost.

2.3.4 General effect on Kenyan Economy

The closure of Supermarkets has had and will definitely have a detrimental effect on the Kenyan economy. Before the financial struggles of supermarkets, they controlled a substantial market. The retail chains directly employed a number of people and numerous small-scale suppliers including smallholder farmers. Being major players in the retail sector, the decline will have an effect on the retail sector value chain.

a) Loss of Tax Revenue

The collapse of supermarkets has occasioned huge losses of Government revenue. For instance, as of November 2017, Nakumatt owed the Kenya Revenue Authority 1.8 billion Kenya Shillings in form of unpaid taxes.

The Total Unpaid debt and Number of debtors affected is estimated to range from (Ksh.13B to 15B). The debtors include Employees, Manufacturers/Suppliers, Landlords, Banks and Government.

2.3.5 Gaps in the Industry

i. Legal and Regulatory Frameworks and Performance of Supermarkets

Supermarkets faced no challenges complying with the regulations. However, it is recommended, that an effective framework be in place to monitor supermarkets compliance with the regulations

ii. Retailers and Suppliers Working Relation

Supermarkets and Suppliers have a code of conduct for engagement. However, not all strictly observe the regulations.

2.3.6 Action by State Department for Trade towards Addressing Challenges

The State Department has held discussions with Retail Traders Association of Kenya (RETRAK), Association of Kenya Suppliers (AKS) and Kenya Association of Manufacturers (KAM) to build consensus on regulating the sector.

The State Department has also undertaken a study on prompt payment within the sector. The study recommends:

- Government regulation of the sector; and
- Self-regulation.

The State Department has also constituted a Technical Committee to work on a framework for the sector's regulation and further implemented the "*Buy Kenya, Build Kenya*" strategy.

2.3.7 Recommendations on the Way Forward

- i. Fast tracking approval of the Trade Development Bill to provide for enforcement of regulation of the sector;
- ii. Development of principles of trade licensing. This will lead to; harmonization all charges and levies charged by the County Governments; and Enhancement of ease of doing business;
- iii. Government's role in the retail sector has been limited to licensing and enforcing competition laws. However, it is evident that government should develop legal framework to effectively regulate the retail trade sector.

2.4 MEETING WITH THE KENYA ASSOCIATION OF MANUFACTURERS

The Ms. Flora Mutahi The Chairperson and members of the Board, Kenya Association of Manufacturers (KAM) met the Committee and informed the members that KAM is the umbrella body for manufacturing value add industries in Kenya. Established in 1959, the organization has over the years, prided itself as the premier business membership organization in policy analysis and advocacy, with a growing membership, now with over 1000 members in the value add industries.

2.4.1 Manufacturing Sector Performance

Kenya aspires to transform from a lower middle-income country to an upper middle-income country by the year 2030. Manufacturing is one of the major sources of Gross Domestic Product (GDP) growth in the county. In 2016, the manufacturing growth stood at (6.3%). In 2017 manufacturing sector growth improved by 0.2% and contributed to the GDP 8.4%.

The Government has prioritised growth of the manufacturing sector to attain 15% growth under Kenya's economic development blue print, Vision 2030. Despite such growth, there still exists a trade deficit in the county where exports of goods, as a percentage of GDP, have been falling since 2005, while imports of goods have been increasing.

Recently, the Government has developed its Big Four Agenda plan where manufacturing is one of the key pillars that, cuts across the other three pillars on Agriculture, healthcare and housing. The Association is confident that this will unlock the barriers hindering the potential growth of the manufacturing sector.

2.4.2. Situational Analysis on the Influence of Supermarkets in providing Domestic Market Access

a. Performance growth trends of the retail sector

The Retail sector has tremendous positive linkages to support growth of the manufacturing sector in Kenya and which has been evidenced in the growth of the supermarkets in Kenya over the years. The interdependence arises from their ability to provide access of a domestic market to the local manufacturers. Vision 2030 targeted to raise the share of products sold through the formal retail channels, such as supermarkets, from 5% in 2007 to 30% by 2012.

The retail sector has received opportunities for growth in the recent years with the investment in real estate in the country that has provided retail supermarkets penetration to consumers, as well as the e-commerce that has introduced cashless payments.

b. Current Situation of the Sub Sector

The environment of the retail sector has been impacted by the changes evidenced in the supermarket sub sector over the last five years. A Government study on Kenya's retail sector (State Department of Trade, 2017), reports that the success of the retail sector has so far been driven by a robust supply chain, tapping from a vibrant manufacturing sector for locally produced goods and liberalized trade regime for imported products.

The sub sector has seen an increase and surge of foreign investments by supermarkets such as Carrefour in 2016; Massmart Holding's Game 2014; Botswana's Choppies; and recently Shoprite from South Africa. In addition, reports indicate that the rising middle-class purchasing power has also contributed to investments in the retail sector.

The celebration of investments in the sub-sector is indeed a cause for celebration. However there exists the reality of the underlying challenges that have and continue to face the local and locally owned supermarkets in the country.

The collapse of the two major locally owned supermarkets considered Uchumi and Nakumatt which, had managed to expand its growth within the country and also into the East African Community (EAC) was mainly due to mismanagement of the outlets and over ambitious plan. In addition, the sector saw the acquisition of Ukwala supermarket by Choppies.

The financial woes of the two supermarkets, Uchumi and Nakumatt has also spurred brewing disagreements within the EAC, with Uganda and Tanzania Governments calling for payment by the Kenyan Government of the losses caused to their citizens - suppliers and landlords.

2.4.3 Challenges facing the Retail Sector from a Manufacturers' Perspective

a) Late Payments

Manufacturers estimate that on average the **coinage period** (number of times payments for goods are being received from retail supermarkets) is once a year due to late payments. The estimate is based on the process of production. Before supply, it takes an average of up to three months for a manufacturer to get goods ready. After supply, more time is wasted as manufacturers wait for payments which are projected to take up to **180-240 days**. The same similar cycle process is repeated in the subsequent year.

Such a situation is of great concern not only for manufacturers but the entire country for the reason that it significantly **reduces cash flow circulation** and which limits growth of businesses. The benefits of prompt payment cannot be gainsaid. They include, enabling economic growth of the whole economy and business enterprises through increased cash flows and promotes fair trade practices and relationships needed for economic growth.

Comparative best practice shows that the average minimum payment period to suppliers can be made within **10-20 days** in countries such as United Kingdom, Finland, Sweden, Germany, and Norway. Below is a table indicating the payments periods:

Country	Average business-to-Consumers term in days	business-to-payment	Average business-to-business payment term in days	business-to-payment duration in days
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UK	20	25	25
Spain	25	60	60
Italy	45	65	80
France	25	40	40
Sweden	20	27	28
Germany	15	25	25
Finland	10	20	20
Norway	15	25	25

Below are tables showing global frameworks developed to address prompt payment:

Country	Established mechanism	Payment Period
South Africa	Voluntary code of conduct	Pay suppliers on time within 30 days once the final valid and compliant invoice is received.
United Kingdom	The Prompt Payment Code (PPC) Prompt payment ombudsman to address late payment. The Late Payment of Commercial Debts (Interest) Act 1998	Government to pay 80% of undisputed and valid invoices within 5 days with the remainder paid in 30 days.
Australia	The voluntary prompt payment protocol	30 days with extension in certain cases for government agencies.
European union	EU Directive on prompt payment (Directive 2011/7/EU of 16 February 2011 on combating late payment)	The limits are within 60 days for businesses and within 30 days for public authorities.

- **Economic Impact of Late Payment to Manufacturers and SMEs**

This problem is far greater for small manufacturing businesses (SMEs) that rely on constant cash flows and do not have the capacity to absorb the unwarranted costs in the same manner as large businesses would.

b) Expansion based on Unregulated Environment Financial and Inventory Management

The lack of a regulatory framework in the country for companies holding large sums of public funds is a cause of concern and has contributed to failure of supermarkets. The recent financial woes of Nakumatt Limited exposed the impact of this situation. Estimates show that the company's estimated deficiency with regards to non-preferential creditors totalled Twenty six billion Kenya shillings (Kshs. 26,404,042,133). With regard to Uchumi reports indicate its debt to suppliers in 2016 stood at three point six billion (Ksh3.6 billion) (\$36 million), double the Ksh1.8 billion (\$18 million) quoted in 2015, according to the management.

Emerging complaints of late and non-payments, dishonouring of direct debits and recently insolvency of retail supermarkets demonstrates or is a clear indication of a lack of a proper financial and inventory management system. The Banking Sector regulation in Kenya provides key lessons on how lack of an accountability system by private companies holding public funds in unregulated terms can lead to failure of an entire sector. The Governments intervention in the sector restored the sector from failure.

c) Unfair Trade Practices by the Retail Sector on Supply and Packaging

Being a capitalist economy, it is expected that competition amongst businesses remains high. In Kenya this is the case and there is constant need for manufacturing companies to re-innovate themselves to remain relevant in the market. In addition, with trade liberalisation, local manufacturers face high competition from imported goods.

Due to the few numbers of supermarkets in the country, supermarkets have over time acquired buyer power and which has allowed them to exercise dominance in the market. Due to the high market competition, manufacturers have been forced to supply goods in order to remain in the market, despite existing concerns on late payments and unfair trade practices.

The country is experiencing a new practice by the retail sector of packaging goods under the retailers' brand name. The concern by manufacturers is on the approach taken by some of the major supermarkets to carry out this practice. Some of the practices include, supermarkets making requirements that manufacturers in addition to their supply of goods, also to supply them with alternate goods which they can package under their brand names.

The problem with such a practice is that, it forces manufacturers to create goods that compete with their original brand product. The most affected in this situation remains the SMEs who are forced to surrender their branding rights in favour of the retailer's brand names or compete with their budding brand in order to have their goods in their retail outlets. This practice is not only impeding growth of manufacturing but also discourages small enterprises.

2.4.4. Proposed Way Forward and Recommendations

The Kenya Association of Manufacturers made the following recommendations to the Committee:

a) **Fast Tracking the Development of a regulatory Framework for the Retail Sector – Prompt payment and Governance Code of Practice**

The State Department of International Trade has initiated a process for development of a regulatory framework for the retail sector. The process is expected to create an environment of co-regulation between Government and the retail sector to ensure challenges facing the sector are addressed. Indeed this step is a milestone towards supporting the retail sector growth and addressing the challenges the sector is currently experiencing with its supermarket sub sector.

There still remains a **need for development of a dedicated prompt payment regulatory framework in Kenya to address late payments**. Globally countries have developed the framework that has supported ensuring there are constant cash flows in their environments. The dedicated framework on prompt payment should entail enforcement of a retailers and suppliers code of practice and a fast dispute resolution mechanism to address late payments challenges.

b) **Legal Accountability for Public Funds**

Accountability for public funds by the supermarkets remains a key issue that requires urgent attention. Private bodies that receive vast amounts of funds from public entities and citizens should be required to have higher accountability measures to safeguard the other sectors of the economy.

The Banking sector regulation on capitalisation requirements remains a critical solution to address financial and governance constraints. To date, supermarkets are not required to

demonstrate proof of ability to hold funds on unsecured terms and this has contributed to the financial woes retailers continue to face.

The failure of supermarkets has, and will continue to negatively impact the manufacturing sector that is highly dependent on the sector to create market access.

c) Development of Local Content Legal Framework to actualise the Buy Kenya Build Kenya Strategy

The retail industry especially supermarkets have great potential to contribute to the growth of multiple sectors and offer direct and indirect employment. This warrants Government's intervention to support the sector. **The support for the retailers, would involve development of regulatory framework on local content** in the country for what is considered to be in the second tier supermarkets (Tiers based on volume and coverage). The second tier supermarkets are projected as having the highest number of businesses locally owned. With support through turnkey solutions, the local companies can evidence growth.

This would be in line with the Government's strategy on local content known as Buy Kenya Build Kenya can support such growth of not only the retail sector but all sectors identified by the Governments economic blue prints such as Vision 2030.

2.5 THE KENYA BUREAU OF STANDARDS

Managing Director Mr. Charles Ongwae made the following submission:

The Kenya Bureau of Standards (KEBS) is a statutory organization of the Government of Kenya established by the Standards Act, Cap 496 of the Laws of Kenya in July 1974.

The functions of KEBS as per the Standards Act Cap 486 section 4 are:

- i. to promote standardization in industry and commerce;
- ii. to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto;
- iii. to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;

- iv. to control, in accordance with the provisions of this Act, the use of standardization marks and distinctive marks;
- v. to prepare, frame, modify or amend specifications and codes of practice;
- vi. to encourage or undertake educational work in connection with standardization;
- vii. to assist the Government or any local authority or other public body any other person in the preparation and framing of any specifications or codes of practice;
- viii. to provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards;
- ix. to provide the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.

2.5.1. Illicit Products

There are four categories of illicit products:

- a) **Counterfeit products** – these are infringements of other people’s intellectual properties. These products are not necessarily sub-standard. KEBS supports the Anti Counterfeit Agency (ACA) to handle issues of counterfeit products.
- b) **Contraband products** – these are basically smuggled products into the country mainly as a result of corruption and porous borders.
- c) **Under-valued / un-declared products** – this is basically tax evasion.
- d) **Sub-standard products** – these products do not meet Kenya Standards and or approved specifications.

2.5.2. Measures and Controls in Place

KEBS’ mandate is to ensure that the quality of goods in the market outlets is complying with Kenya Standards and other product specifications. This is done through controls and measures undertaken at the manufacturing outlets and inspection of imported goods. The two quality assurance activities are supported by market surveillance activities throughout the country.

Below is an overview of the measures that KEBS has put in place to mitigate substandard products.

2.5.3 Quality Assurance for Locally Manufactured Products

KEBS implements a product certification scheme that is guided by *ISO 17065: 2012 - Conformity assessment — Requirements for bodies certifying products, processes and services*.

KEBS undertake the following activities which form the key requirements for product certification under this standard:

- i. **Product testing** for conformity to specified requirements. Locally manufactured goods are required by law to be certified to the respective standards.
- ii. **Initial Inspection** of production system for conformity to specified criteria before certification.
- iii. Supports the industry to develop **schemes of quality supervision and control** for production processes intended to ensure consistency in product quality throughout the certification cycle.
- iv. KEBS undertakes **surveillance inspection** of factories **and sampling for testing** after certification to ensure the factory adheres to the scheme of quality supervision and control during the validity period of the permit.
- v. Complying products are issued with a Standardization Mark(SM), and Diamond mark of Quality (DM).

Currently, there are 10,513 certified products under SM scheme. Of these, 8,250 products belong to large and medium size firms while 2,263 are manufactured by small and micro enterprises. Diamond Mark certified firms are 421.

2.5.4 Quality Inspection of Imports

The measures undertaken on inspection are for the controls on imported goods. Quality of imported goods is controlled through:

- i. The Pre-Export Verification of Conformity (PVoC) programme
- ii. Destination inspection

i. PVoC Programme

This is a programme under which imported goods are inspected at the countries of origin and if complying are issued with certificates of conformity (CoC).

Goods not complying and arrive into the country are surcharged a penalty of 15% of CIF (Cost, Insurance and Freight) and also detained and released only after sampling has been done and complying test results released.

ii. Destination Inspection

In the event some imports arrive at the entry points without CoC, an inspection fee equivalent to 15% of CIF is levied and the goods detained while samples are taken for analysis for compliance with the standard before complying goods are released. KEBS has implemented a multi-agency inspection regime at the entry points that requires:

- 100% inspection of consolidated cargo
- 100% inspection of goods arriving without a COC
- 100% inspection of used clothes and shoes
- 100% inspection of imports through Eldoret Airport.

Certification of Imported Goods

All imported goods are required to have Import Standardization Mark before they are put on the shelf for sale.

Market Surveillance

Market surveillance officers go round market outlets to confirm if the quality of products in the market are complying with relevant standards and if not complying, then such products are confiscated and or destroyed.

2.5.5 Initiatives Undertaken By KEBS to Enhance the Effectiveness of the Measures to Combat Substandard Goods

a) **Strict Enforcement of Certification Criteria**

Companies found not to meet requirements for certification are not issued with Standardization Mark permits and as such are denied access to market. Those who fail to meet the standards during surveillance have their goods seized and production stopped through suspension of Standardization mark permits.

b) **Engagement with Industry Sectors Organized under the Auspices of Kenya Association of Manufacturers.**

In areas where industries have formed associations, KEBS is using such associations to manage quality issues within the sector. Such collaborations entail the industry committing to comply with good manufacturing practices and providing KEBS with intelligence with regard to violations of the law (especially firms dumping substandard products into the market). In its turn KEBS provides technical advice to help industry achieve compliance and enforces the standards through seizure and destruction of reported cases of non-compliance.

These collaborations have helped to create a measure of self-regulation by industry and is achieving a lot especially in the steel sub sector and Plastic Pipes sub sector.

c) Installation of Verification Systems for Verification of Quality Marks by Consumers

KEBS recognizes that one way of combating substandard goods in the market is empowering consumers to differentiate products with valid permits on the shelf. To achieve this for locally manufactured goods all manufactures are now required to indicate the Quality Mark permit number on their product labels below the Quality Mark. KEBS has also invested in a Standardization Marks verification system capable of giving real time responses on the validity of quality marks through a Short Message Service.

Consumers can check the valid quality marks by sending the permit number indicated on the products to 20023 in this format: “SM#xxxxxxx” for locally manufactured goods. Validity of Import standardization Mark for imported products can be verified by either sending a SMS message “ISM#xxxxxxxx” to 20023 or scanning the ISM using the free KEBS ISM app downloaded from Appstore or Googleplay.

This facility has proved to be a critical tool in the war against substandard goods as it has enabled KEBS to deploy its enforcement resources more efficiently by targeting products without valid marks as notified by consumers.

As a result, KEBS is investing more resources to increase consumer awareness through traditional and utilization of social media platforms to educate the public on the use of the SMS system for verifying Quality Marks.

d) Enhancement of Controls within the PVoC Program

As a matter of continuous improvement which is informed by feedback from stakeholders and KEBS market surveillance activities, KEBS continue to strengthen the PVoC program by building controls that are intended to make our PVoC agents more accountable in their certification decisions. Such control includes more monitoring and enhanced penalties for violations of the contracts.

e) Collaborations with other Government Agencies

KEBS has established key partnerships with other regulators in order to make our efforts more fruitful. Among the partners include the following Kenya Revenue Authority, Ant-Counterfeit Agency, Kenya Plant Health Inspectorate Service, Ministry of Industry and Trade and National Construction Authority etc.

i. **Kenya Revenue Authority**

KEBS has partnered with KRA in ensuring that only custom entries for goods with a Certificate of Conformity (COC) issued by Kenya Bureau of Standards (KEBS) through the PVOC partners are passed. Goods without a CoC require a joint verification before the entry is approved. This has reduced the number of shipments that entered the country bypassing KEBS clearance at the ports of entry.

ii. **Pharmacy and Poisons Board (PPB)**

KEBS has entered into an agreement with PPB which ensures that medical devices and supplies (except pharmaceuticals) are subjected to PVOC program before they are issued with import permit.

f) **Enhanced Market Surveillance**

KEBS has established Market surveillance as a full-fledged directorate. This is intended to give it more emphasis in allocation of resources required to enhance its capacity to undertake market surveillance.

Some of the activities undertaken to reduce sale of substandard products include:

- i. Conducting scheduled market surveillance to confirm the quality of locally manufactured and imported products to confirm presence and authenticity of KEBS marks.
- ii. Conducting targeted Market Surveillance based on receipt of complaints and intelligence information.
- iii. Confirming conditions of products including marking and labelling and taking appropriate action where products are found to be in poor state or marking and labelling is found wanting.
- iv. Confirming whether imported products have genuine Certificates of Conformity.
- v. When we receive complaints on a product category, the sector is targeted to confirm whether problem is widespread or a one of.
- vi. For some sectors e.g. steel, roofing sheets and plastics KEBS conduct some tests on site to confirm quality. If and when the site tests indicate the product is substandard, the same are seized for destruction after issuing 14 days' notice.
- vii. When unable to establish importers/dealers of some confirmed substandard products they issue Public Notices warning the public on the dangers of purchasing such products.

- viii. Depending on the non-conformity observed, KEBS at times order dealers in substandard products to voluntarily withdraw the offending products from the market.
- ix. During surveillance activities KEBS officers conduct awareness to businesses/stakeholders. This assists in promoting a quality culture in the general population.
- x. KEBS also organize awareness workshops on sectors noted to have perennial problems/complaints.
- xi. When products with ISM and CoCs are found to be substandard, such information is shared with amongst KEBS other functions directorate so that necessary corrective actions are undertaken.

g) Presence in Various Locations in Kenya

In order to ensure that the mandate of ensuring that only locally manufactured and imported products meet requirements, KEBS has presence in 14 locations distributed all over the country.

2.6 THE KENYA REVENUE AUTHORITY (KRA)

Kenya Revenue Authority (KRA) led by the Commissioner General Mr. J.K. Njiriani appeared before the Standing Committee on Tourism, Trade and Industrialisation on 5th June, 2018 to shed light on the fall of the major supermarkets in Kenya.

2.6.1 Nakumatt Holdings Limited

The Nakumatt Supermarket has been a leading retailer with a chain of supermarkets and at its peak had about 53 stores spread out in Kenya and the East African region. The supermarket was making regular tax payments and KRA did not have challenges with it until the year 2015/16 when the retailer started to experience difficulties in paying taxes when the total collection for that period dropped to Kshs 761 million. In the current financial year 2017/18, Nakumatt paid only Kshs. 4.6 million.

On average KRA was collecting Kshs. 1.3 to 1.5 billion annually from Nakumatt made up of different tax heads.

In January 2017, the taxpayer applied to KRA to be given an extension to submit returns and pay taxes outside the normal due dates citing cash flow challenges. This was granted. In April 2017, the taxpayer negotiated and agreed with KRA on a payment plan of twelve (12) monthly instalments starting April 2017. The taxpayer also committed to stay current in remitting their monthly VAT and PAYE. However, the taxpayer has not honoured the payment arrangement to date.

2.6.2 Outstanding Tax Arrears

The taxpayer has tax outstanding arrears amounting to **Kshs. 2,344,159,452** as at 8th May 2017 as tabulated below:

Tax Head	Principal	Penalty	Interest	Total
	Kshs.	Kshs.	Kshs.	Kshs.
PAYE	948,483,124	177,051,095	39,834,332	1,165,368,550
VAT	864,787,737	10,000	25,824,746	890,622,483
Corporation Tax	206,546,235	38,678,640	42,943,544	288,168,419
Total	2,019,817,096	215,739,735	108,602,622	2,344,159,452

2.6.3 Tax Arrears Recovery Efforts

After many efforts that did not yield the desired results, KRA has instituted the following measures to recover the arrears:

An immediate demand letter was issued on 9th May 2017.

- i. The taxpayer appealed to the National Treasury and KRA requesting for a grace period of 1 year to re-organize themselves and make payments.
- ii. A meeting at Corporate Level was held in July 2017 and the taxpayer was given a one(1) month moratorium upto end of August 2017 to sort out its financial challenges.
- iii. In October 2017, the taxpayer went to court and applied for receivership.
- iv. Meetings were later held with the taxpayer's agent i.e. PKF Taxation. Later, PKF applied in court to be appointed as Receivers and Mr. Peter Kahia (PKF) was appointed as the Administrator in January 2018.
- v. On 12th March 2018, KRA wrote to the Administrator to register its interest on tax arrears outstanding.

- vi. KRA has secured itself as provided for in law by filing claims with the receiver of Nakumatt Stores.

2.7 ANTI-COUNTERFEIT AGENCY

The Anti-counterfeit Agency led by Dr. John Atoken Deputy Director appeared before the Standing Committee on Tourism, Trade and Industrialisation and made a presentation that highlighted its establishment, its achievements, challenges and proposals for continual improvements.

2.7.1. Establishment of Anti-Counterfeit Agency (ACA)

The Anti-Counterfeit Agency is a state corporation established under the Anti-Counterfeit Act, 2008. Currently, the Agency is under the State Department of Trade in the Ministry of Industry, Trade and Cooperatives.

The Vision of ACA is to have a counterfeit-free Kenya, while its Mission is to prohibit counterfeiting through the promotion and enforcement of intellectual property rights.

The Agency has been in operation since June 2010. It is headquartered at the National Water Conservation and Pipeline Corporation Building in Industrial Area, Nairobi, while it has branch offices in Mombasa, Kisumu and Eldoret and a satellite office at the Inland Container Depot (ICD) in Nairobi.

Legal Mandate

The Anti-Counterfeit Agency is established under section 3 of the Anti-Counterfeit Act, 2008. Its mandate is as follows-

- i. Enlighten and inform the public on matters relating to counterfeiting;
- ii. Combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with the Anti-Counterfeit Act No. 13 of 2008 or under any other written law;
- iii. Devise and promote training programs to combat counterfeiting;
- iv. Co-ordinate with national, regional or international organizations involved in combating counterfeiting;
- v. Carry out any other functions prescribed for it under any of the provisions of the Act or under any other written law; and

- vi. Perform any other duty that may directly or indirectly contribute to the attainment of the foregoing.

Apart from ACA inspectors, section 22 of the Anti-Counterfeit Act, 2008 designates the following public officials as inspectors for purposes of enforcing the provisions of the Anti-Counterfeit Act-

- i. any member of the Anti-Counterfeit Agency Board
- ii. any public health inspector
- iii. any police officer
- iv. inspectors appointed under the Standards Act
- v. any authorized customs officer
- vi. inspectors appointed under the Weights and Measures Act
- vii. any trade development officer
- viii. any industrial development officer
- ix. inspectors appointed under the Copyright Act
- x. inspectors appointed under the Food, Drugs and Chemical Substances Act
- xi. any trade mark and patent examiner
- xii. inspectors appointed under the Pharmacy and Poisons Act
- xiii. any seed and plant inspector
- xiv. inspectors appointed under the Pest Control Products Act

The Agency implements the Anti-Counterfeit Act, 2008 and Anti-Counterfeit Regulations, 2010. The Agency's mandate is also borrowed from the Constitution of Kenya [Art. 11(2)(c), 40(5), 69(1)(c)] and the World Trade Organization (WTO) – The Agreement on Trade Related Intellectual Property Rights (TRIPS) Agreement.

Other laws and policies in the EAC that prohibit importation or dealing in counterfeit goods include-

- a. Protocol establishing the EAC Common Market (article 43)
- b. EAC Customs Management Act, 2004 (s.219) – implemented by KRA
- c. EAC IP Policy (yet to be approved by EALA)
- d. EAC Anti-Counterfeit Bill (yet to be passed by EALA)

2.7.2 Structure of ACA

The Agency has three core departments, namely Enforcement and Legal Services; Awareness, Research, Policy & Quality Assurance; and Corporate Services.

In terms of governance, the Agency has a board of directors from the private and public sectors and a management headed by an Executive Director who reports to the board.

2.7.3 Extent of Counterfeiting

Counterfeiting is a billion-dollar industry which is widespread and rampant throughout the world. The Business Action to Stop Counterfeiting and Piracy (BASCAP) estimates that the global economic value of counterfeit and pirated products is between USD 923 billion and 1.13 trillion in 2013 and this is estimated to reach between US\$1.9 trillion and US\$ 2.81 trillion by 2022. According to Organization for Economic Cooperation and Development (OECD), imports of counterfeit and pirated goods are around 2.5% of global imports. Up to 5% of goods imported into the European Union are counterfeit. Most originate in middle income or emerging countries, with China the top producer.

In the US, companies lost between US\$200-250 billion in 2004. In the UK, the value of counterfeit goods was 9.3 billion British pounds in 2013, while in China, counterfeiting accounts for 8% of GDP.

In the East Africa Community (EAC), OECD estimates that in 2008 the EAC loses over US\$500 million in tax revenue annually due to counterfeiting. Unfortunately, there is no nationwide and credible data on counterfeiting in Kenya. However, available information from the Kenya Publishers Association estimates that publishers in Kenya lose more than Kshs 2 billion annually through book piracy.

Research done by the Anti-Counterfeit Agency showed that the levels of counterfeiting in major towns in Kenya stood at 23% in 2016 and 16% in 2018. However, there is need to conduct a comprehensive national baseline survey to determine the extent and magnitude of counterfeiting and other forms of illicit trade in Kenya.

2.7.4. Experiences from Other Countries.

Inter-Agency Collaboration

1. Kenya Experience

In Kenya, the protection of intellectual property (IP) rights is bestowed on various agencies or institutions. These include the following:

- The Anti-Counterfeit Agency
- Kenya Bureau of Standards
- Kenya Revenue Authority (Customs Services)
- Kenya Plant Health Inspectorate Service
- Kenya Copyright Board
- Pharmacy and Poisons Board
- Kenya Industrial Property Institute
- The Kenya Police Service

Although these institutions are supposed to work together, there is no policy or legal framework to facilitate this. This has created a challenge for sustained collaborative activities among these institutions.

2. United States of America Experience

The US Government enacted the “Prioritizing Resources and Organization for Intellectual Property Act of 2008” or Pro-IP Act of 2008 to enforce IP infringements relating to the enforcement of laws protecting copyrights, patents, trademarks, other forms of intellectual property, and trade secrets, both in the United States and abroad, including in particular matters relating to combating counterfeit and infringing goods. This Act also enforces the Trademark Act of 1946 and Computer Crime Enforcement Act.

The Pro-IP Act allows for civil and criminal remedies for infringement. It also provides for a coordination and strategic planning of federal effort against counterfeiting and infringement under the Office of Intellectual Property Enforcement Coordinator. This office prepares the strategic plan and reports to be presented to the Senate.

The Anti-Counterfeit Act provides for the following remedies:

- Civil forfeiture to the state – it includes any prohibited article, facilitating property, and proceeds derived from counterfeiting.
- Criminal forfeiture – the convicted person is order to forfeit to the State any property subject to forfeiture.

- Restitution – the court orders the convicted person counterfeiter to pay restitution to any victim of the offence.

IP Collaborative Approach in the United States of America

Like Kenya, the United States has several public institutions that are mandated to safeguard the interests of the U.S. by protecting the country against counterfeiting, piracy and related activities. These institutions preferred to work singly to protect their autonomy, image, and financial support from the Senate by justifying their existence through single-handedly executed activities. This approach proved to be inefficient in the long run since criminal activities are complex and cut across different disciplines. This necessitated a concerted and collaborative approach to dealing with counterfeiting and related issues enabling the various agencies to draw on the expertise of individual institutions.

The Agencies dealing with IP in the US include the office of the President, Department of Commerce, Library of Congress, Department of State, US Trade Representative, Department of Justice, Department of Homeland Security, Department of Treasury, Department of Agriculture, US Postal Service, Department of Health and Human Services. The mandates of these institutions overlap with each other but they also are specialized to do other activities.

This collaborative approach led to the birth of the National Intellectual Property Rights Coordination (IPR) Centre. The center employs a true task force model to optimize the roles and enforcement efforts of member agencies, while enhancing government-industry partnerships to support on-going IPR enforcement initiatives.

The Centre has 19 partner agencies embedded at the IPR Centre, which include the following public institutions:

- i. U.S. Immigration and Customs Enforcement
- ii. U.S. Customs and Border Protection
- iii. Federal Bureau of Investigation
- iv. U.S. Postal Inspection Service
- v. Food and Drug Administration, Office of Criminal Investigations
- vi. Department of Commerce, International Trade Administration
- vii. Naval Criminal Investigative Service
- viii. Defense Criminal Investigative Service
- ix. U.S. Army Criminal Investigative Command, Major Procurement Fraud Unit
- x. Defense Logistics Agency, Office of Inspector General

- xi. Air Force Office of Special Investigations
- xii. U.S. Patent and Trademark Office
- xiii. General Services Administration, Office of Inspector General
- xiv. Consumer Product Safety Commission
- xv. National Aeronautics and Space Administration, Office of Inspector General
- xvi. U.S. Department of State, Office of International Intellectual Property Enforcement
- xvii. INTERPOL
- xviii. Mexican Revenue Service
- xix. Royal Canadian Mounted Police

The IPR Center also works closely with the Department of Justice (DOJ) Computer Crime and Intellectual Property Section.

Each of the above agencies designates personnel with expertise and experience in intellectual property enforcement matters to the Center. The IPR Center has a director who oversees the day-to-day running of the Center.

The IPR Center

The National Intellectual Property Rights Coordination Center (IPR Center) is a collaborative effort by U.S. Government agencies and two international governments (Canada and Mexico) to stop intellectual property theft that threatens the U.S. and global economy, endangers the public's health and safety, and threatens the war fighter. The partnership is an avenue for joining forces more effectively to combat counterfeiting, trademark piracy, and other intellectual property crimes.

As a task force, the IPR Center uses the expertise of its member agencies to share information, develop initiatives, coordinate enforcement actions, and conduct investigations related to IP theft. Through this strategic interagency partnership, the IPR Center protects the public's health and safety, the U.S. economy, and the nation's war fighters.

The mission of the IPR Center is to insure national security by protecting the public's health and safety, the U.S. economy, and the personnel enforcing the law, and to stop predatory and unfair trade practices that threaten the global economy.

To accomplish this mission, the IPR Center brings together the key U.S. investigative agencies involved in the federal criminal enforcement of IP laws in a task force setting. The task force structure enables the IPR Center to efficiently and effectively leverage the resources, skills, and authorities of each participating agency and provide a comprehensive response to IP theft.

The IPR Center employs a three-pronged strategic approach to combat IP Theft. That approach includes:

- Investigation – Identifying, disrupting, prosecuting and dismantling criminal organizations involved in the manufacture and distribution of counterfeit products.
- Interdiction – Using focused targeting and inspections to keep counterfeit and pirated goods out of U.S. supply chains, markets and streets.
- Outreach and Training – Providing training for domestic and international law enforcement to build stronger enforcement capabilities worldwide.

Successful cases have produced significant seizures, civil penalties, and criminal prosecutions. The IPR Center encourages members of the general public, industry, trade associations, law enforcement and government agencies to report violations of intellectual property rights through its website. The information that is provided is reviewed promptly by IPR Center staff and disseminated for appropriate investigative response and tactical use to IPR Center partners.

As part of these efforts, the IPR Center supports and coordinates training through its state and local engagement initiative that provides the Homeland Security Investigation's (HSI) led IP Theft Enforcement Teams (IPTETs) with specific training on combating IP theft. In addition, the IPR Center works with other entities, such as the International Anti-Counterfeiting Coalition's Foundation, the National Association of Attorneys General and the National White Collar Crime Center to support their domestic IPR training efforts.

Established in each of the 26 HSI Special Agent in Charge (SAC) offices across the country the IPTETs build on the investigative best practices identified by the IPR Center, its partner agencies and private industry. The IPTETs use an informal task force approach to enhance coordination of IP theft investigations between federal, state and local law enforcement partners in their local area.

The IPR Center also provides training to IPTETs and serves as a resource to support the IPTET's investigative efforts. The IPTET training includes participation from the IPR Center, its partner agencies, the Department of Justice Computer Crimes and Intellectual Property Section, HSI SAC offices, state and local law enforcement, private industry representatives and rights holders. These training events are tailored for state and local officers, detectives, prosecutors, and their federal partners to provide them with information on IPR Center the capabilities, federal and state IP laws, investigative techniques and tools, and product identification.

Through joint efforts to target and interdict infringing merchandise, and coordinated joint operations, the IPR Centre has been involved in various joint operations such as:

- i.* **Operation Guardian** – which is meant to target, interdict, and investigate substandard, tainted, and counterfeit products being imported into the United States that pose health and safety risks to consumers.
- ii.* **Operation Apothecary** - an ongoing monthly operation that identifies, measures, and attacks potential vulnerabilities in the entry process that might permit the smuggling of commercial quantities of counterfeit, unapproved, and/or adulterated pharmaceuticals through the Internet, international mail and express courier facilities, and land borders.
- iii.* **Operation Global Hoax** - Led by the World Customs Organization (WCO), the IPR Center coordinates the U.S. efforts on this operation which targets the manufacture, sale, and distribution of pirated music CDs and movie/television DVDs.
- iv.* **Operation Harvest Moon** – is meant to identify the shared top PRC manufacturers of counterfeit merchandise to determine common shipping and distribution networks for the generation of transnational investigations.
- v.* **Operation Stamp Out** – it is designed to combat the rise in the importation and distribution of counterfeit U.S. Postal money orders, stamps, meter stamps, and bank checks into the United States.
- vi.* **Operation Pangea** - This multilateral international operation is led by INTERPOL and the Permanent Forum on International Pharmaceutical Crime, which works with international police, customs and drug regulators to target the online sale of counterfeit pharmaceuticals and raise public awareness of the associated health risks through enforcement actions.

As a result of this collaboration, the number of seizures increased from about 3,700 in 2001 to about 7,500 in 2005 to 15,000 in 2008 to 20,000 in 2010. The domestic values of the seizures were \$75 million, \$85 million, \$275 million, and \$185 million, respectively.

Funding of the IPR Centre

Although some of the funds for the Centre come from the Federal Government as grants, much of the money is generated through enforcement activities carried out jointly with several government agencies. The money is shared out among these agencies. The money is generated through forfeiture of assets and facilitating assets belonging to a counterfeiter or persons facilitating counterfeiting.

3. *United Kingdom Experience*

In the UK, there are many institutions involved in the enforcement of IP crime. These include:-

- i. National Crime Agency (NCA) - A national organization concerned with serious and organized criminals and the IP Crime threat.
- ii. Intellectual Property Office (IPO) – their main function is rights granting of trademarks, patents, designs, etc
- iii. UK Border Force – it detains, for rights holders, goods suspected of being counterfeit or pirated under European legislation – Regulation 608/2013. They detect, detain and destroy/release counterfeit and pirated goods.
- iv. Her Majesty's (HM) Revenue and Customs - Registering IPR for enforcement, through application for action (AFA) process.
- v. Trading Standards - have responsibility for counterfeiting and piracy enforcement and undertake criminal prosecutions. The priority areas of Trading Standards are intellectual property, crime, intelligence and forensics.
- vi. Police Intellectual Property Crime Unit (PIPCU), City of London – deals with online crime.
- vii. Medicines and Health Care Products Regulatory Authority (MHRA) - Objective of the Agency is to prevent counterfeit medicines and medical devices from reaching patients.
- viii. Federation Against Copyright Theft Ltd – private sector institution. It deals with audio visual piracy.

- ix. Control Risks - Its main target is to achieve success in complex and hostile business environments by managing the following: political risks, security risks and integrity risks (IP, etc).
- x. Crown Prosecution Service - Deals with prosecuting counter terrorism, national crime, organized crime and fraud
- xi. Department of Health
- xii. Immigration Service
- xiii. HM Courts and Tribunals Services
- xiv. HM Treasury
- xv. Other local and international institutions such as European Commission, EU-IPO, WIPO

These institutions have put the following structures in place:-

- i. IP Crime Strategy
- ii. IP Crime Group
- iii. IP Crime Report
- iv. IP Criminal Intelligence Database – managed by IPO
- v. National Market Group – deals with IP infringements within the market places

Published in 2004, the Strategy outlines need to:-

- Coordinate activities within the UK
- Share IP intelligence, and
- Raise awareness of IP crime

The Strategy also outlines need for:

- Intelligence-led enforcement
- coordinated working and the sharing of best practice, and
- an effective legal framework

The UK's IP Crime Group:-

- Founded in 2004
- Works to implement the UK's IP Crime Strategy
- Brings together expert resources from industry, government and enforcement agencies
- Chaired by Association of Chief Police Officers (ACPO)
- Three key strands of its work:
 - Coordinate strategic response to tackling counterfeiting and piracy (IP crime)
 - Share best practice and raise awareness of IP crime

- Establish accurate measurement of IP crime through annual IP Crime Report

US IP Recordal System

U.S. Customs & Border Protection (CBP), a bureau of the Department of Homeland Security, maintains a trademark recordation system for marks registered at the United States Patent and Trademark Office (USPTO). Parties who register their marks on the Principal Register may record these marks with CBP, to assist CBP in its efforts to prevent the importation of goods that infringe registered marks. The recordation database includes information regarding all recorded marks, including images of these marks. CBP officers monitor imports to prevent the importation of goods bearing infringing marks, and can access the recordation database at each of the 317 ports of entry.

A business owner must make an application and provide the following to the CBP:

- a) a “status copy” (or “certified copy”) of the certificate of registration issued by the USPTO showing title to be in the name of the applicant;
- b) Five (5) digital images of the protected mark/work in “.jpg” or “.gif” format that accurately depict the right to be protected (each image file must be less than 2MB);
- c) an affidavit under “best knowledge and belief”; and
- d) an application fee of \$190 to cover a copyright recordation and \$ 190 to cover each class for which a trademark recordation is sought.

The Application can be obtained and filed online via the CBP’s Intellectual Property Rights e-Recordation (<https://iprr.cbp.gov/>). The recordation covers renewals of existing trademark and copyright recordation, as well as temporary recordation of unregistered copyrights (for applications which are pending at the US Copyright Office). The US recordation covers trademarks, trade names, and copyrights.

Other countries with IP recordal system include:-

- Romania
- Belarus
- Russia
- Kazakhstan
- Dubai
- Algeria

2.7.5 ACA's Past Efforts in Establishing an Inter-Agency Collaboration Framework

Technical Support from the US Government - Collaborative Approach to IP Enforcement

The US Government has been in the forefront to discuss the importance of IP protection to the economy and society. In this respect, it funded and co-organized two workshops with local government institutions to bring together various players to discuss how best IP enforcement could be conducted in Kenya.

Below is a summary of the discussions held during these two workshops:-

The first workshop was held in Nairobi from May 17-20, 2011 at Intercontinental Hotel.

- Organized and funded by the US government in collaboration with ACA, Kenya Copy Rights Board (KeCOBO) and, and Kenya Industrial Property Institute
- The workshop was titled "Enforcement of IP Rights in Kenya: An Interagency Approach with Private Sector Coordination".
- Main objective was to “facilitate the establishment of an effective interagency approach to IP protection and enforcement in Kenya, utilizing greater cooperation, collaboration, and communication amongst the ACA, partner agencies and private sector stakeholders”.
- The four-day workshop focused two days of government-to-government discussion and training to assist the GoK intellectual property (IP) organizations in developing an interagency approach to policy and enforcement. Subsequently, the workshop focused two additional days on developing a public/private partnership to combat IPR violations in Kenya, including testimony from the private sector on IP issues.
- The workshop brought together roughly 60 representatives from the Kenyan government, and more than 40 industry representatives, in this collaborative effort. Representatives from the East African Community and the EU also observed the event.
- The main output of the workshop was the need for agencies combating counterfeiting to establish a framework of collaboration, communication and coordination. One proposal was the need for a memorandum of understanding between the ACA and its sister organizations to set on paper, the roles and responsibilities for each organization as well as rules of engagement for assistance in investigations.

The second workshop was held from Aug 1-5, 2011 in Alexandria, Virginia, USA.

- The consultative meeting was titled “Consultations on an Interagency Approach to the Enforcement of Intellectual Property Rights: Ghana, Kenya, Liberia, and Nigeria”.
- The objective of the consultations was “to expose a selected group of officials from core agencies dealing with the administration and enforcement of IP rights in Ghana, Kenya, Liberia, and Nigeria to the policy and operational IP interagency approaches in the U.S., thereby building their capacity to lead the efforts towards the adoption and facilitation of IP interagency approaches in their respective countries”.
- The workshop brought together key agencies in selected African countries to consult, discuss and identify effective strategies to enhance communication, collaboration and coordination on IP enforcement matters. Kenya was represented by ACA, KeCoBo, KIPI, KEBS, and KRA.
- The main output of the workshop was the development of the action plan for each country, including timelines.

Output of the Workshops: Kenya Action Plan

The output of the workshops was the Kenya Action Plan, which can be summarized as follows:

Introduction:

Agencies involved in Intellectual Property: Director of Public Prosecution (DPP), Kenya Intellectual Property Institute (KIPI), Kenya Bureau of Standard (KEBS), Kenya Plant and Health Inspection Services (KEPHIS), Kenya Copy Rights Board (KeCoBo), Anti-Counterfeit Agency (ACA), Customs, Police, Kenya Association of Manufactures (KAM) (private sector)

Coordination of activities:

- Enforcement activities
- Public awareness activities

The above activities are anchored on Kenya’s Vision 2030 (flagship projects).

Strategy

- i. Establish CEOs forum

Anti-Counterfeit Agency (ACA) convened the first CEO forum, by Sept 2011. The CEOs forum to establish a mechanism/task Force to review current IP legislations with a view to harmonizing them and enhancing inter-agency cooperation

- ii. Come up with a Memorandum of Understanding (MOU)

Retreat to draft MOU. The MOU provided rules of engagement to govern the interagency collaboration.

iii. Establish IPR Enforcement Committee

Enforcement committee shall be defined in the MOU. The national enforcement committee shall organize all inspectors under the Anti-Counterfeit Act for future training, communication; cooperation, and coordination, etc. Enforcement committee shall be composed of persons who head the enforcement departments in the respective agencies, as defined by the MOU.

Establish other committees as and when need arises under the forum of CEOs.

iv. Membership:

The Inspector General of Police should be represented in both organs (enforcement and CEO's forum). Co-opt other relevant members

v. Establish formal mechanisms for private-public consultations on enforcement of IPR

vi. Activities:

- Promulgation of research on counterfeits and the effect on the Kenyan economy;
- Joint campaign against counterfeit between the private sector and the ACA and other IPR enforcement agencies

vii. Policy/legislation:

- Recommendation that the Kenyan government adequately support IPR and IPR enforcement agencies
- Finalize draft National IP policy
- Amendment to the IP laws (harmonization)

viii. Mechanism that brings together various tribunals that enforce civil IPR

Establishment of a CEOs' Forum

Based on the support of the US Government, the Agency drafted the following document to establish the CEOs' Forum which consists of Chief Executive Officers of relevant institutions that play an important role in IP enforcement.

Purpose of the Forum

The main purpose of the Forum is to enhance inter-agency communication, cooperation, and collaboration.

Membership to the Forum

The membership to the CEOs' Forum shall include those institutions whose inspectors have been listed in Anti-Counterfeit Act and any other relevant institution. The number should not go beyond 15 institutions. The proposed members are:

1. DPP – Director of Public Prosecutions

2. KIPi – Kenya Industrial Property Institute
3. KEBS - Kenya Bureau of Standards
4. KEPHIS - Kenya Plant Health Inspectorate Service
5. KeCoBo – Kenya Copyright Board
6. W&M - Department of Weights and Measures, Ministry of Trade
7. ACA - Anti-Counterfeit Agency
8. KACC – Kenya Anti-Corruption Commission
9. Customs – Customs Services, Kenya Revenue Authority
10. Kenya Police Service
11. KAM – Kenya Association of Manufacturers
12. PPB – Pharmacy and Poisons Board
13. PCPB – Pest Control and Products Board
14. NSIS - National Intelligence Service

Terms of Reference (TORs)

- i. The CEOs’ Forum shall be responsible for the following activities:
- ii. Optimizing operations through coordinated activities
- iii. Developing IP enforcement policy
- iv. Developing joint public awareness campaigns
- v. Sharing information among agencies
- vi. Serving as a lobby group for funding and policy support
- vii. Reviewing and harmonizing the draft national IP policy as well as IP laws
- viii. Advising the government on IP related issues arising from time to time
- ix. Establishing formal mechanisms for private-public consultations on enforcement of IPR
- x. Establishing a mechanism that brings together various tribunals that enforce civil IPR
- xi. Preparing a legislative framework in which the CEOs’ Forum shall be anchored in law

2.7.6 Framework of Inter-Agency Collaboration

Memorandum of Understanding

There shall be a Memorandum of Understanding to be signed by all agencies that will define the nature of collaboration, cooperation and communication. The MoU shall contain the following:

Establishment of Committees

- a) The National IP Enforcement Committee (NIPEC) – it shall be composed of persons who head/oversee the enforcement functions in the respective agencies as defined under the Anti-Counterfeit Act.
- b) The National Public Awareness Committee (NaPAC) – it shall be composed of persons who coordinate/oversee the public awareness function in the respective agencies.
- c) Other committees shall be established as and when the need arises under the forum of CEOs.
- d) A coordination centre for the committees shall be set up. All participating institutions shall second to the centre key members of their staff who will be expected to collectively make and execute decisions.

Conflict Resolution

Any conflict that may arise during the course of the engagement shall be resolved as amicably as possible between the two institutions. However, if the conflict persists, a third party (participating institution) shall be engaged to help resolve the conflict. If this strategy fails, then the CEOs' Forum shall be convened to resolve the problem.

Status on the Operationalization of the CEOs Forum

The Agency organized two consecutive meetings of the CEOs at the Serena Hotel, but the CEOs failed to agree to sign an omnibus MoU as planned. This led to the collapse of the CEOs' Forum. However, the Agency did not give up. It went ahead to sign MoUs with individual institutions but this strategy was deemed not sustainable.

Formation of the Inter-Agency Anti-Illicit Trade Executive Forum

During the Jamhuri day celebrations on 12th December, 2017, the President directed the Anti-Counterfeit Agency and KRA to destroy counterfeit goods upon seizure as part of measures to deliver on the Big four Agenda especially on manufacturing. This revived calls for an interagency collaboration model.

With this in mind, the Agency proposed the following initiatives with an aim to promote inter-agency collaboration in the fight against counterfeiting and other forms of illicit trade:

a) National Anti-Illicit Trade Executive Forum

The Chief Executive Officers/Accounting Officers of the various Enforcement Agencies will constitute the Executive Forum, under the chairmanship of the Principal Secretary. The Forum will have a technical committee (multi-agency working group) to facilitate its work. The main responsibility of the forum is to review the work of the Multi-Agency Anti-Counterfeiting working group on a quarterly basis, approve the implementation plan of the National Strategy on combating illicit trade and mobilize for resources to implement the plan. The Executive Forum may co-opt into its meetings the private sector as and when it requires. The Principal Secretary Trade will gazette the Executive Forum after getting the buy-in of stakeholders.

b) Multi Agency Anti-Counterfeiting Working Group

The Agency will establish a Technical Working Group comprised of strictly Heads of Enforcement from the relevant institutions. The working group will develop the National strategy on combating illicit trade and individual institutions will be responsible for developing specific Institutional policies as per their mandate. The working group will design the model of inter-agency collaboration and will be responsible in taking lead in implementation of the National Strategy on combating illicit trade. Through the Executive Forum, the working group may establish sub-committees to handle sector-specific issues.

c) Established a linkage between Government Agencies and the Private Sector

The fight against illicit trade requires effort from both the public and private sectors. Therefore, the Agency proposes a forum between government agencies and the private sector to strategize on combating illicit trade in line with the Big 4 Agenda No. 1 of manufacturing. Subsequently, a series of meetings under the chairmanship of the PS Trade resulted in the approval and adoption of the above interagency collaboration model. The following are the chronology of events that led into the formation and operationalization of the Inter-Agency Anti-Illicit Trade Executive Forum.

2.7.7. ACA's Achievements

1. Overall Achievements

The Agency has consistently been rated highly in the implementation of the performance contract and achieved the following composite scores.

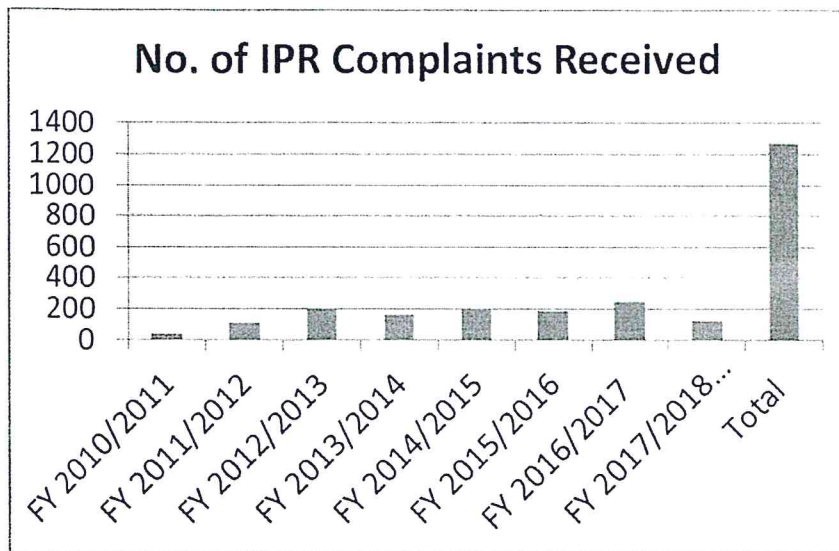
Financial year	Composite Score	Remarks
2011/2012	2.9978	Very good
2012/2013	2.8022	Very good
2013/2014	2.9981	Very good
2014/2015	2.96	Very good
2015/2016	3.01	Good
2016/2017	2.77	Very Good

Enforcement

Number of IPR complaints, cases investigated and prosecuted

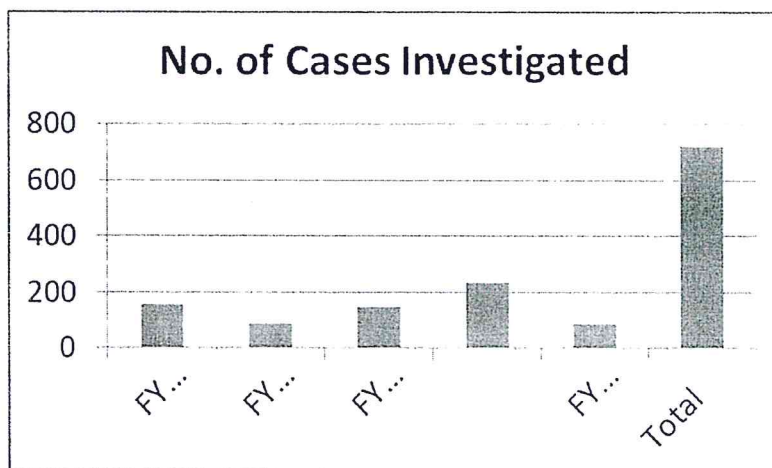
IPR Complaints Received

Financial Year	IPR Complaints Received
FY 2010/2011	38
FY 2011/2012	108
FY 2012/2013	202
FY 2013/2014	162
FY 2014/2015	205
FY 2015/2016	185
FY 2016/2017	252
FY 2017/2018 (Q1-3)	123
Total	1275



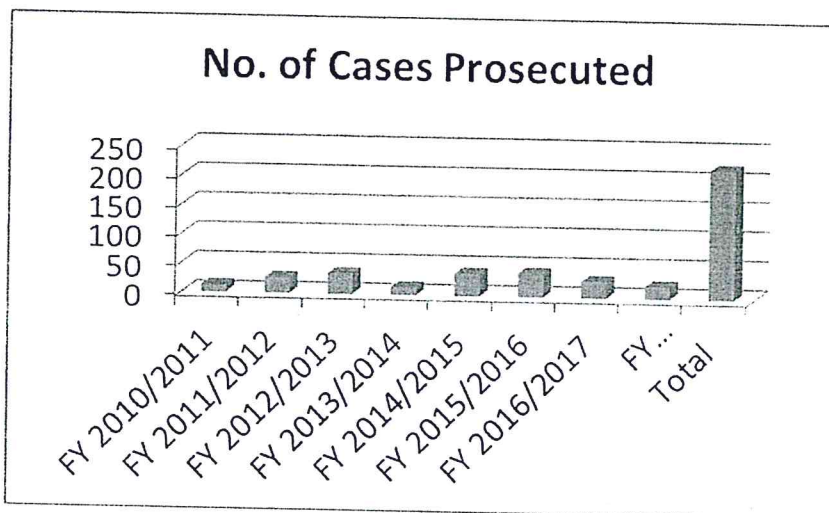
a) Cases Investigated

Financial Year	Cases Investigated
FY 2010/2011	
FY 2011/2012	
FY 2012/2013	
FY 2013/2014	159
FY 2014/2015	90
FY 2015/2016	148
FY 2016/2017	234
FY 2017/2018 (Q1-3)	90
Total	721



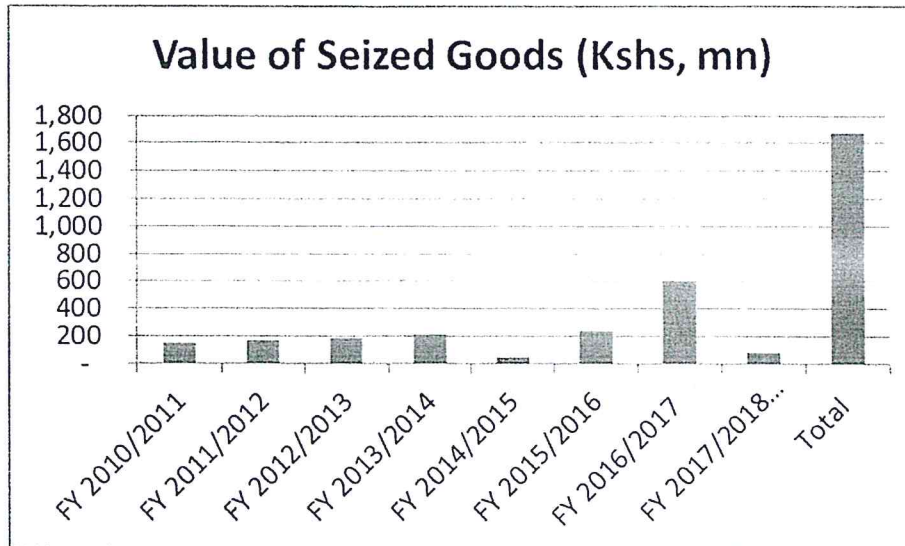
b) Cases filed in Court/Prosecuted

Financial Year	Cases Prosecuted
FY 2010/2011	13
FY 2011/2012	27
FY 2012/2013	36
FY 2013/2014	14
FY 2014/2015	39
FY 2015/2016	41
FY 2016/2017	29
FY 2017/2018 (Q1-3)	22
Total	221



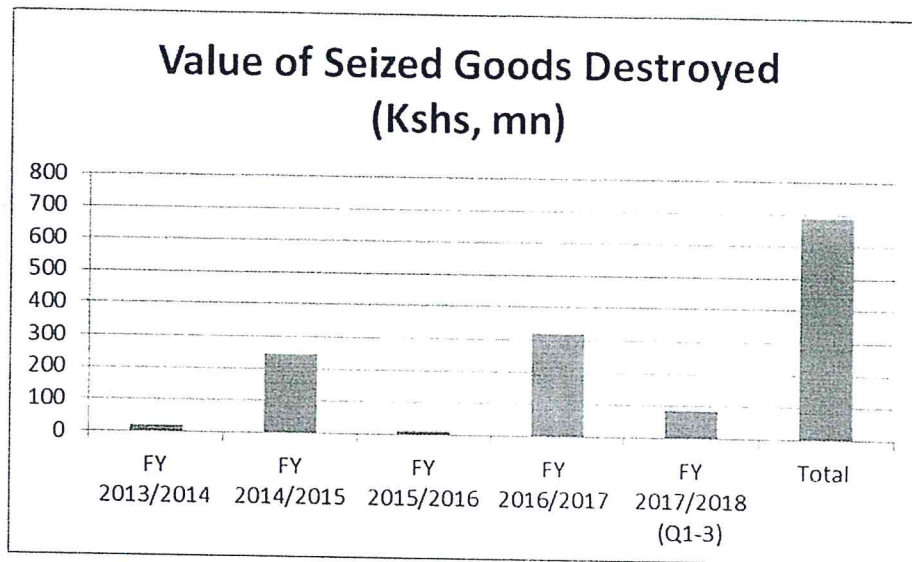
c) Value of Seized Goods

Financial Year	Value of Seized Goods (Kshs)
FY 2010/2011	148,886,595
FY 2011/2012	166,809,628
FY 2012/2013	182,618,733
FY 2013/2014	210,682,971
FY 2014/2015	44,077,359
FY 2015/2016	235,035,826
FY 2016/2017	610,099,251
FY 2017/2018 (Q1-3)	81,890,868
Total	1,680,101,231



d) Value of Seized Goods Destroyed

Financial Year	Value of Seized Goods Destroyed (Kshs)
FY 2010/2011	-
FY 2011/2012	-
FY 2012/2013	-
FY 2013/2014	21,682,971.00
FY 2014/2015	245,022,958.50
FY 2015/2016	12,988,594.75
FY 2016/2017	320,357,049.25
FY 2017/2018 (Q1-3)	89,098,192.00
Total	689,149,765.5



Education and Public Awareness

The Agency has organized and participated in several programs designed to create public awareness as well as enhance the capacity of law enforcement agencies and Intellectual property Owners on issues of combating counterfeiting. Broadly the programs fall within the following categories:

- Public outreach
- Fagia Bandia – outreach in the community, schools, universities (JKUAT, Strathmore),
- ASK Shows and awareness weeks – Nairobi, Mombasa, Nakuru, Kisumu, Eldoret, LSK & KRA weeks, Trade Week
- Special days – AID, WIPD, WACD, etc
- Road shows – Coast, Central, North Rift, etc

Sensitization/Training

Below are the statistics for the awareness programs undertaken over the years:-

	Sensitization/Training		Public Outreach		
	No	of people	No	of	No of people
Financial					

year	activities	reached	activities	reached
2010/2011	4	300	5	3,000
2011/2012	5	450	5	over 3,000
2012/2013	12	1,500	10	Over 10,000
2013/2014	8	1,000	33	Over 50,000
2014/2015	5	300	5	1,000
2015/2016	18	2,500	11	6,000
2016/2017	12	2,500	15	15,000
2017/2018	7	650	12	12,000

NB: The above does not include the number of people covered through the media

Market Research

Catalogue of Past Research Papers

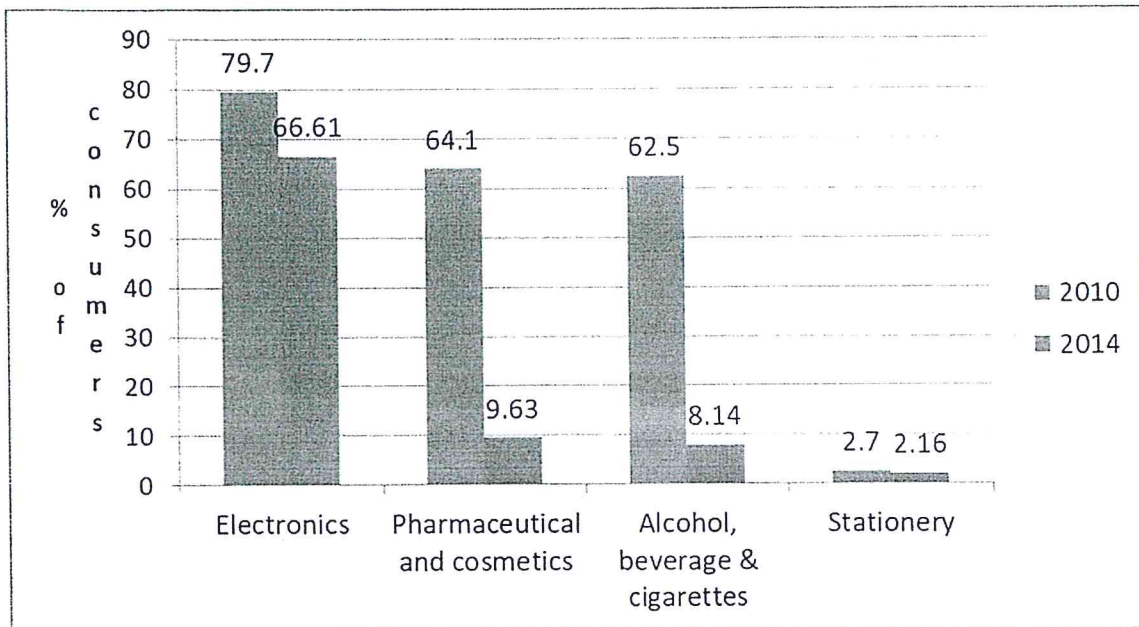
No	Research Topic	Financial year
1	The effects of counterfeit pesticides on the environment in relation to human health and safety	FY 2011/12
2	The levels of consumer awareness on Counterfeiting and piracy in Nairobi and Mombasa	
3	The effect of counterfeiting on profitability in the Manufacturing sector in Kenya	
4	Survey on the impact of counterfeits on spare Parts in the automobile industry in Kenya	
5	The impact of mobile counterfeit switch off in Kenya	FY 2012/13
6	A macro-economic perspective of counterfeiting in Kenya	
7	Factors that influence consumers to engage in counterfeit Purchases in Nairobi City County	
8	Factors that influence consumers to engage in counterfeit purchases in Nairobi City County	
9	Level of public awareness on counterfeiting in Nairobi City County	FY 2013/14
10	Level of counterfeiting in Nairobi City County	
11	Prevalence assessment of counterfeiting in Nairobi City County	

12	Level of counterfeiting in urban Kenya	FY 2014/15
13	Level of public awareness on counterfeiting in urban Kenya	
14	Level of counterfeiting in urban Kenya	FY 2015/16
15	Level of public awareness on counterfeiting in urban Kenya	
16	Market intelligence survey on counterfeit seeds and fertilizers in North-Rift Kenya	
17	Anti-counterfeiting measures and strategies among the Police, Judiciary and Office of the Director of Public Prosecution <i>(Nairobi, Kiambu, Machakos and Nakuru counties)</i>	FY 2016/17
18	Anti-counterfeiting measures and strategies among the Police, Judiciary and Office of the Director of Public Prosecution <i>(Kisumu, Eldoret and their environs)</i>	
19	Anti-counterfeiting measures and strategies among the Police, Judiciary and Office of the Director of Public Prosecution <i>(Coastal Region)</i>	
20	Online counterfeiting <i>(Kisumu, Eldoret and their environs)</i>	
21	Online counterfeiting <i>(Mombasa and its environs)</i>	FY 2017/18
22	Consumer awareness on matters of counterfeiting <i>(Mombasa and its environs)</i>	
23	Consumer awareness on matters of counterfeiting <i>(Kisumu, Eldoret and their environs)</i>	

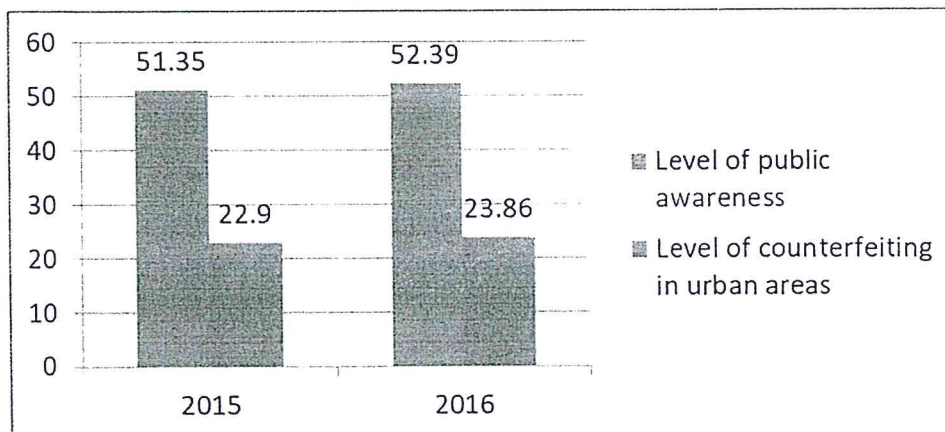
ACA Statistic

Research recommendations uptake from the above research papers stands at 70%.

Most Counterfeited Goods – Consumers Perspective



Levels of Counterfeiting and Public Awareness (%)



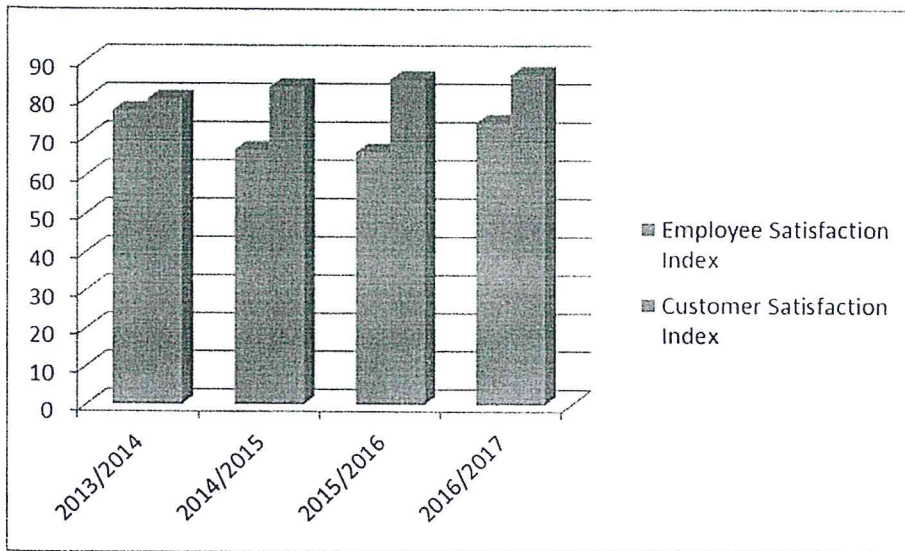
ACA Statistic

Institutional Capacity

The key result area on institutional capacity covers activities undertaken by the support sections in the Agency that include Finance, Human Resource, ICT, Procurement, Strategy and Planning.

a. Customer and Employee Satisfaction Surveys

Annually, the Agency undertakes the customer and employee satisfaction surveys whose findings are illustrated below. The figure shows the research findings on customer and employee satisfaction index. It shows that over 78% of the customers were satisfied with the Agency's services.



b. ISO Certification

To enhance the quality of services offered by the Anti-Counterfeit Agency, the Agency undertook to pursue certification to ISO 9001:2015. On 20th October 2017, the Agency was issued with a certificate number KE17/2400 valid from 9 October 2017 until 9 October 2020. The Agency endeavours to maintain the certification to expand the scope to the regional offices.

c. Performance Managements System Based on Balanced Scorecard Model

The Agency has trained all cadres of staff and it is implementing a performance management system based a balanced scorecard model to align operational actions with the strategic objectives of the Agency for effective delivery of services, to ensure effective implementation of the Strategic Plan and enhanced staff performance, and to eliminate wastage.

d. Recruitment History

Due to budgetary constraints, the Agency has only increased its staff capacity from 54 in 2010/11 to 73 in 2017/18 against a staff establishment of 250. The number of enforcement staff increased by a small margin from 14 in 2010/11 to 26 in 2017/18.

Year	Total No. of Staff	Enforcement Staff
2010/2011	54	14
2011/2012	55	14

2012/2013	53	13
2013/2014	53	13
2014/2015	58	12
2016/2016	71	13
2016/2017	72	26
2017/ May 2018	73	26

e. Budgetary Allocations by the National Treasury to the Agency Since Inception

The Agency has been allocated the following amounts for funds since inception:

Financial Year	Recurrent Allocation	Development Allocation	Total Allocation by GOK	Appropriation In Aid	Total Income
2010/2011	212,690,000	-	212,690,000		212,690,000
2011/2012	200,067,816	-	200,067,816	3,247,336	203,315,152
2012/2013	172,951,199	36,000,000	208,951,199	6,925,420	215,876,619
2013/2014	172,051,200	59,875,000	231,926,200	4,654,855	236,581,055
2014/2015	158,600,000	20,000,000	178,600,000	9,660,534	188,260,534
2015/2016	237,352,500	56,250,000	293,602,500	8,022,486	301,624,986
2016/2017	225,402,000	12,500,000	237,902,000	11,697,345	249,599,345
2017/2018	245,402,000	-	245,402,000	8,000,000	253,402,000
2018/2019	232,500,000	50,000,000	282,500,000	8,000,000	290,500,000

NOTE:

The 2018/2019 is a projection as per the National Treasury ceiling.

Summary of Expenditures

The following is a summary of how the Agency has been utilizing its allocated budget:-

Summary Of Expenditures	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016	2016/2017
Staff Emoluments	98,090,274	95,224,766	90,313,839	89,606,754	142,243,693	141,912,000
Board of directors expense	12,069,694	7,651,640	7,150,783	5,234,124	5,715,573	3,500,000
Operating and maintenance	85,695,212	60,831,029	59,871,670	65,519,013	80,243,325	56,372,274
Total emoluments and utilities	195,855,180	163,707,435	157,336,292	160,359,891	228,202,591	201,784,274
Enforcement Activities	7,945,016	7,775,970	12,523,846	12,141,150	17,883,911	9,887,365
Awareness Activities	7,029,129	9,787,335	10,664,695	7,259,675	11,103,154	5,090,361
Research Activities	0	0	691,260	4,728,423	5,736,736	1,640,000
Total Operations	14,974,145	17,563,305	23,879,801	24,129,248	34,723,801	16,617,726
Total Expenditure	210,829,325	181,270,740	181,216,093	184,489,139	262,926,392	218,402,000
% total operations	7%	10%	13%	13%	13%	8%

NB: The Agency has been utilizing 100% of the allocated budget from 2010-2016.

On average, only 7% has been used for the operations of the Agency (enforcement, awareness and research activities). The rest of the funds support the non-discretionary expenses which include staff personnel, rents and insurance cost.

Supplementary Estimates No.2 for The FY 2017/18

The Agency aligned its budget to the Big Four priority areas and requested for an additional Kshs 219 million in recurrent resource allocation for supplementary estimates No. 2 as per the table below.

Supplementary Estimate No. 2 Recurrent resource Requirements

Description	Amount Required (Kshs in Mn)	Source of Funding	Funding Confirmed
Review of the Anti-counterfeit Act	5	GOK	No
Attachment of police officers	54	GOK	No
Decentralization of services to the counties and entry points	70	GOK	No
Sector based market intelligence surveys	15.5	GOK	No
National baseline surveys	30	GOK	No
National public outreach programs	19.5	GOK	No
Training of trainers County program	25	GOK	No
Total	219		

The Agency also aligned its budget to the Big Four priority areas and requested for additional Ksh 160 mn in development resource allocation for supplementary No.2 as per the table below.

Supplementary Estimate No. 2 Development resource Requirements

Description	Amount Required (Ksh in Millions)	Source Of Funding	Funding Confirmed
Automation of case and depot management	55	GOK	No
QR code system	5	GOK	No
Acquisition of 2 seized goods holding depots	100	GOK	No
Total	160		

The Agency is therefore seeking for an additional Ksh 379 m in supplementary estimate No. 2 being the shortfall for the planned activities and projects during the FY 2017/18.

Proposed Budget For FY 2018/19

The Agency has aligned its budget to the ceiling and Big Four priority areas. The recurrent ceiling as per the sector as shown below is Kshs. 232.5 Million which is only enough to cater for personnel emoluments, rent for the head office & the three regional offices, leaving nothing for operations.

Anti-Counterfeit Agency's Budgetary Resources that supports The Big Four Agenda:

Description	Actual 2016/17	Budget 2017/18	Estimates 2018/19
REVENUE			
Internally generated	12.1	8	8
Government grants	237.9	245.4	282.5
Of Which: Current grants	225.4	245.4	232.5
Capital grants	12.5	-	50
Other sources: Investment income	0.38	-	-
EXPENDITURES			
Current Expenditures			
Of Which: Compensation to employees	141	183	181
Insurance	12.4	15.5	18.5
Utilities	6.4	5.5	7
Rent	31	23	26
Contracted Professional services (Guards & Cleaners)	5.2	7	7

Administrative expenses (internet access, Telecommunication, Electricity, Courier services, Printing Maintenance etc.)	16.8	7.9	-
Anti-counterfeiting operations	15.2	11.5	-
Of which: Enforcement	8.3	4.5	-
Awareness	5.3	5.5	-
Research	1.6	1.5	-
Capital Expenditures			
Of which: Purchase of depot	12.5	-	50

With the heavy mandate the Agency is tasked with, there is need to strengthen the institutional capacity by expanding its operations to the entry points. This will thus require additional inspectors, rent, motor vehicles and other operating expenses.

Unfunded Recurrent Requirements

The requirement for recurrent budget for the financial year 2018/19 is Kshs. 479 million. Kshs. 246.5 million is unfunded as per the table below:

Description	Amount Required (Ksh in Millions)	Source Of Funding	Funding Confirmed
Recruitment of additional Inspectors and secondment of police officers	108	GOK	No
Purchase of Motor Vehicles	50	GOK	No
Rent	46	GOK	No
Operating Expenses	42.5	GOK	No
Total	246.5		

Unfunded Development resource requirements

The Agency has not been allocated development budget for the FY 2018/19, yet its requirement is Kshs. 224 million for the following:

Project name	Amount Required (Kshs. in Millions)	Source of Funding	Funding Confirmed
Baseline Survey to establish the magnitude of Counterfeiting by sector	26	GOK	No
Development of Quick Response System, recordation and Enforcement case management	51	GOK	No
Acquisition of 2 holding depots for seized goods in Nairobi and Mombasa	100	GOK	No
Training of relevant enforcement agencies and judicial officers on the Anti-Counterfeit Act	47	GOK	No
Total	224		

2.7.8. ACA's Strategies towards Implementation of the Government's Big 4 Agenda

To support the Big 4 Agenda, the Agency will implement the following strategies:

Enforcement

The Agency has put in place the following strategies (some are proposals) that are geared towards increasing enforcement efficiency and impact with regard to counterfeiting:

Intelligence led-inspections and investigations;

Prior, accurate and verifiable information and intelligence is the key to successful inspections and seizures. The Agency seeks, inter alia, to partner with the National Intelligence Service to spur and inform its inspections and investigations.

More Emphasis on Prevention of Entry of Counterfeit Goods;

Empirical evidence and data show that most of the counterfeit goods seized in the country come from outside. The Agency intends, subject to availability of resources, to have officers at all the land borders (Namanga, Busia, etc), airports (Jomo Kenyatta International Airport and Eldoret International Airport) and sea ports (Mombasa and Lamu).

The Agency also intends to have more robust presence in the dry ports such as Inland Container Depot at Embakasi and all the container freight stations.

More Collaboration with Partner Institutions and Government Departments;

The fight against counterfeiting cannot be won successfully by one institution. There are various aspects that require the support of other institutions. To this end, the Agency intends to strengthen its collaborative efforts with other institutions like Kenya Revenue Authority (Customs etc), Kenya Bureau of Standards, Pharmacy and Poisons Board, Energy Regulatory Commission, National Authority for the Control of Alcohol and Drug Abuse (NACADA), Public Health, County Governments and various Ministries.

More Stakeholder Collaboration;

The Agency exists to enforce intellectual property rights. These are primarily private rights. It is not possible to fight counterfeiting without the confidence and the support of the key stakeholders in the private sector in the form of intellectual property rights owners. The Agency intends to deliberately cultivate the intellectual property rights owners to assist in the fight against counterfeiting.

Amendment and Revision of the Act;

The Agency has identified gaps that need to be filled in the law in order to ensure that the enforcement measures by the Agency are more robust and successful. The Agency has so far forwarded legislative proposals to the Ministry for further action. One of the proposals involves the mandatory recordation of intellectual property rights with regard to imported goods.

Training and Capacity Building of Enforcement Staff;

The success of the Agency is a direct mirror of the efficiency, effectiveness, commitment and professionalism of its inspectors. The Agency intends to, subject to the availability of resources, to train its inspectors to improve on their investigative capabilities and to ensure that they are in a position to investigate matters properly and professionally.

Use of Technology;

The Agency recognizes the role that technology plays in the fight against counterfeiting. The Agency intends to have in place a number of ICT technologies-

- i. An enforcement case management system – to manage cases from filing to adjudication and make the process efficient and transparent
- ii. a Depot management system – to manage seized goods and account for the same
- iii. QR code – to empower consumers and law enforcement agencies (LEAs) as a means by which genuine goods can be identified from counterfeit goods using technology
- iv. IPR recordal system – to create a database of intellectual property for imported goods and to ensure that only those goods whose IP is in the register are allowed into the country. The system will also serve as a revenue generation tool considering that ACA has suffered for long because of inadequacy of financial resources which impacted negatively on its operations

Police support program;

In collaboration with the National Police Service and the Ministry, the Agency will engage up to 100 police officers to support the Agency's enforcement activities.

Certification on product knowledge;

Currently, ACA relies on IPR holders and agents to identify counterfeit goods and give evidence in a court of law. The Agency wishes to engage IPR holders to bring ACA inspectors on board. IPR holders will train ACA inspectors on product knowledge and issue a certificate to enable ACA inspectors to give evidence in court on their behalf.

Deal with on-line counterfeiting;

Online counterfeiting is become an emerging conduit through which counterfeit goods are distributed to consumers. ACA will put measures in place to deal with online counterfeiting including collaborating with LEAs such as the police/Interpol.

Corruption

The Agency is a law enforcement institution. The Agency is aware and alive to the danger posed by corruption in its operations and has initiated measures to deal with the menace. For instance, the Agency has in place a Corruption Prevention Committee with clear terms of reference. The Committee is active. At the same time, the Agency has communicated to all its officers its zero-tolerance policy with regard to instances of engagement in corruption. The Agency intends to pursue measures to reign in corruption including but not limited to working closely with the Ethics and Anti-Corruption Commission.

Private Investigators;

The Anti-Counterfeit Act at Section 33(1) allows intellectual property rights owners to engage “agents” to act on their behalf and to represent them. Ordinarily, the law of agency has proved effective and efficient in the conduct of affairs especially in the protection of intellectual property rights.

The over-reliance on agents or private investigators in the enforcement of intellectual property rights by the Agency is not in the long-term interests of the public in the fight against counterfeiting. The Agency intends to deliberately chart a path that empowers it to enforce the provisions of the Anti-Counterfeit Act without over-reliance on agents or private investigators.

To this end the Agency-

- Intends to strengthen its intelligence gathering networks in terms of the Intelligence Gathering Policy and in collaboration with other government institutions like National Intelligence Service (NIS);
- Engage more directly with intellectual property rights owners for information and intelligence on the counterfeiting of their products;
- Engage more on own motion inspections and investigations based on intelligence and information gathered by its inspectors and other officers. Presently, every inspector has a target to generate own motion files which are commonly called suo moto investigations;
- Have the agents or intellectual property rights owners registered. Presently, there is no provision for due diligence and registration of agents or private investigators that do anti-counterfeit investigations. The Agency intends to have this embedded in law so that the agents or private investigators can, inter alia, conform to a specific code of conduct.

2.7.9 Education and Public Awareness

The focus of awareness programs is combating counterfeiting with a national priority in catalysing the Big Four Agenda in Kenya. Some of the programs are under implementation while some are proposals for funding and collaboration.

Capacity building program

This will involve training and certification of the following stakeholders-

- Private Investigators to curb the problem of impostors and misinformed private sector players;
- Training of Trainers /Champions at the County level to facilitate devolution of the mandate and widening the scope of trainers to cater for needs on the ground
- Mainstreaming of counterfeiting issues for in service Police officers training programs
- Intensive training and certification of officers from enforcement agencies designated as inspectors
- Mainstreaming of counterfeiting issues in institutions of learning to enable institutionalization for different professions and sectors

Border Inter-agency program

This is a program targeted at the border stakeholders – consumers, law enforcement agencies. It also involves inter-agency enforcement action.

County awareness program

This is a program targeting county officials (sensitization/training) and the public (awareness) followed by enforcement action.

Stakeholder management framework

Counterfeiting is part of illicit trade which requires collaboration and hence stakeholder management. The Agency will develop a framework to manage stakeholder engagement.

Promoting genuine

The government is the biggest consumer of goods from the private sector, hence vulnerable to acts of counterfeiting. In order for MDAs to promote genuine products at their work places, ACA proposes the following measures:-

Incorporate the provisions of the Anti-Counterfeit Act 2008 in Public Procurement and Disposal laws

Pursue its implementation by way of mainstreaming through national performance contracting to all government institutions to curb counterfeiting within their jurisdictions

Public outreach

The agency will employ outreach programs to create awareness about IP and counterfeiting among the public.

Educational outreach

This is a program targeting educational institutions (secondary schools and colleges/universities). The aim is to sensitize students on the value of IP and the actions to be taken in case of infringements.

Media

The Agency will continue to partner with the media in order to create awareness about the Agency's achievements. This includes print (newspapers, magazines, etc) and electronic media such as TV, radio and social media.

2.7.10 Market Research

The focus of market research is to support the other programs of the Agency such as public awareness and enforcement. The Agency will continue with market research and intelligence programs but will initiate market price surveys to collect market prices to aid in alternative dispute resolution (ADR).

a) Market research program

The Agency will periodically collect consumer and industry specific data to inform policy, strategy and Agency's core programs.

b) Market intelligence program

The Agency will periodically collect sector specific data about counterfeiting to inform enforcement action.

c) Market price surveys

On quarterly basis, the agency will collect market price data from goods that are commonly counterfeited in order to facilitate compounding of cases where a suspect pleads guilty to an offence of counterfeiting.

2.7.11 Preparation of Funding Proposals

Due to serious budgetary constraints, the Agency is unable to implement fully its strategic plan and annual work plans. In order to bridge the financial gap, the Agency has established a Resource Mobilization Committee to mobilize resources to implement the Agency's programs. The Committee has prepared a Resource Mobilization Strategy and

Implementation Plan as well as a basket of funding proposals for submission to development partners and other stakeholders.

The Agency has submitted proposals to the following institutions, among others:-

- i. United Nations Industrial Development Organization (UNIDO)
- ii. British High Commission
- iii. Embassy of the People's Republic of China
- iv. Embassy of France
- v. Embassy of Switzerland
- vi. Trademark East Africa (TMEA)
- vii. European Union

The following are the achievements:-

- i. Embassy of France has indicated that it would support the Agency on a benchmarking visit
- ii. The British High Commission, in partnership with DFID and TMEA will support ACA to conduct a national baseline survey on counterfeiting in Kenya
- iii. Embassy of the People's Republic of China has shown interest in supporting the Agency to acquire some equipment for institutional capacity

Key Challenges

The following are the major challenges that the Agency is facing.

1. Severe financial constraints, which has limited its operation in fighting counterfeiting (for details, see section 7.5 above). For instance, in the last 6 years, the Agency's budget for operational activities (enforcement, public awareness and research) averaged about Kshs 22 million per year, which is very little to create an impact. This has resulted into the following:-
 - i. Inadequate human capacity (currently, the Agency has only 26 inspectors to cover the whole country against an establishment of 174 officers);
 - ii. Limited geographical spread (ACA is present only in Nairobi, Mombasa, Kisumu and Eldoret. All major entry points are unmanned);
 - iii. Inadequate awareness of counterfeiting and its effect to the country. For the Agency to succeed it needs to enhance public awareness. Informed public will reduce the demand for counterfeits in the country hence the supply;
 - iv. There is lack of authoritative and comprehensive research data on counterfeiting in the country. Much research has not been carried out in the

country on counterfeiting such that data currently used are estimates, thus making any planning for the agency and the government difficult; and

- v. The agency still relies on manual system of receiving and processing complaints from intellectual property right holders and this creates inefficiencies and hampers trade because of the delays in processing cases and making appropriate decisions.

To address human capacity challenges in the past, the Agency collaborated with the National Police Service where the latter seconded police officers to support the Agency's enforcement activities. However, due to financial challenges, the Agency could not continue to maintain them and therefore they were returned to their employer.

1. Inadequate cooperation by some IPR owners
2. Porous borders encourage illegal trade
3. Need for continuous training of ACA inspectors to identify counterfeit goods
4. E-commerce. Counterfeiters have now changed their mode of operation whereby they are increasingly selling counterfeit goods over the internet (e-commerce). This raises challenges in terms of enforcement and also the fact that some websites are hosted outside the country and hence require cooperation of foreign governments to seize and shut down those websites.
5. Inadequate understanding of IP issues by some members of the judiciary and law enforcement agencies (LEAs)
6. Storage and destruction of counterfeit goods. The Agency has one depot in Nairobi which is full. The Agency is unable to secure depots in Mombasa and Kisumu due to financial challenges
7. Limited knowledge by public on issues of counterfeiting
8. High poverty levels, consumers' attitude and ignorance
9. Weak inter-agency collaboration which is compounded by lack of appropriate inter-agency legal framework
10. High labor turnover as a result of lack of career growth and incentive mechanisms
11. Change in management; since its inception in 2010 the Agency has had four CEOs causing instability
12. Staff faces security risks associated with covert operations

The Agency has tried to address some of the above challenges. For instance, in the case of financial constraints, it has engaged development partners and submitted various funding proposals. So far, the Agency has received support from the US Government, British

Government, Indian Government, and Chinese Government and is now engaging with DFID to fund a national baseline survey on illicit trade.

The Agency has also reviewed the Anti-Counterfeit Act to address emerging challenges in its pursuit to combat counterfeiting more effectively.

The following are the implications and strategic response to the challenges indicated above.

Challenges and Strategic Response

No.	Category	Challenges	Implications	Strategic response
1	Strategic	a) Inadequate cooperation by Intellectual Property Rights (IPR) owners	<ul style="list-style-type: none"> Loss of cases in court Lack of reporting/Information sharing 	<ul style="list-style-type: none"> Uphold public and stakeholder relationship Continuously train stakeholders
		b) Inadequate collaboration by other enforcement agencies which is compounded by lack of appropriate inter-agency legal framework	<ul style="list-style-type: none"> Duplication of Government efforts Lack of resource use optimization 	<ul style="list-style-type: none"> Deepen inter-agency collaboration through Government communication channels Continuously train Law Enforcement Agencies (LEAs)
2	Legal	a) Non-alignment of sections of the Act with the Constitution	<ul style="list-style-type: none"> Weak Act to deal with emerging counterfeit issues 	<ul style="list-style-type: none"> Re-align and amend laws through stakeholder participation
		b) ACA Act & Regulations not dynamic to current trends of counterfeit crime		
		c) Non-harmonized regional laws on IPR	<ul style="list-style-type: none"> Free movement of goods including counterfeits due to lack of duo-criminality 	<ul style="list-style-type: none"> Lobby and advocate for regional harmonization of anti-counterfeit laws

3	Operational	a) Inadequate staff:-Currently at 74 employees against 250, representing about 30%	<ul style="list-style-type: none"> • Less staff for key operation. • Low staff morale and motivation • High staff turn over 	<ul style="list-style-type: none"> • Deepen inter-agency collaboration to make use of designated inspector from other Agencies. • Redeploy and increase staff for the Agency.
		b) Inadequate geographic spread across the country. Currently the Agency has a presence in Nairobi, Mombasa, Kisumu, and Eldoret	<ul style="list-style-type: none"> • Lack of coordinated control of trade in counterfeits across the country 	<ul style="list-style-type: none"> • Increase staff capacity and regional presence to include border points, airports • Deepen inter-agency collaboration to make use of designated inspector from other Agencies • County Government collaboration
		c) Porous borders that encourage illegal trade	<ul style="list-style-type: none"> • Challenges of transit & trans-shipment of goods 	<ul style="list-style-type: none"> • Increase staff capacity and regional presence to include border points, airports • Deepen inter-agency collaboration to make use of designated inspector from other Agencies
4	Financial	a) Inadequate budgetary allocation	<ul style="list-style-type: none"> • Decreased operational support • Decreased achievement of performance targets • Constraints in capacity building 	<ul style="list-style-type: none"> • Aggressive resource mobilization from both private and public sector • Aggressive resource mobilization from donors and development partners
5	Technology	a) E-commerce b) 3D Technology c) Artificial Intelligence	<ul style="list-style-type: none"> • Selling of counterfeits over the Internet • Ease of making of packages and trademarks • Decrease of <i>prima facie</i> evidence 	<ul style="list-style-type: none"> • Training and capacity building to tackle online counterfeiting • Continuous innovation of packages by IPR owners for brand protection
6	Environmental	a) Disposal of environmentally	<ul style="list-style-type: none"> • Custody of environmentally 	<ul style="list-style-type: none"> • Training and capacity building on environmentally friendly

		hazardous counterfeit goods	hazardous goods	ways of counterfeit goods disposal • Re-ship to country of origin
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2.7.12 Proposals to the Senate/Parliament

The Agency proposes the following measures for it to be effective in combatting counterfeiting-

a) Enhanced budgetary allocation

This will help in strengthening the Agency and increase its capacity. The additional allocation is required-

- i. To hire more staff and decentralize them to the entry/exit points (increase inspectors, legal officers and drivers from the current 26 to 174 as reflected in the establishment)
- ii. To hire additional depots to store seized counterfeit goods (from the current 2 depots to at least 5 depots)
- iii. To purchase an incinerator-cum-extractor for counterfeit goods (this will also serve as a revenue-generating project)
- iv. To purchase working tools, equipment and vehicles
- v. To automate its services – e.g. enforcement case management system, depot management system, QR code, IPR recordal system, ERP. The IPR recordal system for border measures will also generate A-in-A for ACA's financial sustainability
- vi. To pay for office space (for additional regional offices)
- vii. For capacity building (of staff, stakeholders, etc) and creation of public awareness

The Agency seeks the support of the Parliament to lobby for increased budgetary allocation to ACA, which requires an optimal budget of **Kshs 700 million** each year (see the appendix for the budget that was recently presented to the Parliamentary Departmental Committee on Trade, Industry and Cooperatives).

b) Amendments to the Anti-Counterfeit Act

This will enable the Agency to deal with emerging issues in its pursuit to combat counterfeiting. The purposes of the proposed amendments are:-

- i. To define new offences
- ii. To increase minimum penalties

- iii. To give inspectors additional powers to investigate and prosecute related offences
- iv. To entrench inter-agency collaboration framework
- v. To introduce IP recordation for border measures

The Agency seeks the support of the Senate and National Assembly to have these proposed amendments passed.

c) Harmonization of regional laws on IP, counterfeiting and standards

Considering that we have a single regional market, harmonization of laws on IP, counterfeiting and standards will enable a common approach in dealing with these issues.

The Agency seeks the support of the Parliament to lobby EALA to have the EAC policy on IP and EAC Anti-Counterfeit Bill passed. The two documents have been under review for close to 10 years.

2.9 NAKUMATT SUPERMARKET

The Nakumatt Administrator gave the following submission:

That, Nakumatt started in 1992. At its peak it had over 150,000 transactions per day, over 1.3m loyalty Card Holders(Nakumatt Global Card). Nakumatt Mega (Uhuru Highway) was the first Branch. The supermarket has employed over 6000 people across East Africa directly and more than 20,000 indirectly. It had a turnover of \$600m in the 2017 financial Year and about 1% of Kenya GDP in 2016. It has remained the East Africa's largest retailer for two decades.

Nakumatt has always been known for its resilience having endured; demolition of its stores in Thika Road, Downtown fire and Westgate terrorist attack where each of the stores contributed in excess of 10% to the total revenue.

The recent challenges facing Nakumatt are as a result of-

- Rapid over expansion in Kenya and the region;
- Imbalance of debt equity ratio;
- High staff overheads;
- High cost of borrowing and interest rate capping
- Inefficient stock management;

- Last minute ditch withdrawal by prospective strategic investor; and
- Lack of good corporate governance

Nakumatt with refreshed approach to retail sought to focus on-

- High profitability;
- Efficiency;
- Lean and new management structure;
- Accountability;
- Debt reduction; and
- Cost reduction

The current Nakumatt debts (in millions)

- Bank/Loans/Hire Purchase –Kshs. 7,500 (21%)
- C/P and P/P - Kshs. 6,000 (17%)
- Suppliers/Landlords -Kshs. 18,000 (51%)
- Staff -Kshs. 1,600 (4%)
- Kenya Revenue Authority -Kshs. 2,400 (7%).

The proposed Debt Plan includes-

- Bank/Loans/H.P: 33% debt right off, 3B asset recovery, 2.025B cash payout over 8 years (2 year moratorium)
- C/P& P/P: 50% debt right of, 50% conversion to equity
- Suppliers/Landlords: 90% debt right off, 10% conversion to equity
- Staff: 100% pay-out over 8 years (2 year moratorium)
- KRA: 100% cash pay-out over 8 years (2 year moratorium)

The proposed Engine rooms:

- Nakumatt Ukay
- Nakumatt Lavington
- Nakumatt Prestige
- Nakumatt Mega
- Nakumatt Embakasi
- Nakumatt Nakuru
- Nakumatt City (Kisumu)

These locations have been picked based on historical sales and profitability, convenient locations, proven catchment areas and strategically positioned locations.

Achievable Projections – Per Store (Monthly)

Store Name	Total Operating Costs	Break Even Gross Sales	2016 Gross Revenue	Projected Revenue	Projected Profit
Mega	21,355,146	106,775,730	400,000,000	300,000,000	35,644,854
Prestige	14,779,805	73,899,025	300,000,000	200,000,000	23,220,195
Nakuru	8,852,128	44,260,638	120,000,000	90,000,000	8,247,872
City	10,890,013	54,450,067	138,000,000	75,000,000	3,359,987
Ukay	5,989,500	29,932,500	90,000,000	70,000,000	7,313,500
Lavington	3,048,368	15,241,842	65,000,000	50,000,000	6,451,632
Embakasi	7,330,335	36,651,675	85,000,000	60,000,000	4,069,665
Central Costs	23,000,000				(23,000,000)
Monthly (Kshs)	95,242,296	361,211,478	1,198,000,000	845,000,000	65,307,704

Considering increased competition, the supermarket is conservatively projecting a revenue of 75% of 2016 which translates into a Kshs. 65M per month and revenues in excess of Kshs. 10B per year. The key categories driving revenue include; Fresh Dairy, Meats, Fruit & Vegetables, Frozen products, Alcohol, Grains, flour, sugar, rice pastas, Food Additives, Beverages (hot and cold), Confectionary, Cutlery and Crockery (Cookware, Plastics), Electronics and Household Appliances, Baby (including Accessories and Toys).

The Suppliers will be paid on a weekly basis (consignment payment model) and the 45 day trading terms to be honoured. A letter to be provided to the suppliers stating that the supplier has complete ownership and control of stocks, safety and security of the stocks in custody, Access to the stocks at any time and return of stocks on demand within 7 days of demand letter.

The seven branch landlords are ready to support this revival provided that branches are restocked and there is an aggressive marketing plan. Landlords will be paid on a monthly advanced basis.

The supermarket has engaged one of the leading marketing agencies TDF Group. TDF Group has experience in the retail sector and has already developed a marketing strategy. The

objectives have been outlined based on sales projections. The proposal is to reposition Nakumatt and bring customers back. The target audiences are the loyal Nakumatt shoppers and based on Geo-locations of the 7 branches.

Kshs.3M per month allocated to the marketing plan as per recommendations by agency to achieve the objectives through Above the Line (ATL), Below the Line (BTL) and Digital medium. The agency will explore additional revenue generation possibilities with in-store branding.

The immediate requirements in terms of funds for this program are-

- Rentals outstanding (7 Branches) – Kshs. 55M
- Staff salaries – Kshs. 50M
- Power bill – Kshs. 40M
- Marketing (12 Months) – Kshs. 36M
- Insurance – Kshs. 20M
- Overdraft facility – 192M (32M for 6 Months)

The total cash requirements will be Kshs. 393M, Bank guarantee facility for essential goods Kshs. 100M making the overall requirement to Kshs. 493M.

2.10. UCHUMI SUPERMARKET LIMITED

The Chief Executive Officer of Uchumi Mr. Mohammed Mohammed gave the following submission:

In 1975, the Kenyan Government through Industrial & Commercial Development Corporation (ICDC) initiated the process of founding a supermarket completely Kenyan, run by Kenyans. Uchumi Supermarkets Limited was incorporated under the Companies Act (Cap. 486) on 17th December 1975.

The main objective of creating Uchumi was to have an enterprise for equitable distribution of essential commodities and affordable prices and to create an outlet for locally manufactured goods. An objective that the Board and Management strongly believe in and are determined to achieve.

In 1976, shareholders Industrial & Commercial Development Corporation ICDC, Kenya Wine Agencies Limited (KWAL) and Kenya National Trading Corporation (KNTC), all

government owned parastatals entered into a management contract with Standa S.P.A of Italy. Standa was one of the biggest companies with a chain of supermarkets in Europe and a wealth of experience in retail.

In 1992, with 3 stores, Uchumi floated 60 Million shares and was listed in the Nairobi Stock Exchange with the Market Capitalization standing at Kshs. 2.74 Billion as at February 2016. In 2005, Uchumi closed 10 of perennially loss making branches. Uchumi raised Kshs. 1.2 billion in a successful rights issue that saw majority shareholders whittle their shareholding from 52% to less than 20%.

In 2006, Uchumi was declared insolvent and thereby suspended from trading in the stock market and was put under receivership. It regained solvency in 2010 and resumed trading in the stock market in 2011.

Uchumi Supermarkets Plc started experiencing liquidity challenges in 2012 and by close of the financial year 2014/2015 had made a Net Loss of Kshs.3.4 Billion resulting to a negative balance sheet of Kshs. 5.6 Billion. To salvage the situation a Rights Issue was made in 2014, however due to aggressive expansion the funds did not achieve the intended purpose.

In 2016/2017, a new management was put in place to spearhead the turnaround strategy however the challenges in liquidity have persisted delaying the turnaround strategy which has been compounded with exit of senior staff .

Uchumi Brand has a focus on 'Buy Kenya Build Kenya' through a diverse and local product offering, has served over 25 million customers over the last 42 years, created employment opportunities across all sectors of the economy, is synonymous with Kenya's prosperity and growth which has enabled the growth of some of big local companies in Kenya; and resonates well with common *Mwananchi*, an underserved market.

2.10.1 Uchumi Turnaround Plan

Uchumi Turnaround was developed in anticipation on materialization of the funding options and planned timelines.

The turnaround plan was engineered by the following key strategic pillars-

- Growing the business to profitability through existing channels;
- Balance Sheet Re-organization;
- Building motivated engaged teams that will create value;
- Align Information, Communication and Technology (ICT) to drive operational excellence;
- Focusing on fresh produce assortment and offering;
- Developing superior customer experience through innovation;
- Achieve supply chain excellence through technology and supplier partnerships; and
- Drive growth through an multi/Omni-channel strategy

2.10.2 Rescue Plan Implementation and Results

- **Balance Sheet Re-organisation**

Closure of non-performing Branches 12 in Kenya and 2 subsidiaries in Tanzania and Uganda resulting to rent reduction from Kshs. 86M to Kshs. 27M offloaded 1600 excess employees. And Staff cost reduction from Kshs. 127M to Kshs. 36 M

Sale of non-core assets; Ngong Hyper – Sold, Kasarani land– Valued at Kshs 2.6 Billion – Up for sale and Langata – Valued at Kshs 1.5 Billion. The results are assisting to settle old debt (current liabilities) and improve the company’s liquidity position and bridging working capital towards on boarding investor.

- **Supplier Management**

Old debt conversion to equity; Discussions with Technical Advisors are on-going. This has to take into consideration the possible investor as well. There is also a planned settlement of balance of old debt from the proceeds of the sale of Kasarani land. Further, there is in place Consignment Model of supply through the Escrow Account but the model is facing challenges due to cash flow problems, restrictive trading terms and bureaucracy. Improved and sustained engagement with the suppliers through the Association of Kenya Suppliers and Joint Business Planning with suppliers on how to settle current Escrow debt and grow sales. Settlement planned from the GOK funds and Investor pre-financing.

- **Funding Options**

Uchumi Statement of Financial Position (SOFP) as at 30th June 2017 showed a negative cash position of Kshs 5.9 Billion. At the minimum level, the company required an equivalent

amount to return to solvency and an additional Kshs.1.8 Billion for operations and business growth.

With this position, accessing Credit from Banks had been impossible and the company had to look for funding options elsewhere.

The Board had approved-

- KCB Bridging finance of Ksh.800 Million – Uchumi proposal was declined;
- Conversion of 50 percent suppliers’ old debt to unlock Kshs.1.8 Billion. This option was declined by majority with only 22 suppliers showing willingness;
- GOK loan of Kshs.1.8 Billion with Kshs.600 Million being for closed subsidiaries’ in Uganda and Tanzania – GOK advance Ksh.500 Million that was received in February 2017 and Kshs received late in December 2017;
- Sale of Kasarani Land to avail a minimum Net amount of Kshs.1.6 Billion after taking into account the proposed settlement with Sidhi Investments;
- On-boarding of an Investor to inject fresh capital of not more than Kshs.5 Billion through issuance of new shares. The interested investor had made an offer of injecting Kshs.3.5 Billion which stalled.

2.10.3 Uchumi Balance Sheet as at April, 2018

The company had a negative capital position of Kshs 4.687 Billion as end of April 2018

Government of Kenya Funding Tranche (i)

GOK 500M UTILISATION SUMMARY FEB, 2017		
Trade suppliers	385,710,464.67	77%
Loans	9,546,160.03	2%
Rents	53,241,867.15	11%
Salaries	41,044,048.05	8%
Other Utilizations	13,155,325.35	3%
	502,697,865.25	100%

Significant allocation of the funds went towards restocking

Government of Kenya Funding Tranche (ii)

Summary of Funds Utilization December, 2017		% Utilization
Trade Suppliers	425,000,000.00	61%
Expenses	44,000,000.00	6%
Salaries	131,000,000.00	19%
Rent	100,000,000.00	14%
	700,000,000.00	100%

Also in tranche 2, significant allocations of funds went to re-stocking. However as indicated in Statement of Financial Position, at the point of receiving the first tranche, all obligations were lagging behind.

What needs to be done now?

- i. Bridging funding towards on-boarding of the Investor;
 - Government to immediately release the balance of the Shareholder's Loan Ksh 600M
 - Pursue pre-financing from Investor
 - Renegotiate Supply Chain financing with Banks and Suppliers
 - Balance sheet restructuring
- ii. Expedite Sale of Kasarani Land to settle part of Supplier Debt and negotiate resumption of supply

Current Situation

- i. Government to immediately release the balance of the Shareholder's Loan Kshs 600M – Funds put on hold
- ii. Pursue pre-financing from Investor – Subject to completion of due diligence.
- iii. Renegotiate Supply Chain financing with Banks and Suppliers – Discussions on-going together with technology partners
- iv. Expedite Sale of Kasarani Land to settle part of Supplier Debt and negotiate resumption of supply – Viable proposal of Kshs 2.8bln in on going.

2.11 THE NATIONAL TREASURY

The National Treasury represented by the Cabinet Assistant Secretary Hon. Nelson Gichuhie informed the Committee that, they are privy to the fact that the retail sector contributes over

eight (8) per cent to the GDP and also provides employment to about eight million people. The sector is therefore fundamental to the achievement of not only the Big Four Agenda but also ultimately the realization of Vision 2030.

The role of the National Treasury in this matter is to ensure a conducive investment climate in the sector which we do through various policies and initiatives including providing for effective regulatory framework based on any emerging issues.

However, despite the above the National Treasury aware that there have been some challenges in the sector including exit of a leading player in the market.

Other challenges identified are:

- i. Failure to pay suppliers on time;
- ii. Issuing of bad cheques by retail outlets;
- iii. Threatening of suppliers with termination of contracts without notice;
- iv. Lack of good Corporate governance principles; and
- v. Rapid expansion funded by supplier credit. It has been indicated that 97% of the finances held by the retailers, at the Till at any day is suppliers' money.

These challenges have contributed to the exit of SMEs in the market and also led to increase in the portfolio of nonperforming loans (NPL) which may lead to macroeconomic instability. According to reports, the supermarket which exited may have accumulated supplier debts. Specifically, the Administrator's Report regarding Nakumatt, indicated that it had total liabilities of Kshs. 35.82 billion against assets of Kshs. 3.82 billion.

The National Treasury, cognizant of these emerging issues in the sector guided the review of the Competition Act, No 12 of 2010 ("Competition Act") and provided for control of Abuse of Buyer Power, which is basically manifested under the issues highlighted in para 4 above. The said amendment specifically provides in section 24 (2A) of the Competition Act as follow:

(2A) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2B) In determining buyer power, the Authority shall take into consideration—

(a) the nature and determination of contract terms;

(b) the payment requested for access infrastructure; and

(c) the price paid to suppliers.

(2C) The Authority, in consultation with the Cabinet Secretary and other relevant government agencies and stakeholders, shall develop rules for the better carrying out of the provisions of this section.

Towards this, the National Treasury will soon be presenting to Parliament the proposed Rules for better carrying out of these provisions in the Competition Act. The Rules have already been developed with the relevant government agencies and exposed to the key stakeholders across the country through workshops and by invitation for submission of comments.

In addition, to support effective regulation of Abuse of Buyer Power, the National Treasury has supported and procured approval for reconstitution of the organizational structure of the CAK to create a department within this financial year to deal with these emerging issues in the sector.

Also, the National Treasury is working closely with the Ministry of Industry, Trade and Cooperatives and the Competition Authority of Kenya, and the stakeholders to develop a Code of Conduct for self-regulation of the sector and Retail Sector Prompt Payment Regulations. The Ministry of Industry, Trade and Cooperatives is spearheading this initiative.

Despite the above challenges, the National Treasury notes that there has been an increase in number of investors (both local and foreign) in the retail sector in the recent past. This is evident from the entry and expansion of ten (10) supermarkets namely; Choppies, Shoprite, Carrefour, Game, Souk, Tumaini, Quickmart, Maathai, Chandarana and Naivas over the last two (2) years. Therefore it is the National Treasury's position that the investment climate is conducive enough to attract new investment.

In conclusion, the Treasury noted that-

- i. There are emerging issues in the retail sector such as Abuse of Buyer Power as codified by the Competition Act. In addition, the National Treasury shall be presenting the Rules, to Parliament, to support the effective implementation of these provisions in the Competition Act.
- ii. The National Treasury has also supported the re-organization of the Competition Authority of Kenya and we are in the process of favouring the Authority with the

requisite budgetary and institutional support in order to deepen implementation of the provisions of the Act with respect to Abuse of Buyer Power.

- iii. The National Treasury is working closely with the Ministry of Industry, Trade and Cooperatives and the Competition Authority of Kenya, and other stakeholders to develop a Code of Conduct for self-regulation and Retail Sector Prompt Payment Regulations.
- iv. Lastly, the National Treasury is interrogating proposals of developing regulations to manage retailers/buyers who heavily acquire short term credit in acquisition of goods and have to sell to pay the creditors. These regulations may guide in regard to the allowable ratio of assets and liabilities in order to ensure management of the retailers expanding using the suppliers' credit.

GoK Support to Uchumi Supermarkets Limited (USL) in regard to its turnaround strategy Financing plan for an amount not exceeding Kshs 1.8 billion – Release of Kshs 1.2 billion to USL under Loan Agreements framework

The Cabinet formed a subcommittee of Cabinet “to discuss and recommend appropriate conditions under which Cabinet approval for advancing Kshs 1.8 billion to USL should be made.

The sub-committee agreed in principal to support the request for the release of Kshs 1.2 billion in two tranches of Kshs 500 million and Kshs 700 million

The Government through the Cabinet Secretary, National Treasury holds 14.67% of the total shareholding of the company. This places Government as minority shareholder.

Release of funds

The Funds have since been released to USL as a loan and Loan Agreements have been duly executed between the Government and USL. As follows:

- Kshs 500 million released as a first tranche in 2016 and
- Kshs 700 million released in 2017

Reasons for advancing the Loan

USL developed a comprehensive turnaround strategy in consultation with Deloitte and Touché consultants, with a view to attaining stability and sustainable profitability. The USL Turnaround road map uses a three phased approach (stabilize, optimize and grow).

The Plan identified the following as the key turnaround initiatives:

- i. Funding which would require support of the company's lenders;
- ii. Recruitment of a new leadership team to drive the turnaround strategy;
- iii. Improve on the sales and distribution;
- iv. Review the employee productivity; and
- v. Put in place a strategy to contain costs across all costs and revenue centers of the Company.

The initial steps of the plan would comprise taking advantage of the festive season to do business. Subsequently USL applied for the release of both tranches so far disbursed.

CHAPTER THREE

3.0 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.0.1 Committee Observations

The committee observed the following—

1. That there is increased presence of imported goods in the supermarket shelves in lieu of the locally manufactured goods;
2. That there are increased cases of gross mismanagement due to the lack of requisite financial skills in retail businesses;
3. That there was a poor application of corporate governance in major retail outlets due to a lack of defined corporate structure and a failure to implement best business practices;
4. That the retail industry has seen a rise in competition from internationally branded retail outlets such as Carrefour, Shoprite and Choppies supermarkets. Furthermore, online retailing websites such as Jumia, OLX, Kilimall have increased competition over locally created retail outlets;
5. That there are no adequate legal and regulatory frameworks in place to monitor the performance of the retail industry;
6. That there is undue delay in payment to suppliers and manufacturers by most of the big retailers. For instance, it was confirmed that Nakumatt Supermarket owed Ksh 30.6 billion to suppliers and manufacturers by the time it went down. This situation has contributed to the increase in the non-performing loan portfolio of many banks and at the same time seriously jeopardised the financial performance of most suppliers and manufacturers;
7. That most of the outlets especially Nakumatt used suppliers' money to carry out unplanned expansion. This contributed to delayed payments to suppliers and manufacturers;
8. That Nakumatt Supermarkets owes the Kenya Revenue Authority an estimated KSh. 2.3 Billion in unpaid taxes;
9. That the National Government bailout to Uchumi Supermarket has not helped the supermarket regain its position and all other state intervention has not been helpful due to piecemeal disbursement of grants;

10. That the Committee noted that although Kenya is a free market economy, there is a need to establish an Office of Fair Trade with a clear mandate to regulate recommended retail pricing.
11. That the Committee observed that companies with a strong capital base tend to be drivers of the economy as they create a lot of job opportunities and are generators of revenue for the state. Therefore there is a subtle monopoly/dominance by the major players in the retail industry. The Committee further observed that when such companies are in financial distress, the national economy and the public at large are impacted negatively as employment and revenue is diminished.

3.0.2 Recommendations

1. The government should actualise the development of local content and create a legal framework to facilitate the Buy Kenya Build strategy;
2. The National Government should enhance and promote capacity building for businesses with an emphasis on the retail sector;
3. Parliament should amend the existing legislation so as to strengthen the laws on enforcement of corporate governance standards in public and private institutions;
4. There is need for Parliament to amend the Competition Act to provide for remedies for abuse of buyer power and an avenue for resolution of complaints in the retail sector. The Competition Authority should immediately and continuously create awareness among retailers and the general public on how to lodge complaints under the Competition Act;
5. There is need for the Ministry of Trade to come up with regulations to manage retailers and buyers who heavily acquire short term credit in acquisition of goods in a one year. The Government should expedite on establishment of prompt payment regulatory framework in Kenya which shall include a 10 day period for payment of perishables.
6. The Competition Authority should fast track the development of the code of conduct for self-regulation of the sector to supplement the enforcement initiatives provided for under the Competition Act within twelve months;
7. The State Department of Trade should develop regulations that aim to halt retailers from engaging in expansion activities using suppliers credit;

8. The Kenya Revenue Authority should proceed to collect the unremitted taxes from Nakumatt Holdings Limited;
9. The National Government should cease and desist from awarding financial bailouts to insolvent firms such as Mumias Sugar Company, Kenya Airways and Uchumi Supermarkets;
10. Parliament should create a legislative proposal that establishes an Office of Fair Trade whose mandate shall be the regulation of recommended retail pricing for goods;
11. Parliament should formulate legislation to establish an independent public oversight board similar to the Public Interest Oversight Board which shall seek to improve the quality and public interest focus of accounting standards in audit, financial management and ethics.
12. There is need to strengthen and build capacity of the Anti-Counterfeit Agency's by expanding its operations to the entry points therefore justifying the need to increase its budgetary allocations by the National Treasury in the FY 2019/2020.
13. The Anti-Counterfeit Act needs to be reviewed and amended with a view to addressing emerging challenges in the retail sector;
14. The National government through its relevant investigative agencies should undertake a forensic audit of the money owed to the suppliers of Nakumatt as they risk losing Ksh 30.6 billion in the event that Nakumatt is liquidated.