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THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – FIFTH SESSION – 2026

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL
PLANNING

REPORT ON:

THE CONSIDERATION OF THE COMPETITION (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILL NO. 4 OF 2026)

	
THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 12 AUG 2026	DAY: Wednesday
TABLED BY:	Vice Chairperson (Hon. Benjamin Hargrett)
CLERK-AT THE-TABLE:	Halima Ahmed



Directorate of Departmental Committees
Clerk's Chambers
Parliament Buildings
NAIROBI

AUGUST, 2026

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LIST OF ABBREVIATIONS AND ACRONYMS

AMCHAM	-	American Chamber of Commerce Kenya (AMCHAM)
CAK	-	Competition Authority of Kenya
CBK	-	Central Bank of Kenya
COK	-	Constitution of Kenya
EY	-	Ernst & Young
FKE	-	Federation of Kenya Employers
ICPAK	-	Institute of Certified Public Accountants of Kenya
IEA	-	Institute of Economic Affairs
KAM	-	Kenya Association of Manufacturers
KBA	-	Kenya Bankers Association
LSK	-	Law Society of Kenya
MP	-	Member of Parliament
OAG	-	Office of the Auditor-General
ODM	-	Orange Democratic Movement
PWC	-	PricewaterhouseCoopers
SMP	-	Strategic market position
UDA	-	United Democratic Alliance

ANNEXURES

Annexure 1: Adoption Schedule

Annexure 2: Minutes of the Committee on consideration of the Bill

Annexure 3: The Competition (Amendment) Bill (National Assembly Bill No. 4 of 2026)

Annexure 4: Advertisement inviting the public to submit memoranda on the Bill

Annexure 5: Letter from the Clerk of the National Assembly inviting relevant stakeholders to attend the public participation forum

Annexure 6: Memoranda by Stakeholders

CHAIRPERSON'S FOREWORD

This Report contains the proceedings of the Departmental Committee on Finance and National Planning on its consideration of the Competition (Amendment) Bill (National Assembly Bill No. 4 of 2026). The Bill was published in the Kenya Gazette on 19th February 2026 and read a First Time on 1st April 2026. The Bill was thereafter committed to the Committee for consideration and tabling of the report to the House pursuant to Standing Order 127.

The principal object of the Bill is to amend the Competition Act, Cap. 504, to broaden the mandate of the Competition Authority in addressing anti-competitive conduct in digital markets and unfair market conduct arising from the abuse of superior bargaining position.

In compliance with Article 118 (1) (b) of the Constitution and Standing Order 127(3), the Clerk of the National Assembly placed an advertisement in the print media on 10th April 2026 inviting the public to submit memoranda by way of written statements on the Bill.

In addition, the Clerk of the National Assembly vide letters Ref. No. NA/DDC/F&NP/2026/101, NA/DDC/F&NP/2026/102, NA/DDC/F&NP/2026/103 and NA/DDC/F&NP/2026/104 dated 8th July 2026 invited key stakeholders to submit views on the Bill and attend a public participation forum on Tuesday, 21st July 2026, Wednesday, 22nd July 2026 and Thursday, 23rd July 2026. The memoranda were to be received on or before Monday, 8th June 2026 at 5.00 pm (East African Time).

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Bill. Similarly, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made invaluable contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to the provisions of Standing Order 199(6), it is my pleasure to report that the Committee has considered the Competition (Amendment) Bill (National Assembly Bill No. 4 of 2026) and wish to report to this august House with the recommendation that the House **approves the Bill with amendments.**

Hon. FCPA. Kuria Kimani, CBS, M.P

Chairperson, Departmental Committee on Finance and National Planning

CHAPTER ONE

I PREFACE

I.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE

- I. The Departmental Committee on Finance and National Planning is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is as follows:
 - a) *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
 - b) *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
 - c) *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
 - d) **To study and review all legislation referred to it;**
 - e) *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
 - f) *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
 - g) *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
 - h) *To examine treaties, agreements and conventions;*
 - i) *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
 - j) *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
 - k) *To examine any questions raised by Members on a matter within its mandate.*
2. The Second Schedule to the National Assembly Standing Orders assigns the Committee the mandate to consider matters in relation to public finance, public audit policies, monetary policies, financial institutions, economy, investment policies, competition, banking, insurance, national statistics, population, revenue policies including taxation, national planning and development, digital finance, including digital currency.
3. In executing its mandate, the Committee oversees the following Ministries/Departments:
 - a) The National Treasury.
 - b) State Department for Economic Planning.

- c) State Department for Public Investments and Asset Management.
- d) The Commission on Revenue Allocation (CRA)
- e) Office of the Controller of Budget

I.2 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House on 27th October 2022 and reconstituted on Wednesday, 5th March 2025 and further on Thursday, 28th May 2026.
5. The Committee comprises the following Members:

Chairperson

Hon. FCPA Kuria Kimani, CBS, MP
Molo Constituency

UDA Party

Vice-Chairperson

Hon. (Amb.) FCPA Langat Benjamin Kipkirui, CBS, MP
Ainamoi Constituency

UDA Party

Members

Hon. Peter Kaluma, CBS, MP
Homa Bay Town Constituency
ODM Party

Hon. Sunkuyia, R. George, MP
Kajiado West Constituency
UDA Party

Hon. FCPA Oyula, Joseph H. Maero, MP
Butula Constituency
ODM Party

Hon. Dr. Gathoni Wamuchomba, HSC, MP
Githunguri Constituency
UDA Party

Hon. Mboni, David Mwalika, MP
Kitui Rural Constituency
WDM Party

Hon. Sheikh Umul Sheikh, MP
Mandera County
UDM Party

Hon. Okuome Adipo Andrew, MP
Karachuonyo Constituency
ODM Party

Hon. (Dr.) Shadrack Mwiti, MP
South Imenti Constituency
Jubilee Party

Hon. Chiforomodo, Munga, MP
Lunga Lunga Constituency
UDM Party

Hon. (Dr.) Ariko John Namoit, MP
Turkana South Constituency
ODM Party

Hon. CPA Rutto Julius Kipletting, MP
Kesses Constituency
UDA Party

Hon. Machele M. Soud, MP
Mvita Constituency
ODM Party

Hon. Paul Biego, MP
Chesumei Constituency
UDA Party

I.3 COMMITTEE SECRETARIAT

6. The Committee is facilitated by the following staff:

Ms. Tracy Chebet
Principal Clerk Assistant II

Ms. Jennifer Ndeto
Deputy Director, Legal Services

Mr. Benson Kamande
Clerk Assistant III

Ms. Winfred Kambua
Clerk Assistant III

Mr. Salem Lorot
Senior Legal Counsel

Mr. Eugene Luteshi
Audio Officer III

Ms. Nelly W. Ondieki
Research Officer III

Mr. George Ndenjeshe
Fiscal Analyst II

Mr. James Macharia
Media Relations Officer

Ms. Joyce Wachera
Hansard Reporter II

Mr. Benson Muthuri
Assistant Serjeant-At-Arms

Mr. Jared Onyancha
Protocol Officer

Mr. Allan Kimani Ngugi
Administrative Officer II

CHAPTER TWO

2.0 OVERVIEW OF THE COMPETITION (AMENDMENT) (NATIONAL ASSEMBLY BILL NO. 4 OF 2026)

2.1 BACKGROUND

7. The Competition (Amendment) (National Assembly Bill No. 4 of 2026), is a Bill sponsored by the Leader of Majority Party. It was published on 19th February, 2026 and was read for a First Time on 1st April, 2026. The Bill was thereafter committed to the Departmental Committee on Finance and National Planning for its consideration and tabling of the report to the House pursuant to Standing Order 127.

2.2 SUMMARY OF LEGAL PROVISIONS

Main highlights of the Bill

8. The principal object of the Bill is to amend the Competition Act, Cap. 504, to broaden the mandate of the Competition Authority in addressing anti-competitive conduct in digital markets and unfair market conduct arising from the abuse of superior bargaining position.
9. **Clause 2** seeks to amend section 2 of the principal Act to include new definitions of terms used in technical sense but not defined. The definitions are “*business consumer*”, “*counterparty*”, “*digital activity*”, “*digital market*”, “*intermediate transaction*”, “*multi-home*”, “*privatization*”, “*product information standard*”, “*strategic market position*” and “*superior bargaining position*”. The clause also proposes to amend the definitions of “*person*” and “*undertaking*”.
10. **Clause 3** seeks to amend section 4 of the principal Act to include parameters for assessing dominant position in the case of digital activities. Additionally, it includes a proposed interpretation of the expression “*strategic market position*” and “*superior bargaining position*” in a market. The amendment reflects the evolving nature of modern markets and digital markets, where competitive advantage is often derived from network effects, data control, and intermediary positioning rather than sheer size.
11. **Clause 4** seeks to amend section 9 of the principal Act to expand the functions of the Authority, including fostering strategic partnerships with national, regional and international bodies.
12. **Clause 5** seeks to amend section 18 of the principal Act to empower the Authority to conduct inquiries into any matter affecting abuse of superior bargaining position.

13. **Clause 6** seeks to amend section 23 of the principal Act to provide for the regulation of intermediaries that are considered to be in a dominant position.
14. **Clause 7** seeks to repeal section 24A of the principal Act to streamline the provisions relating to abuse of buyer power. The abuse of buyer power is not a restrictive trade practice and as such the current position under Part III on Restrictive Trade Practices is considered an anomaly. Accordingly, the provision is reintroduced under clause 9 of the Bill which seeks to introduce a new Part in the Act on unfair market conduct; and particularly, the introduction of sections on the abuse of buyer power and abuse of superior bargaining position. The conduct deals with a situation where a party with greater influence over the outcome of negotiations uses that advantage to bring about excessive imbalances in the rights and obligations in the business engagement to the detriment of the other party.
15. **Clause 8** seeks to amend section 31 of the principal Act to empower the Authority to investigate any conduct constituting an abuse of superior bargaining position.
16. **Clause 9** seeks to insert a new Part IIIA to the Act to provide for unfair market conduct, specifically addressing abuse of buyer power and abuse of superior bargaining position.
17. **Clause 10** seeks to amend section 41 of the principal Act to broaden the definition of a merger to include privatization of Government agencies and state corporations that engage in trade. The inclusion of privatization within the statutory definition of mergers extends the Competition Authority's oversight to privatization transactions that may impact market competition.
18. **Clause 11** seeks to amend section 55 of the principal Act (*False or misleading representations*) to include offences on providing false or misleading representations on goods or services by:
- a) falsely representing that goods or services are in such other manner other than the manner specified;
 - b) making false or misleading representation concerning any other relevant information in connection with the supply or promotion of goods or services to the consumer; or
 - c) withholding material information on the quality and use of a product.
19. **Clause 12** seeks to amend section 70A of the principal Act to expand the Authority's power to initiate investigations into consumer welfare matters. Therefore, the amendment replaces the words "consumer complaint" and "complaints" with "*consumer welfare issues*". The amendment therefore expands the

scope of issues that the Competition Authority of Kenya can address, allowing it to intervene not only when a formal complaint is lodged but also in situations affecting consumers more generally. This is in line with international best practices in the regulation of competition in Kenya. Section 70A provides as follows:

70A. Authority to initiate investigation into complaint

(1) Pursuant to the provisions this Part, the Authority may on its own initiative or upon receipt of information or a complaint from any person, government agency, Ministry, or consumer body, initiate investigations into a consumer complaint.

(2) The provisions of sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply mutatis mutandis to the investigation of consumer complaints under this section.

20. **Clause 13** seeks to amend section 89 of the principal Act to provide for a penalty of up to ten percent of the undertaking's gross annual turnover for failure to comply with an order of the Authority. Section 89 of the Act provides that, "Any person who contravenes or fails to comply with a lawful order of the Authority given in terms of this Act commits an offence". Section 91 provides for the general penalty: "A person convicted of an offence under this Act, for which no penalty has been specified under this Act shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or both". Therefore, the proposed amendment introduces a stiffer penalty by linking fines directly to an undertaking's gross annual turnover.
21. **Clause 14** seeks to insert a new section 91A to provide for the administrative enforcement actions that may be taken by the Authority. The clause also imbeds procedural fairness requirements within the provision.

CHAPTER THREE

3. PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

22. Article 118 (1)(b) of the Constitution provides that:

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.”

23. The National Assembly Standing Order 127 (3) and (3A) stipulates that:

*“(3) The Departmental Committee to which a Bill is committed shall **facilitate public participation on the Bill** through an appropriate mechanism including-*

- (a) inviting submission of memoranda;*
- (b) holding public hearings;*
- (c) consulting relevant stakeholders in a sector; and*
- (d) consulting experts on technical subjects.*

(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

3.2 MEMORANDA RECEIVED ON THE BILL

24. Pursuant to the aforementioned provisions of law, the Clerk of the National Assembly placed an advertisement in the print media on 10th April, 2026 inviting the public to submit memoranda by way of written statements on the Bill.

25. In addition, the Clerk of the National Assembly vide letters Ref. No. NA/DDC/F&NP/2026/101, NA/DDC/F&NP/2026/102, NA/DDC/F&NP/2026/103 and NA/DDC/F&NP/2026/104 dated 8th July 2026 invited key stakeholders to submit views on the Bill and attend a stakeholder engagement forum on Tuesday, 21st July 2026, Wednesday, 22nd July 2026 and Thursday, 23rd July 2026.

26. The Committee received twenty-four (24) memoranda from the following stakeholders whose submissions are detailed below:

- 1. Office of the Auditor-General (OAG);
- 2. Office of the Attorney General (AG);
- 3. State Department for Trade;
- 4. ALN Kenya;
- 5. PricewaterhouseCoopers (PwC);
- 6. KPMG;

7. Bowmans, Coulson Harney, LLP;
8. Dr. Vellah Kedogo;
9. MultiChoice Kenya;
10. Kenya Association of Manufacturers (KAM);
11. American Chamber of Commerce Kenya (AMCHAM);
12. Competition Authority of Kenya (CA);
13. Institute of Economic Affairs (IEA);
14. Kenya Bankers Association (KBA);
15. Institute of Certified Public Accountants of Kenya (ICPAK);
16. Hon. Wilson Rading (Magistrate ELRC);
17. Transparency International;
18. Google;
19. Law Society of Kenya (LSK);
20. Ernst & Young (EY);
21. Federation of Kenya Employers (FKE);
22. Kinyeru Mwago;
23. KBL; and
24. WeCare.

3.3 SUBMISSIONS FROM STAKEHOLDERS

General Submissions

Office of the Auditor General (OAG)

27. The **OAG** submitted that the Bill seeks to broaden the Mandate of the Competition Authority in addressing anti-competitive conduct in digital markets and unfair market conduct arising from abuse of superior bargaining position. This will go a long way in protecting the citizens of Kenya from exploitative practices.
28. By expanding the functions of the Authority to include fostering strategic partnerships with National, Regional and International bodies, the bill seeks to ensure that the Authority can achieve seamless information sharing that is crucial in the detection of anti-competitive practices in the various sectors of the economy and also adoption of international best practice in matters pertaining to competition.
Ultimately, if the Authority performs its role of detecting and eliminating restrictive trade practices, superior bargaining position and abuse of buyer power, the benefits will be to the Kenyan people and the Authority will all have contributed in making Kenya a prosperous Country.

Office of the Attorney General (AG)

29. The Attorney General (AG) submitted that they have scrutinized the contents of the bill and the bills do not offend the Constitution or raise significant statutory

issues. They noted that the office supported the development of the bill and confirmed that the proposed amendments reflect the agreed policy position.

Clause by Clause Submissions

Proposed section 40B: Abuse of superior bargaining position

30. The stakeholder submitted that the provision is broad and may discourage legitimate commercial negotiations, while matters relating to data processing are more appropriately regulated under data-protection law. The stakeholder recommended that section 40B(1) be amended to read:

“A person shall not engage in any conduct that amounts to abuse of a superior bargaining position and that causes or is likely to cause harm to competition in a market in Kenya...”

31. The stakeholder further recommended that clauses 40B(2)(d), (e), (f) and (j) be clarified to apply only to unilateral actions that are not permitted under the agreed contractual terms; clause 40B(2)(i) be amended by replacing “unreasonable” with “unlawful” data collection; and criminal sanctions be replaced with administrative penalties.

Committee’s Observation.

The Committee noted that clause 9 of the Bill proposes to introduce a new part on unfair market conduct. It is envisaged that the proposed new section 40B will address abuse of the rights between trading parties and is not dominance *per se*. Further, the Committee recommended retention of paragraphs (d), (e), (f), (g) and (h) because they are important safeguards to guard against abuse.

The Committee also noted that paragraph (i) as drafted is adequate to achieve the purposes of the provision. Lastly, the criminal sanctions proposed in the Bill are aligned with the penalty provisions in the principal Act in which prohibited conduct has been criminalized (for instance under restrictive trade practices, abuse of dominant position and merger control). The criminalization serves a deterrent purpose.

Clause 2

32. The State Department for Trade proposed defining objective thresholds for determining strategic market position, including market share, turnover, user base, and control of data, and exempt MSMEs where appropriate. They noted that some definitions are broad and may create uncertainty for businesses operating digital platforms or using digital channels, potentially discouraging innovation and investment.

Committee's Observation

The Committee noted that clause 2 of the Bill seeks to define terms used in the Bill and that in some definitions, for instance, business consumer, amendments will be proposed to clarify the definitions. Further, care will be exercised to ensure that the definitions do not defeat the purposes of Kenya's competition regime. In addition, it is envisaged that, pursuant to section 93 of the Competition Act, the Cabinet Secretary, in consultation with the Competition Authority and stakeholders, will make rules incorporating stakeholders' proposals and clarifying the concepts in greater detail.

The amendments are therefore not aimed at stifling innovation and investment: in fact, they will propel them by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct in line with section 3 of the Competition Act, Cap. 504.

33. **ALN** proposed amending the definition of 'undertaking' by extending the definition as follows:

"Provided that a natural person shall only constitute an undertaking for purposes of this Act where that person carries on a trade, business, or professional activity in the market, and shall not include a natural person acting as an employee or in a purely private capacity."

34. **ALN Kenya** submitted that as currently drafted, the extension to natural persons has no limiting language. Without a qualifier, any individual, including employees or consumers acting privately, could technically fall within the definition. The proposed proviso confines the extension to natural persons acting in a commercial capacity, which is consistent with the stated objective of the Bill.

Committee's Observation

The Committee acknowledged **ALN's** proposal but was of the view that the proposed definition of "undertaking" in the Bill was adequate to achieve the Bill's purposes. The intention was to bring a natural person within the ambit of the definition and that the concerns of **ALN** are addressed in the definition, the substantive Act and the Competition (General) Rules, 2019.

35. **ALN** proposed amending the definition of 'digital activity' to provide a materiality qualifier to limit its application to undertakings for whom digital activity is a principal or material aspect of their business. They submitted that the definition is very broad and should be limited to undertakings for whom the provision of digital platform

services constitutes a principal or core business activity, rather than undertakings that merely utilize digital tools such as cloud computing, online advertising, or social media as ancillary to their primary commercial operations.

Committee's Observation

The Committee acknowledged ALN's proposal and made the following observations—

- (i) Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;**
- (ii) The definition of “digital activity” is borrowed from the United Kingdom’s Digital Markets, Competition and Consumers Act 2024, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things;**
- (iii) Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;**
- (iv) It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The Committee was therefore of the view that the definition was adequate;**
- (v) It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly’s processes in the scrutiny of delegated legislation.**

36. **PwC** proposed amending clause 2 to create a neutral definition of what a ‘*Superior Bargaining Position*’ position is (i.e., a factual status based on bargaining power), separate from the concept of its abuse.
37. They submitted that the proposed section 4(6) mixes up two separate ideas. It defines what a Superior Bargaining Position is by reference to what happens when it is abused, namely, creating an imbalance in rights and obligations. This means the definition of the position and the abuse of the position are treated as one and the same thing, when they should be kept apart. Additionally, keeping the definition separate from its abuse ensures analytical clarity. If the definition of the position already describes abusive conduct, it becomes difficult for the Competition Authority of Kenya to distinguish between simply holding the position and actually misusing it.

Committee’s Observation

The Committee acknowledged PwC’s proposal and made the following observations:

- (i) **Clause 2 of the Bill proposes the new definition of “superior bargaining position” as follows—**
“superior bargaining position” has the meaning assigned to it under section 4(6);
- (ii) **Clause 3 of the Bill then proceeds to introduce the meaning of the expression by amending section 4 to provide as follows—**

(6) A person has a superior bargaining position in a market if the person creates an imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty cannot find a viable and satisfactory alternative in the market.
- (iii) **Clause 9 then provides for the proposed new section 40B on abuse of superior bargaining position where “a person shall not engage in any conduct that amounts to abuse of superior bargaining position in a market in Kenya, or a substantial part of Kenya”;**
- (iv) **The same pattern obtains for the definition of “buyer power” in section 2 of the principal Act and its prohibition as “abuse of buyer power” in section 24A of the principal Act;**
- (v) **Further, section 4(3) of the principal Act adopts the same pattern in defining the expression “a person has a dominant position in a**

market” and then proceeds to provide for “abuse of dominant position” in section 24;

- (vi) **Considering therefore the architecture of the principal Act, the Committee was of the view of retaining the definition as “superior bargaining position” since there are safeguards in the proposed new section 40B(1) in clause 9 on abuse of superior bargaining position.**

38. **PwC** proposed that the Bill be amended to insert definitions for ‘dependence’ and ‘viable and satisfactory alternative’. The definition uses the terms ‘dependence’ and ‘viable and satisfactory alternative’ without defining them. Additionally, they appear again in section 40B(4) as factors for determining abuse.

Committee’s Observation

The Committee acknowledged PwC’s proposal and noted that clause 3 in the proposed new subsection (6) needs to be amended to remove ambiguities in the provision and to provide clarity.

39. **PwC** proposed reviewing whether the existing enforcement mechanisms (turnover-based penalties, dominance thresholds, merger notification) are appropriate when applied to natural persons and introduce any necessary adjustments to ensure proportionate application.
40. **PwC observed that Clause 2 redefines “person” by reference to Article 260 of the Constitution; expands “undertaking” to include natural persons, and introduces a new term “business consumer”. The extension of “undertaking” to include natural persons is a significant policy change that brings individuals, such as freelance workers, gig economy participants, and individual traders, within the scope of competition enforcement.**
41. However, **PwC** noted that the Act's enforcement framework was designed for corporate entities. Key provisions may not translate fairly to natural persons. For example, penalties calculated at up to 10% of gross annual turnover could be devastating for an individual, dominance tests based on market share thresholds (40% or 50%) were designed for corporate undertakings and may not apply sensibly to individuals, and merger notification obligations may not be appropriate where a natural person acquires a business. Separately, the new term “business consumer” is distinct from the existing definition of “consumer” under the Act, but the Bill does not explain how the two categories interact or when each applies under Part VI (Consumer Welfare).

Committee’s Observation

The Committee acknowledged PwC's proposal. The principal Act defines a person to include a 'body corporate', therefore the original intention in the competition regime was to also have a natural person in applicable circumstances. The Bill provides further clarity by adopting the definition in Article 260 of the Constitution. The definition of "undertaking" in the principal Act is as follows—

"undertaking" means any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service, and includes a trade association;

The proposed definition of "undertaking" in the Bill bears this leitmotif as the intention was to bring a natural person within the ambit of the definition. The Committee was of the view that, as it currently obtains in the principal Act, the provisions have not been applied without due consideration of particular circumstances in line with the substantive Act and the Competition (General) Rules, 2019.

Further, Article I of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy (of which Kenya is a member of the African Continental Free Trade Area (AfCFTA)) defines a person as follows—

"Person" means a natural or juridical person and includes firms, partnerships, associations, organizations, and any other body of persons involved in the production of, or the trade in goods, or the provisions of services.

In addition, the COMESA Competition and Consumer Protection Regulations, 2025 (of which Kenya is a member of COMESA Free Trade Area, having joined it in 2000) defines a person in the following terms—

"person" means a natural or legal person;

42. **LSK** submitted that the proposed definition of "strategic market position" substantially mirrors the existing definition of "market power" and the Bill does not clearly distinguish the two concepts or explain when each should apply, particularly in digital markets. LSK stated that using two substantially similar concepts without clearly distinguishing their scope may create uncertainty in interpretation and enforcement.

43. They recommended the removal of the proposed definition of “strategic market position” and instead expand the existing definition of “market power” to incorporate the additional digital market considerations set out in proposed section 4(5) or if a separate concept is intended, revise the definition to clearly distinguish it from “market power”, including by identifying the specific characteristics that justify a separate standard, such as control over digital systems etc.

Committee’s Observation

The Committee acknowledged LSK’s proposal and observed that section 2 of the Competition Act, Cap. 504, defines “market power” as follows—

“market power” means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers;

Clause 3 in the proposed new subsection (4) provides as follows—

(4) A person has a strategic market position in a market if the person influences market prices, quality, service, output or innovation to an appreciable extent independent of competitors, suppliers, users or consumers.

The Committee was of the considered view that the two definitions were conceptually different as used in the principal Act and proposed in the Bill.

Clause 2(a)

44. **KPMG** proposed amending the provision by clarifying that the application of the Act should be limited to persons engaged in economic or commercial activities with an actual or potential impact on competition, consumer welfare or market conduct. They noted that the expanded definition of “person” may inadvertently subject professional associations, industry representative bodies, charitable organisations and other non-commercial entities to investigation and enforcement despite their activities having no demonstrable impact on competition. Additionally, limiting the provision to persons engaged in economic or commercial activities would preserve the intended enforcement objective while reducing regulatory uncertainty and unintended application to non-commercial entities.

Committee’s Observation

The Committee acknowledged KPMG’s proposal but allayed fears that the proposed definition needed further amendments to limit its application. The Committee was of the view that the principal Act has

inbuilt safeguards to ensure that it carries its objects in line with section 3 on objects of the Act.

Clause 2(b)

45. **KPMG** proposed amending the clause by clarifying that a natural person shall constitute an undertaking only to the extent that he or she engages in economic or commercial activities capable of having an actual or potential effect on competition, market conduct or consumer welfare. The expanded definition of "undertaking" may inadvertently subject small traders, sole proprietors, freelancers, consultants, independent professionals and micro-enterprises to the full application of competition law despite lacking significant market influence. They submitted that the provision does not distinguish between a dominant market participant operating as a natural person and a small entrepreneur with minimal market impact.

Committee's Observation

The Committee acknowledged KPMG's proposal and observed that the intention of the amendment to the definition of "undertaking" was to bring clarity that it also applies to natural persons. Therefore, there was need to ensure that there is consistency in this stance between the definition of "person" and "undertaking". Further, the definition, when read holistically with the other provisions of the principal Act and the rules, allays the stakeholders' fears. In particular, section 3 of the Act is instructive.

46. **Multichoice Kenya** proposed deleting the proposed words "or a natural person" from the definition of "undertaking". They noted that the proposed amendment is redundant since the definition of "person" already aligns with Article 260 of the Constitution, which includes both natural and juristic persons. Further, the insertion adds no substantive legal value and may create interpretive inconsistency by implying a distinction where none exists. Retaining the existing definition would preserve legal clarity, avoid unnecessary duplication and ensure consistency in the interpretation of the Act.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya and observed that the intention of the amendment to the definition of "undertaking" was to bring clarity that it also applies to natural persons. Therefore, there was need to ensure that there is consistency in this stance between the definition of "person" and "undertaking".

47. **LSK** submitted that the proposed definition of "*undertaking*" may include every natural person, including persons who are not carrying on business for gain or

reward. LSK stated that the amendment would ensure that only natural persons engaged in commercial or economic activities are treated as undertakings.

48. The stakeholder recommended the amendment of the provision to expressly link a natural person to the conduct of business, for example: "...and includes a trade association or a natural person carrying on business for gain or reward."

Committee's Observation

The Committee acknowledged LSK's proposal and observed that the intention of the amendment to the definition of "undertaking" was to bring clarity that it also applies to natural persons. Therefore, there was need to ensure that there is consistency in this stance between the definition of "person" and "undertaking". Further, the definition, when read holistically with the other provisions of the principal Act and the rules, allays the stakeholder's fears. In particular, section 3 of the Act is instructive.

Clause 2 (c)

49. **KAM** proposed amending the definition of "Business consumer" to read as follows:
"Business consumer" means a person, other than a natural person acting in a personal capacity, that purchases or offers to purchase goods or services for use in the course of carrying on a business, but not for the purpose of resale, or for the purpose of using those goods or services as an input in the manufacturing or production of goods or articles for sale.
50. According to the stakeholder, this will remove the ambiguity and align it with the broadened definition of "person" under Article 260 of the Constitution.

Committee's Observation

The Committee acknowledged KAM's proposal but was of the view that it was adequate and non-ambiguous save for the replacement of the word "includes" with the word "means" to limit the scope of the definition. The revised definition would read:

"business consumer" means a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

51. **AMCHAM** observed that the definition of "business consumer", is ambiguous, open-ended and inconsistent with the terminology used in the principal Act, which may result in uncertainty in distinguishing business consumers from end consumers and increase compliance complexity, particularly for digital platforms. They proposed amending the definition to make it exhaustive, align it with the broadened

definition of "person" under Article 260 of the Constitution, and adopt terminology consistent with the principal Act.

Committee's Observation

The Committee acknowledged AMCHAM's proposal and made the following observations—

- (i) **Clause 2 proposes to introduce a new definition of "business consumer" which has been used in section 57 of the Competition Act, Cap. 504, which provision provides for unconscionable conduct in business transactions;**
- (ii) **It was therefore important to define the term to provide clarity on its meaning;**
- (iii) **The Principal Act provides for the definition of "consumer" in the following terms—**

"consumer" includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale;

- (iv) **The proposed new definition "business consumer" as provided in the Bill was adequate and non-ambiguous save for replacement of the word "includes" with the word "means" to limit the scope of the definition. The revised definition would read:**

"business consumer" means a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

52. **AMCHAM** noted that the definition of "digital activity", is overly broad and may inadvertently capture non-service digital activities, thereby creating ambiguity in the application of the law. The stakeholder proposed deleting the term "digital activity" and substituting it with "digital service" to provide greater clarity on the digital services intended to be regulated.

Committee's Observation

The Committee acknowledged AMCHAM's proposal and made the following observations—

- (vi) **Digital activity** refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;
- (vii) The definition of “digital activity” is borrowed from the **United Kingdom’s Digital Markets, Competition and Consumers Act 2024**, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things;
- (viii) **Digital service** refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;
- (ix) It is envisaged that to operationalize the provisions, pursuant to section 93 of the **Competition Act**, the **Cabinet Secretary**, in consultation with the **Competition Authority**, will make rules in consultation with the stakeholders. The Committee was therefore of the view that the definition was adequate;
- (x) It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the **National Assembly’s** processes in the scrutiny of delegated legislation.

53. **Multichoice Kenya** proposed deleting the definition of “business consumer” and instead amending the definition of “consumer” to clarify that it applies to any person as defined under Article 260 of the Constitution. They noted that introducing a separate definition of “business consumer” duplicates the existing definition of “person”, creates interpretive ambiguity and may blur the distinction between consumer protection and business-to-business transactions. A constitutionally aligned definition of “consumer” would provide greater legal certainty, promote consistency in the application of consumer welfare provisions and eliminate unnecessary duplication.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya and made the following observations—

- (v) Clause 2 proposes to introduce a new definition of “business consumer” which has been used in section 57 of the Competition Act, Cap. 504, which provision provides for unconscionable conduct in business transactions;
- (vi) It was therefore important to define the term to provide clarity on its meaning;
- (vii) The Principal Act provides for the definition of “consumer” in the following terms—

“consumer” includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale;

- (viii) The proposed new definition “business consumer” as provided in the Bill was adequate and non-ambiguous save for replacement of the word “includes” with the word “means” to limit the scope of the definition. The revised definition would read:

“business consumer” means a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

54. **Multichoice Kenya** proposed reconsidering the introduction of a statutory definition of “digital market” or, alternatively, refining the definition to clarify that the identification of a digital market remains subject to established competition law principles, including substitutability and competitive constraints. A fixed statutory definition may pre-empt the market definition exercise ordinarily undertaken on a case-by-case basis and create rigidity where online and offline channels form part of the same competitive landscape. Allowing digital markets to be assessed using established competition law principles would provide greater flexibility, preserve analytical consistency and accommodate evolving market dynamics.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya but was of the view that the definition was necessary in consideration of the proposed new definition of “digital activity” and the logical consequence of development of rules to provide for the substantive and procedural aspects on the regulation of digital activities within the competition regime. This would provide clarity and help achieve the purposes of the competition regime in Kenya.

55. **Google** submitted that the definition is ambiguous, open-ended and may blur the distinction between a business consumer and an end consumer. The stakeholder recommended that the definition be amended to read:

“Business consumer” means a person, other than a natural person acting in a personal capacity, that purchases or offers to purchase goods or services for use in the course of carrying on a business, but not for the purpose of resale, or for the purpose of using those goods or services as an input in the manufacturing or production of goods or articles for sale.

Committee’s Observation

The Committee acknowledged Google’s proposal and made the following observations—

- (i) Clause 2 proposes to introduce a new definition of “business consumer” which has been used in section 57 of the Competition Act, Cap. 504, which provision provides for unconscionable conduct in business transactions;
- (ii) It was therefore important to define the term to provide clarity on its meaning;
- (iii) The Principal Act provides for the definition of “consumer” in the following terms—

“consumer” includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale;

- (iv) The proposed new definition “business consumer” as provided in the Bill was adequate and non-ambiguous save for replacement of the word “includes” with the word “means” to limit the scope of the definition. The revised definition would read:

“business consumer” means a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

56. **Google** further submitted that the definition is too broad and may extend regulation beyond services covered under the principal Act. The stakeholder recommended replacing the term “digital activity” with “digital service” and defining it as follows:

“A digital service is a service offered through a digital platform that enables direct interaction between buyers and sellers of goods and services.” The stakeholder further recommended the inclusion of guidance notes for technical terms.

Committee’s Observation

The Committee acknowledged Google’s proposal and made the following observations—

- (i) **Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;**
- (ii) **The definition of “digital activity” is borrowed from the United Kingdom’s Digital Markets, Competition and Consumers Act, 2024, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things;**
- (iii) **Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;**
- (iv) **It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The**

Committee was therefore of the view that the definition was adequate;

- (v) It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly's processes in the scrutiny of delegated legislation.

57. **Google** submitted that strategic market position duplicates the existing concepts of dominance and market power and lacks a clear designation process and procedural safeguards. The stakeholder recommended that the Strategic Market Position provisions be deleted in their entirety. Where the provisions are retained, the stakeholder recommended the introduction of a formal assessment process, clarification of the regulatory consequences, addition of a strategic significance requirement and introduction of an entrenchment or forward-looking test, such as durability of the position over five years.

Committee's Observation

The Committee acknowledged Google's proposal and made the following observations:

- (i) Strategic market position (SMP) as a concept in the Bill is different from "a dominant position" in the sense that dominance is not a relevant consideration when considering strategic market position;
- (ii) The purpose of strategic market position is to address firms that are not dominant but are still in a position to abuse their strategic position.
- (iii) The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;
- (iv) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;

- (v) The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this;
- (vi) The Bill should be amended to introduce the prohibition immediately after section 24A as follows—

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to—
	(a) imposing price or service parity clauses on business users; (b) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (c) using business user data to compete against the business user; (d) self-preferencing of services or products offered by the gatekeeper on a core platform; (e) differentiation in fees or treatment against small and medium enterprises; (f) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (g) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (h) combining personal data sourced from different services offered by the gatekeeper; or (i) requiring the pre-installation of gatekeeper applications or services on devices.

- (vii) **To address the stakeholder’s concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.**

58. **Dr Vellah Kedogo** proposed amending the clause on the definition of “digital service” because, under the UK 2024 Digital Markets Competition and Consumer Act (DMCCA), a digital service is provided via the internet, even when it is provided through a combination of the internet and an electronic communications service. This aspect is missing from the Bill, raising the question of whether digital services offered through an electronic communications service constitute a digital activity.

59. The stakeholder submitted that what constitutes ‘digital activities’ under the Kenyan Competition Bill is likely to cause confusion and legal uncertainty among the business community. If Kenya chooses to adopt an exhaustive listing of digital activities, it should also decide whether the definition of each digital activity is embedded in the Competition Act, Cap. 504 or in implementing legislation. While international practices should be considered when drafting new legislation, caution should be taken to avoid copying and pasting provisions without adequate consideration.

Committee’s Observation

The Committee acknowledged Dr. Vellah Kedogo’s proposal and made the following observations—

- (i) **Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;**
- (ii) **The definition of “digital activity” is borrowed from the United Kingdom’s Digital Markets, Competition and Consumers Act 2024, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things;**
- (iii) **Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on**

what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;

- (iv) It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The Committee was therefore of the view that the definition was adequate;
- (v) It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly's processes in the scrutiny of delegated legislation.

60. **Dr. Vellah Kedogo** proposed amending the clause on the definition of "intermediate a transaction" because the question that follows is whether this Section will apply only to undertakings that provide intermediation between buyers and sellers in the digital market. It also raises a question whether this will be the definition applied to online intermediation services.

Committee's Observation

The Committee acknowledged **Dr. Vellah Kedogo's** proposal and was of the view that the definition was important since it was central in the regulation of digital activities and that it was adequate. Further, it is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly's processes in the scrutiny of delegated legislation.

61. **Bowmans**, proposed amending Clause 2 on the definition of "business consumer" to read as follows:

"Business consumer means a person, other than a natural person acting in a personal capacity, that purchases or offers to purchase goods or services for use in the course

of carrying on a business, but not for the purpose of resale, or for the purpose of using those goods or services as an input in the manufacturing or production of goods or articles for sale”

62. According to the stakeholder, the revised definition will remove the identified ambiguity and take proper account of the broadened definition of "person" under Article 260 of the Constitution. It positively identifies the "business consumer" as a person that acquires goods or services for use in the course of carrying on a business, which distinguishes it from an ordinary end consumer (who may be a natural person acting in a personal capacity).

Committee's Observation

The Committee acknowledged Bowman's proposal and made the following observations—

- (i) **Clause 2 proposes to introduce a new definition of “business consumer” which has been used in section 57 of the Competition Act, Cap. 504, which provision provides for unconscionable conduct in business transactions;**
- (ii) **It was therefore important to define the term to provide clarity on its meaning;**
- (iii) **The Principal Act provides for the definition of “consumer” in the following terms—**

“consumer” includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale;

- (iv) **The proposed new definition “business consumer” as provided in the Bill was adequate and non-ambiguous save for the replacement of the word “includes” with the word “means” to limit the scope of the definition. The revised definition would read:**

“business consumer” means a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

63. **Bowmans** proposed amending Clause on the term “activity” to be replaced with “service” and adopt the definition below.

“A digital service is a service offered through a digital platform that enables direct interaction between buyers and sellers of goods and services.”

64. According to the stakeholder, with digital activities, the CAK risks expanding the scope outside the meaning of a service as defined in section 2 of the Principal Act. The proposed definition is consistent with the definition from the Kenya Revenue Authority.

Committee’s Observation

The Committee acknowledged Bowman’s proposal and made the following observations—

- (i) **Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;**
- (ii) **The definition of “digital activity” is borrowed from the United Kingdom’s Digital Markets, Competition and Consumers Act 2024, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things;**
- (iii) **Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;**
- (iv) **The definition of “service” in section 2 of the principal Act should be looked at independently from the proposed definition “digital activity” which uses the word “service” and in any case, the inclusive word “includes” is expansive;**
- (v) **It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The**

Committee was therefore of the view that the definition was adequate;

- (vi) It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly's processes in the scrutiny of delegated legislation.

65. KBL proposed amending the definition of "undertaking" to read as follows;

"undertaking" means any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or the provision of any service, and includes a trade association or a sole proprietor."

Committee's Observation

The Committee acknowledged KBL's proposal but was of the view that the proposed definition of "undertaking" in the Bill was adequate to achieve the Bill's purposes.

66. KBL proposed amending the definition of "digital activity" to read as follows;

"Digital activity" means the provision of goods, services or digital content through the internet or other electronic networks, whether for consideration or otherwise, including, but not limited to, online intermediation services, search services, social networking services, cloud computing services, operating systems, online advertising services and other digital platform services."

Committee's Observation

The Committee acknowledged KBL's proposal and made the following observations—

- (i) Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing;
- (ii) The definition of "digital activity" is borrowed from the United Kingdom's Digital Markets, Competition and Consumers Act 2024 in which section 3 defines "digital activities" as "the provision of a service by means of the internet", among other things;

- (iii) **Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services;**
- (iv) **It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The Committee was therefore of the view that the definition was adequate;**
- (v) **It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly's processes in the scrutiny of delegated legislation.**

67. KBL proposed amending the definition of “digital market” to read as follows;

““Digital market” means a market in which goods or services are offered, supplied, purchased or exchanged primarily through digital platforms, online interfaces or other electronic means, where businesses and consumers, or businesses and other businesses, interact to facilitate commercial transactions.”

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposed definition in the Bill was adequate.

68. KBL proposed amending the definition of “counterparty” to read as follows;

““counterparty” means, for the purposes of Part IIIA, the other party involved in a transaction or agreement, being a person or undertaking whose annual turnover does not exceed the threshold prescribed by the Cabinet Secretary, or who is otherwise shown to be economically dependent on the relationship in accordance with prescribed regulations.”

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposed definition in the Bill was adequate.

69. **KBL** proposed amending the definition of “intermediate transaction” to provide that intermediation is measured by reference to objective metrics, including the gross value, volume or number of transactions facilitated, as may be prescribed.

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposed definition in the Bill was adequate.

70. **KBL** proposed amending the definition of “product information standard” by either linking the definition to the operative provision in which is intended to apply or defer its introduction until such a provision is identified.

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposed definition in the Bill was adequate.

71. **KBL** proposed amending the provision to require that a finding of strategic market position be supported by positive findings on at least three of the assessment factors set out under subsection (5).

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the provision in the Bill was adequate.

72. **KBL** proposed amending subsection (5) by inserting the words "the following factors, considered cumulatively," immediately before paragraph (a).

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposed definition in the Bill was adequate.

Clause 3

73. The **Competition Authority of Kenya (CA)** supported the proposal as it broadens the Authority’s mandate to effectively address anti-competitive conduct in the digital economy. The stakeholder submitted that the current Act does not expressly provide for the regulation of competition in digital markets and virtual marketplaces.

74. **ALN** proposed amending the proposed Section 4(4) to include a clarifying provision, whether in the Section itself or through the guidelines to be published by the Authority, that sets out how “**strategic market position**” is to be distinguished from “**dominance**” under Section 4(3) and “**market power**” as defined in Section 2 of the Principal Act.

75. ALN Kenya submitted that the definition of “strategic market position” as currently drafted describes the ability to influence price, quality output or innovation independently of competitive constraints. Further, the principal Act already contains ‘dominance’ and ‘market power’ concepts which the Bill doesn’t differentiate from ‘strategic market position’ clearly. According to the stakeholder, the enforcement of the provisions of the Act by the Authority will be difficult as a respondent will be entitled to ask which concept the Authority is relying on and why.

Committee’s Observation

The Committee acknowledged ALN’s proposal and made the following observations:

- (i) **Strategic market position (SMP) as a concept in the Bill is different from “a dominant position” in the sense that dominance is not a relevant consideration when considering strategic market position;**
- (ii) **The purpose of strategic market position is to address firms that are not dominant but are still in position to abuse their strategic position.**
- (iii) **The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;**
- (iv) **It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (v) **The Bill has not provided for the prohibition of abuse strategic market position, hence there is need to amend the Bill to provide for this;**
- (vi) **The Bill should be amended to introduce the prohibition immediately after section 24A as follows—**

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to— (j) imposing price or service parity clauses on business users; (k) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (l) using business user data to compete against the business user; (m) self-preferencing of services or products offered by the gatekeeper on a core platform; (n) differentiation in fees or treatment against small and medium enterprises; (o) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (p) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (q) combining personal data sourced from different services offered by the gatekeeper; or (r) requiring the pre-installation of gatekeeper applications or services on devices.
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- (vii) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.

76. **PwC** proposed amending clause 3 to also insert the words “intermediates a transaction” into section 4(3) of the Act, so that the definition of “dominant position in a market” matches the proposed amended definition of “dominant undertaking” under section 23(1)(a). PwC submitted that both provisions serve the same purpose, which is identifying when an entity holds a dominant position in a market. If only one is updated to cover digital intermediaries, it creates a gap where digital platforms may fall within one definition but not the other, leading to inconsistent enforcement.

Committee’s Observation

The Committee agreed with PwC’s proposal since it aligns the amendment in clause 6 of the Bill with section 4(3) of the principal Act, which are interrelated.

77. **KAM** proposed amending the section to differentiate between dominance/market power and the concept of SMP particularly in the context of digital markets. The stakeholder submitted that the definition of SMP be revised as follows:

“a person involved in digital activities has a strategic market position in a digital market if the person influences market prices, quality, service, output or innovation to an appreciable extent independent of competitors, suppliers, users or consumers.”

78. Further, the stakeholder proposed the inclusion of provisions to:

- i) empower the Authority to designate persons with SMP in relation to specific digital activities;
- ii) require the Authority to issue binding guidelines setting out the criteria and process for designation, including:
 - a) evidence of substantial and entrenched market power based on a forward-looking assessment;
 - b) strategic significance of the undertaking (including size, gateway role, and ability to influence market dynamics); and
 - c) applicable turnover thresholds;
 - d) require consultation with affected parties and publication of provisional findings prior to designation;
 - e) mandate the development of a binding code of practice to regulate the conduct of entities with SMP;
 - f) provide that enforcement and investigations be guided by such code of practice; and
 - g) provide for appropriate penalties and application of interim relief provisions.

79. According to the stakeholder, the proposed definition of SMP substantially overlaps with the existing concept of market power under the Competition Act, making it difficult to distinguish SMP from dominance or market power. Further, the

proposals seek to address the precision, predictability, and proportionality of the SMP framework.

Committee's Observation

The Committee acknowledged KAM's proposal and made the following observations:

- (i) It agreed with KAM to amend clause 3 of the Bill in the proposed new subsection (4) to clarify that the provision applies to a “digital market” and not “market” as provided in the Bill;
- (ii) Strategic market position (SMP) as a concept in the Bill is different from “a dominant position” in the sense that dominance is not a relevant consideration when considering strategic market position; further, it is different from “market power”;
- (iii) The purpose of strategic market position is to address firms that are not dominant but are still in position to abuse their strategic position.
- (iv) The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;
- (v) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;
- (vi) The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this;
- (vii) The Bill should be amended to introduce the prohibition immediately after section 24A as follows—

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from
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	engaging in any of the following conduct, but not limited to—
	(s) imposing price or service parity clauses on business users; (t) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (u) using business user data to compete against the business user; (v) self-preferencing of services or products offered by the gatekeeper on a core platform; (w) differentiation in fees or treatment against small and medium enterprises; (x) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (y) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (z) combining personal data sourced from different services offered by the gatekeeper; or (aa) requiring the pre-installation of gatekeeper applications or services on devices.

- (viii) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.

80. **KPMG** proposed amending the clause by introducing objective criteria for determining the existence of a superior bargaining position and requiring evidence

of economic dependence, unfair conduct and demonstrable harm to competition, market access or consumer welfare before regulatory intervention. They noted that the bill broadens competition law intervention into ordinary commercial relationships by removing the requirement to establish dominance or market power and relies on subjective concepts such as "imbalance", "viable alternative" and "satisfactory alternative", which may create regulatory uncertainty and blur the distinction between legitimate commercial negotiations and abusive conduct. Introducing objective assessment criteria would protect weaker trading parties while reducing the risk of regulatory overreach into ordinary commercial arrangements and promoting consistency and predictability in the application of the law.

Committee's Observation

The Committee acknowledged KPMG's proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;**
- (ii) The context within which an "imbalance" arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;**
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition, thus complementing traditional rules on abuse of dominance;**
- (iv) The concept aligns Kenya's law with international trends, for instance Japan and the EU on unfair trading practices rules;**
- (v) Due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision;**

(vi) To address stakeholder's concerns under clause 3 in the proposed new subsection (6) where subjective terms such as "viable" and "satisfactory" have been used, there is need to relook the provision to make the provision objective.

81. KBA proposed deletion of the proposed subsections to be replaced as follows: -

(4) A person shall have a strategic market position only where the Authority establishes that the person has substantial and durable market influence in a properly defined relevant market.

(5) In assessing strategic market position in a digital market, the Authority shall consider the relevant factors cumulatively, including network effects, access to data, switching costs, ability to multi-home, economies of scale, availability of substitutes, market contestability and the importance of any intermediary service.

(6) A person shall not be considered to hold a strategic market position solely because its product or service is widely used, data-enabled, offered through a digital channel, supported by network effects, or offered through a partnership or other commercial arrangement.

(7) In assessing market power, the Authority shall consider all reasonably available alternatives, including regulated and unregulated providers, domestic and cross-border providers, formal and informal alternatives, substitute products or services, and digital or non-digital channels available to consumers or users.

(8) A finding of strategic market position shall not, by itself, constitute a contravention of this Act. Liability shall only arise where the person engages in conduct that materially restricts competition, market access, innovation, switching, multi-homing or consumer choice.

(9) Conduct shall not be considered abusive or anti-competitive where it is objectively justified, proportionate and reasonably necessary for legitimate commercial, technical, security, data-protection, consumer-protection, operational-resilience, credit-risk, prudential, AML/CFT, sanctions-compliance or regulatory purposes.

82. KBA observed that the current framework may inadvertently classify ordinary digital financial products and innovative business models as anti-competitive merely because they exhibit characteristics common in digital markets. Introducing objective thresholds and clearly linking strategic market position to conduct that materially restricts competition, market access, innovation, switching, multi-homing

or consumer choice would preserve the Authority's ability to intervene against genuinely harmful conduct while reducing uncertainty for legitimate digital innovation and financial sector partnerships.

Committee's Observation

The Committee acknowledged KBA's proposal and made the following observations:

- (i) **The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;**
- (ii) **It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (iii) **The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this;**
- (iv) **The Bill should be amended to introduce the prohibition immediately after section 24A as follows—**

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to—
	(a) imposing price or service parity clauses on business users; (b) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (c) using business user data to compete against the business user; (d) self-preferencing of services or products offered by the gatekeeper on a core platform;

	(e) differentiation in fees or treatment against small and medium enterprises; (f) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (g) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (h) combining personal data sourced from different services offered by the gatekeeper; or (i) requiring the pre-installation of gatekeeper applications or services on devices.
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- (v) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position;
- (vi) The proposed new subsections (4) and (5) in clause 3 of the Bill are not exhaustive since they clarify the meaning of the expression "strategic market position" within section 4 of the principal Act whereas new subsection (5) uses the words "in addition to other relevant matters" to mean that other relevant factors will be applicable.

83. **LSK** submitted that section 4(5) uses the term "strategic market" instead of the defined term "strategic market position", thereby creating ambiguity. LSK stated that the amendment would align the provision with the defined term and remove ambiguity. They recommended the amendment of section 4(5) to read:

"...in assessing or determining whether an undertaking has a strategic market position in a digital market...".

Committee's Observation

The Committee agreed with LSK’s proposal, as it brings clarity to the provision.

84. **Dr. Vellah Kedogo** proposed amending the clause on the determination of strategic market position because it is not clear how CAK will determine an undertaking’s strategic market position. The Bill only provides factors that CAK will consider when assessing or determining whether an undertaking has a strategic market position in a digital market, or whether a digital activity is undertaken in one or multiple digital markets.

Committee’s Observation

The Committee acknowledged Dr. Vellah Kedogo’s proposal and made the following observations—

- (i) The provisions in clause 3 seek to amend section 4 of the principal Act on interpretation of expressions;**
- (ii) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (iii) The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this;**
- (iv) The Bill should be amended to introduce the prohibition immediately after section 24A as follows—**

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to—
	(a) imposing price or service parity clauses on business users; (b) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (c) using business user data to compete against the business user; (d) self-preferencing of services or products offered by the gatekeeper on a core platform;

	(e) differentiation in fees or treatment against small and medium enterprises; (f) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (g) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (h) combining personal data sourced from different services offered by the gatekeeper; or (i) requiring the pre-installation of gatekeeper applications or services on devices.
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- (v) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.

85. **Dr. Vellah Kedogo** further proposed amending the clause on the definition of a superior bargaining position under the Competition Bill to be similar to abuse of economic dependence under Article 11 of the AfCFTA CP, raising questions on how businesses will determine the best forum. She submitted that the Bill creates confusion about when a person offering digital activities will be regulated under the superior bargaining position, the dominant position, or the buyer power provisions. It raises fundamental questions, such as whether CAK can investigate firms operating in a digital market and offering digital activities under the abuse of dominant position.

Committee's Observation

The Committee acknowledged Dr. Vellah Kedogo's proposal and made the following observations—

- (i) It agreed with the stakeholder that the proposed new subsection (6) in clause 3 needs to be amended to bring clarity to the definition

- (ii) Therefore, it agreed to borrow from the text in Article 11(1) of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy and to amend it as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

- (iii) As drafted, there is no confusion in the provisions since the word “market” is defined in the principal Act whereas the proposed new definition “digital market” in clause 2 of the Bill bring out the clarity. Where the substantive provisions in the Bill adopt the word “digital market”, the intention has therefore been made clear;
- (iv) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;
- (v) The Bill has not provided for the prohibition of abuse strategic market position, hence there is need to amend the Bill to provide for this;
- (vi) The Bill should be amended to introduce the prohibition immediately after section 24A as follows—

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to—
	(i) imposing price or service parity clauses on business users; (ii) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform; (iii) using business user data to compete against the business user;

	(iv) self-preferencing of services or products offered by the gatekeeper on a core platform; (v) differentiation in fees or treatment against small and medium enterprises; (vi) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (vii) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (viii) combining personal data sourced from different services offered by the gatekeeper; or (ix) requiring the pre-installation of gatekeeper applications or services on devices.
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(vii) There was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.

New Provisions

Ex-ante Digital Market Competition Regulations (DMCRs)

86. **Dr. Vellah Kedogo** submitted that Parliament must consider the extent to which EU Digital Markets Act (DMA) and UK DMCCA provisions are incorporated into the Bill, and how it aligns with the AfCFTA Competition Protocol and the COMESA Competition and Consumer Protection Regulations, of which Kenya is a Member State and has an obligation to harmonize its competition legislation with the AfCFTA and COMESA competition regimes.

Committee's Observation

The Committee agreed with Dr. Vellah Kedogo's proposal but noted that this should be adequately addressed during the development of rules and guidelines on regulation of digital markets, ensuring that

stakeholders' concerns are addressed through extensive public participation and robust National Assembly's scrutiny of the rules transmitted to it.

87. **Dr. Vellah Kedogo** submitted that other countries, such as Germany, have included provisions in their competition legislation to empower competition agencies to investigate digital markets. Kenya is seeking to follow this approach. However, due to the complexities of regulating digital markets, to ensure legal certainty and business predictability, the provisions on digital markets must be clear and should align with the entire competition legislation to avoid confusion.

Committee's Observation

The Committee acknowledged **Dr. Vellah Kedogo's** proposal but noted that this should be adequately addressed during the development of rules and guidelines on regulation of digital markets, ensuring that stakeholders' concerns are addressed through extensive public participation and robust National Assembly's scrutiny of the rules transmitted to it.

Clause 3

88. **Bowmans** proposed amending the wording for section 3(4) to read as follows:
- “An undertaking involved in a digital activity has a strategic market position in a digital market in respect of that digital activity where the Authority considers that —*
- (a) the undertaking has substantial and entrenched market power in respect of the digital activity; and*
 - (b) the undertaking holds a position of strategic significance in respect of the digital activity.”*
89. The stakeholder submitted that the revised wording is for a clear differentiation to be made between dominance/market power and the concept of Strategic Market Position.

Committee's Observation

The Committee acknowledged **Bowmans' proposal** and recommended that clause 3 of the Bill be amended in the proposed new subsection (4) by clarifying that “A person has a strategic market position in a digital market...” since the provision doesn't clarify this. The Committee further observed that the provision was adequate.

90. **Bowmans**, proposed amending the definition of "superior bargaining position" in proposed section 4(6) to incorporate objective and measurable criteria. In particular, the definition should require an assessment of factors such as:

- (i) the degree of the counterparty's economic dependence on the undertaking in question (including the proportion of revenue derived from that relationship);
- (ii) the availability of genuinely comparable alternative trading partners within a reasonable timeframe;
- (iii) the switching costs that would be incurred in transitioning to an alternative counterparty; and
- (iv) the relative size and economic strength of the parties.

91. The stakeholder further submitted that there is a need to introduce a requirement that the Authority publish detailed regulations or guidelines, developed in consultation with stakeholders, setting out the methodology and factors it will apply in assessing whether an undertaking holds a superior bargaining position, prior to the enforcement of these provisions.

Committee's Observation

The Committee acknowledged Bowmans' proposal and made the following observations—

- (i) **There was a need to amend the proposed new subsection (6) in clause 3 to bring clarity to the definition of superior bargaining position as follows—**

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

- (ii) **Due to overlap between the proposed new section 40A in clause 9 on abuse of buyer power and the proposed new section 40B on abuse of superior bargaining position, there was need to delete the abuse of power provision;**
- (iii) **Article 37(4) of the COMESA Competition and Consumer Protection Regulations, 2025 provides as follows—**

- (4) The determination of economic dependence may be based on:*
 - (a) the market share of the undertaking in the Common Market;*
 - (b) the relative strength of the undertaking;*
 - (c) the existence or lack thereof of alternative solutions;*

- (d) *the factors that led to the situation of dependence; or*
- (e) *any other relevant factors as the circumstances dictate.*

- (iv) The new section 40B(4) in clause 9 of the Bill mirrors Article 37(4) of the COMESA Competition and Consumer Protection Regulations, 2025, thus the stakeholder's proposals are catered for;
- (v) Section 93 of the Competition Act, Cap. 504, provides for the making of Rules to implement the provisions in the Act and it is envisaged that the Cabinet Secretary, in consultation with the Competition Authority, will make rules providing for this in consultation with the stakeholders;
- (vi) Further, section 9(1)(f) of the Competition Act, Cap. 504, provides for one of the functions of the Competition Authority on making guidelines as follows—
 - (f) *make available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act;*

Clause 3 (4)

92. **The OAG** submitted that there is a need to define what amounts an appreciable extent and how it is measured.

Committee's Observation

The Committee acknowledged the proposal by the Office of Auditor General but was of the view that the proposed new subsection (5) in clause 3 of the Bill cures the concerns by the OAG.

93. **AMCHAM** observed that the proposed definition of Strategic Market Position (SMP) substantially overlaps with the existing concept of market power or dominance under the principal Act without introducing a clear distinction between the two. The stakeholder further noted that the Bill does not clearly articulate the regulatory purpose, designation process or consequences of an SMP finding, which may create uncertainty in its application.
94. The stakeholder proposed deleting the SMP provisions or in the alternative, amend to distinguish SMP from dominance, establish a formal designation process with procedural safeguards, define the regulatory consequences of an SMP finding, introduce a forward-looking assessment of market power, and provide an express right of appeal against SMP designations and related enforcement measures. In addition, they recommended that the Bill should introduce an express right of appeal or review for designated parties in respect of SMP designations and any

associated obligations or enforcement measures, to ensure procedural fairness and accountability.

Committee's Observation

The Committee acknowledged AMCHAM's proposal and made the following observations:

- (i) **Strategic market position (SMP) as a concept in the Bill is different from "a dominant position" in the sense that dominance is not a relevant consideration when considering strategic market position;**
- (ii) **The purpose of strategic market position is to address firms that are not dominant but are still in position to abuse their strategic position.**
- (iii) **The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;**
- (iv) **It will be important that, if the Bill is passed, rules and guidelines be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (v) **The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this;**
- (vi) **The Bill should be amended to introduce the prohibition immediately after section 24A as follows—**

Abuse of strategic market position.	24B. Any undertaking or a group of undertakings designated to have Strategic Market Position shall be prohibited from engaging in any of the following conduct, but not limited to—
	(i) imposing price or service parity clauses on business users; (ii) imposing anti-steering provisions, or otherwise preventing business users from engaging consumers directly outside of a core platform;

	(iii) using business user data to compete against the business user; (iv) self-preferencing of services or products offered by the gatekeeper on a core platform; (v) differentiation in fees or treatment against small and medium enterprises; (vi) placing restrictions on the portability of data or other actions that inhibit switching platforms for business and end-users; (vii) failing to identify paid ranking as advertising in search results and to allow paid results to exceed organic results on the first results page; (viii) combining personal data sourced from different services offered by the gatekeeper; or (ix) requiring the pre-installation of gatekeeper applications or services on devices.
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- (vii) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position.

95. **Multichoice Kenya** proposed deleting the concept of "strategic market position" and instead amend Section 2 and 4 (3) in the Principal Act to include a definition along the following lines:

"dominance" or "dominant position" means a position of economic strength enjoyed by a firm, undertaking or person, which enables it to prevent, restrict or distort effective competition in the relevant market and to behave to an appreciable extent independently of its competitors, customers, suppliers or consumers.

A person shall be presumed to hold a dominant position where that person –

- (a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or
- (b) provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof.

Such presumption may be rebutted by evidence demonstrating that the person does not, in fact, possess the ability to act independently of competitive constraints or to materially influence market conditions.

96. **Multichoice Kenya** submitted that the proposed concept substantially replicates the established concept of dominance while introducing an additional category that may create legal uncertainty and overlap with existing competition law principles. The concept of strategic market position is inherently static and may not adequately accommodate the evolving nature of digital markets. Relying on the well-established concept of dominance would promote legal certainty, align the Bill with international competition law principles and provide a coherent framework for assessing market power.

Committee's Observation

The Committee acknowledged the proposal by **Multichoice Kenya** and made the following observations:

- (i) **Strategic market position (SMP) as a concept in the Bill is different from "a dominant position" in the sense that dominance is not a relevant consideration when considering strategic market position;**
- (ii) **The purpose of strategic market position is to address firms that are not dominant but are still in a position to abuse their strategic position;**
- (iii) **The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy.**

97. Additionally, **Multichoice Kenya** proposed amending the definition of "superior bargaining position" to:

"A firm has a superior bargaining position where, in the context of a commercial relationship, it possesses a degree of leverage over a counterparty that results in material dependency, such that the counterparty lacks a commercially feasible alternative trading partners, having regard to the structure of the market and the availability of substitutes"

98. They highlighted that the current formulation may equate ordinary commercial asymmetry with abusive conduct, introduce subjective standards and create a presumption of fault against larger market participants. A definition based on genuine economic dependency and bargaining leverage would better distinguish exploitative conduct from legitimate commercial negotiations while promoting certainty and proportionality in the application of the provision.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya and made the following observations:

- (i) It agreed with the stakeholder on the need to amend clause 3 in the proposed new subsection (6) to make the provision objective;
- (ii) Therefore, the Committee recommends an amendment to subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

99. **Kinyeru Mwago** observed that this provision is directly applicable to ride-hailing platforms. He noted that as a driver, he cannot realistically multi-home due to platform-specific rating systems, in-app incentive lock-in, and algorithmic deprioritisation of drivers using competing apps. He proposed amending the Bill to explicitly cite ride-hailing platform-driver relationships as an illustrative application of s.4(4)-(5), to remove any ambiguity as to CAK's jurisdiction over this sector.

Committee's Observation

The Committee acknowledged Kinyeru Mwago's proposal but was of the view that the provisions in the Bill were adequate to cater for his concerns.

100. **KBL** proposed deleting the proposed subsection. Alternatively, if retained, the provision should require objective evidence of economic dependency, including measurable indicators such as turnover concentration and the absence of commercially viable alternatives.

Committee's Observation

The Committee acknowledged KBL's proposal and made the following observations—

(i) To address stakeholder's concerns under clause 3 in the proposed new subsection (6) where subjective terms such as "viable" and "satisfactory" have been used, there is need to relook the provision to make the provision objective;

(ii) The proposed amendment to subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

Clause 3 (5)

101. **The State Department for Trade** noted that the criteria for determining strategic market position are largely discretionary, which may create legal uncertainty and affect investor confidence. They proposed that the Competition Authority applies objective assessment criteria, publish designation guidelines, undertake stakeholder consultations, and provide an appeal mechanism before designation.

Committee's Observation

The Committee acknowledged the proposal by the State Department for Trade and made the following observations—

- (i) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position;
- (ii) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;
- (iii) The Bill has not provided for the prohibition of abuse of strategic market position; hence, there is a need to amend the Bill to provide for this.

102.**AMCHAM** proposed amending the clause to distinguish between indicators of market power and strategic significance, require both criteria to be satisfied separately, introduce a forward-looking assessment of whether market power is substantial and entrenched over a defined period, clarify that SMP designation should be undertaken in respect of a specific digital activity rather than the undertaking or digital market as a whole, and include a turnover-based or similar threshold to ensure that the regime applies only to undertakings of sufficient economic significance.

103.The proposed criteria for determining whether an undertaking has a Strategic Market Position (SMP) conflate indicators of market power with indicators of strategic significance, thereby reducing analytical clarity and lowering the threshold for designation. The stakeholder further noted that the Bill does not require a forward-looking assessment of whether market power is substantial and entrenched, does not clearly link the assessment to a specific digital activity, and does not provide a turnover threshold, which may result in uncertainty and the designation of undertakings that do not warrant heightened regulatory intervention.

Committee's Observation

The Committee acknowledged the proposal by AMCHAM and made the following observations—

- (i) **To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position;**
- (ii) **It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (iii) **The Bill has not provided for the prohibition of abuse of strategic market position, hence there is need to amend the Bill to provide for this.**

Clauses 3(5)(b), (d), and (e)

104.**AMCHAM** proposed deleting clauses 3(5)(d) and 3(5)(e) from the Bill and amending clause 3(5)(b) by deleting the reference to "access to competitively relevant data", so that the criterion is limited to economies of scale. The proposed amendments would improve clarity, promote legal certainty and ensure that the

assessment of Strategic Market Position targets genuinely dominant or strategically significant undertakings. Innovation-driven competitive pressure and the importance of intermediary services are features of competitive digital markets and that their inclusion as assessment criteria may discourage platform development, innovation and competitive dynamism.

105. The stakeholder further noted that the reference to "data relevant for competition" is undefined, creating ambiguity in interpretation and enforcement, while the criteria do not clearly distinguish between indicators of market power and strategic significance or provide a forward-looking or threshold-based assessment, thereby creating the risk of overbroad application.

Committee's Observation

The Committee acknowledged the proposal by AMCHAM and made the following observations—

- (i) To address the stakeholder's concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position and prohibited practices by undertakings with strategic market position;
- (ii) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;
- (iii) The Bill has not provided for the prohibition of abuse strategic market position, hence there is need to amend the Bill to provide for this.

Clause 3 (6)

106. **KAM** proposed amending the definition of "*superior bargaining position*" to incorporate objective and measurable criteria. The stakeholder submitted that the amendment does not take into account relevant contextual factors such as the duration of the relationship, switching costs, or the degree of economic dependence, which are critical in assessing bargaining power.

Committee's Observation

The Committee agreed with the proposal by KAM and recommends the amendment of subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

107.**ALN** proposed amending the proposed Section 4(6) by providing that 'strategic bargaining position' means

'the position of a person who, by reason of the relative size, resources, or strategic importance of that person to the counterparty's business, is able to impose trading conditions on the counterparty that the counterparty would not otherwise accept, and where such conditions create a material imbalance in the rights and obligations in their commercial relations, to the detriment of the counterparty'.

108.**ALN** Kenya submitted that the definition as drafted introduces a test that is untethered from the conduct of the respondent and instead turns on the structure of the market in which the counterparty operates. According to the stakeholder, this places an indirect burden on the respondent for circumstances entirely outside their control. A supplier operating in a sector with few competitors does not choose the level of competition in its market thus penalising that supplier for a market structure it did not create, and which it has no ability to change, is neither fair nor consistent with the deterrence rationale of competition law.

109.Further, the definition is broad in sectors with naturally limited supply such as capital-intensive industries, where the number of viable suppliers is inherently limited. The stakeholder cited that the proposal submitted would remove the counterparty's inability to find alternatives as a standalone element.

Committee's Observation

The Committee agreed with the proposal by ALN and recommends amendment of subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

110.**AMCHAM** observed that the proposed definition of a person having a superior bargaining position relies on subjective concepts such as an "imbalance in the rights and obligations" and the inability of a counterparty to find a "viable and satisfactory alternative", without providing objective benchmarks for their assessment. Further,

the provision does not take into account the nature, duration or context of the commercial relationship, including switching costs, contractual commitments and investment-specific dependencies, which may result in uncertainty and the regulation of ordinary commercial arrangements that do not warrant intervention.

111. The stakeholder therefore proposed amending the clause to refine the definition of "superior bargaining position" by incorporating objective and measurable criteria, including economic dependence, availability of alternatives, switching costs, and the relative economic strength of the parties; clarifying the meaning of a "viable and satisfactory alternative"; incorporating contextual factors relating to the commercial relationship; and introducing appropriate safeguards to ensure that the framework remains proportionate and targets genuinely abusive conduct.

Committee's Observation

The Committee agreed with the proposal by AMCHAM and recommends amendment of subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

Clause 3(7)

112. **ALN** proposed amending the proposed Section 3(7) to introduce a minimum threshold, as follows:

'In determining whether an undertaking has a superior bargaining position, the Authority shall have regard to the undertaking's market position, including whether it holds a dominant market position'

113. The stakeholder submitted that the Bill as drafted effectively creates a status-based offence rather than one grounded in demonstrable harm or anti-competitive effect, which is inconsistent with the general principles of competition law enforcement.

Committee's Observation

The Committee acknowledged the ALN's proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world,**

- contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily “dominant”; (3) economic dependence of one party to the other and the lack of alternatives;
- (ii) The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition thus complementing traditional rules on abuse of dominance;
- (iv) The concept aligns Kenya’s law with international trends, for instance Japan and the EU on unfair trading practices rules.

114. **AMCHAM** proposed retaining the requirement to establish dominance or market power or, alternatively, publishing detailed guidelines on the assessment of superior bargaining position to ensure consistency and predictability in the application of the provision. The removal of the requirement to establish dominance or market power significantly broadens the scope of the provision and may extend its application to ordinary commercial relationships, particularly involving small and medium-sized enterprises, where bargaining asymmetry is a normal feature of commerce rather than an abuse of power.

Committee’s Observation

The Committee acknowledged **AMCHAM**’s proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily “dominant”; (3) economic dependence of one party to the other and the lack of alternatives;
- (ii) The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between

the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;

- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition thus complementing traditional rules on abuse of dominance;
- (iv) The concept aligns Kenya's law with international trends, for instance Japan and the EU on unfair trading practices rules.

Clause 3(6-7)

115. **Kinyeru Mwago** observed that as a driver he cannot negotiate fare, commission, or deactivation terms, and has no viable alternative platform offering materially different terms. He proposed that Drivers, Riders, and their associations should be expressly recognised as "counterparties" under this definition.

Committee's Observation

The Committee acknowledged Kinyeru Mwago's proposal and noted that the proposal in the Bill is framed within the broad objects of the Act and that to an extent the Bill addresses his concerns through the proposal on abuse of superior bargaining position.

Clause 3 (section 4(7))

116. **KBL** proposed deleting the clause in its entirety.

Committee's Observation

The Committee acknowledged the KBL's proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;
- (ii) The context within which an "imbalance" arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;

- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition thus complementing traditional rules on abuse of dominance.

New Provisions

117. **Bowmans**, proposed the insertion of a new subsection (4)(a) on the assessment of substantial and entrenched market power:

“(4)(a) In order to assess whether an undertaking has substantial and entrenched market power in respect of a digital activity for the purposes of subsection (4)(a), the Authority shall carry out a forward-looking assessment of a period of at least five years, taking into account —

- (a) the direct and indirect effects of network effects and the barriers to entry arising in connection with those effects;*
- (b) the economies of scale and scope enjoyed by the undertaking, including access to data relevant for competition;*
- (c) the costs of switching for users and the ability and propensity for users to multi-home;*
- (d) the competitive pressure driven by innovation;*
- (e) developments that would be expected or foreseeable if the Authority did not designate the undertaking as having a strategic market position in respect of the digital activity; and*
- (f) any other factor the Authority considers relevant to the assessment.”*

118. **Bowmans**, proposed the insertion of a new subsection 4(4)(b) on position of strategic significance to read as follows;

“(4)(b) An undertaking has a position of strategic significance in respect of a digital activity for the purposes of subsection (4)(b) where one or more of the following conditions is met—

- (a) the undertaking has achieved a position of significant size or scale in respect of the digital activity;*
- (b) a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business;*
- (c) the undertaking’s position in respect of the digital activity would allow it to extend its market power to a range of other activities; or*
- (d) the undertaking’s position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves in respect of the digital activity or otherwise.”*

119. **Bowmans**, proposed inserting new subsections 4(4)(c) – (h) establishing a formal designation process to read as follows;

“(4)(c) The Authority may designate an undertaking as having a strategic market position in respect of a digital activity where the Authority considers that —

- (a) the undertaking meets the conditions set out in subsection (4); and
- (b) the turnover condition is met. The turnover condition is met where the total value of the global turnover and the total value of the turnover in Kenya of the undertaking, or of the group of which the undertaking forms part, in the relevant period exceeds such thresholds as the Authority may, by notice in the Gazette, determine from time to time. The Authority shall, in setting such thresholds, have regard to the need to ensure the regime is targeted at undertakings of sufficient scale to warrant designation and shall consult with relevant stakeholders before publishing or amending the thresholds).

(4)(d) The Authority may only designate an undertaking as having a strategic market position in respect of a digital activity after carrying out an investigation into whether to designate the undertaking, which investigation shall be completed within a period of twelve months from the date of commencement.

(4)(e) Before making a designation under subsection (4)(c), the Authority shall —

- (a) give written notice of the investigation to the undertaking concerned;
- (b) carry out a public consultation on any decision it is considering making, and bring the public consultation to the attention of such persons as it considers appropriate;
- (c) publish its provisional findings and allow the undertaking and any other interested person to make representations within such period as the Authority shall specify; and
- (d) have regard to any representations received.

(4)(f) Where the Authority designates an undertaking as having a strategic market position, the Authority shall publish a notice setting out —

- (a) a description of the undertaking;
- (b) a description of the digital activity in respect of which the designation has effect;
- (c) the Authority’s reasons for its decision;
- (d) a statement of the period for which the designation has effect, which shall be five years from the date of the notice; and
- (e) a statement of the circumstances in which the designation may be revoked before the end of the designation period.

(4)(g) If the Authority does not make a designation decision within the period specified in subsection (4)(d), the Authority shall be deemed to have decided not to designate the undertaking in respect of the digital activity to which the investigation related.

(4)(h) The Authority shall, not later than nine months before the expiry of the designation period, commence a further investigation to determine whether to revoke, re-designate or vary the designation of the undertaking.”

120. **Bowmans** proposed the inserting new subsections (4)(4)(i) – (l) on establishing a code of conduct framework to read as follows;

“(4)(i) The Authority may impose one or more conduct requirements on a designated undertaking, being requirements as to how the designated undertaking shall conduct itself in relation to the digital activity in respect of which it is designated.

(4)(j) The Authority may only impose a conduct requirement or a combination of conduct requirements on a designated undertaking if it considers that it would be proportionate to do so for the purposes of one or more of the following objectives —

(a) the fair dealing objective being that users or potential users of the relevant digital activity are treated fairly and are able to interact with the undertaking on reasonable terms;

(b) the open choices objective, being that users or potential users of the relevant digital activity are able to choose freely and easily between services provided by the undertaking and services provided by other undertakings; and

(c) the trust and transparency objective, being that users or potential users of the relevant digital activity have the information they require to understand the services provided by the undertaking and to make properly informed decisions about whether and how they interact with the undertaking.

(4)(k) Without limiting the generality of subsection (4)(i), conduct requirements may be for the purpose of —

(a) obliging the designated undertaking to trade on fair and reasonable terms;

(b) obliging the designated undertaking to have effective processes for handling complaints by and disputes with users;

(c) obliging the designated undertaking to provide clear, relevant, accurate and accessible information about the relevant digital activity to users;

(d) preventing the designated undertaking from applying discriminatory terms, conditions or policies to certain users;

(e) preventing the designated undertaking from using its position in relation to the relevant digital activity to treat its own products more favourably than those of other undertakings;

(f) preventing the designated undertaking from restricting interoperability between the relevant service or digital content and products offered by other undertakings; or

(g) preventing the designated undertaking from using data unfairly.

(4)(l) Before imposing a conduct requirement, the Authority shall —

(a) carry out a public consultation on the conduct requirement which it proposes to impose;

(b) have regard to any representations received and

(c) keep the conduct requirements under review.”

121. Bowmans proposed inserting new subsections (4)(4)(m) – (n) on enforcement and penalties to read as follows;

“(4)(m) Without prejudice to section 91A, a designated undertaking that contravenes a conduct requirement imposed under subsection (4l) shall be liable to an administrative penalty of up to ten percent of the designated undertaking’s immediately preceding year’s gross annual turnover in Kenya.

(4)(n) Where the Authority has reasonable grounds to believe that a designated undertaking has breached or is breaching a conduct requirement, and it considers it necessary to act on an interim basis, the interim reliefs set out in section 37 of the Act shall apply mutatis mutandis.”

Committee’s Observation

The Committee acknowledged Bowmans’ proposals and made the following observations—

- (i) The new subsections (4) and (5) in clause 3 of the Bill are applicable to a digital market and that intention has to be clarified in the proposed new subsection (4) through an amendment;**
- (ii) Strategic market position (SMP) in a digital market as a concept in the Bill is different from “a dominant position” in the sense that dominance is not a relevant consideration when considering strategic market position;**
- (iii) The purpose of strategic market position in a digital market is to address firms that are not dominant but are still in position to abuse their strategic position.**
- (iv) The prohibition of abuse of strategic market position in a digital market is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy;**
- (v) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;**
- (vi) The Bill has not provided for the prohibition of abuse strategic market position, hence there is need to amend the Bill to provide for this;**
- (vii) To address the stakeholder’s concerns, there was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic**

market position and prohibited practices by undertakings with strategic market position.

Clause 4

122. The State Department for Trade was of the view that the threshold for determining "superior bargaining position" is not sufficiently objective and may expose legitimate commercial negotiations to regulatory intervention. They proposed amending to prescribe objective criteria for determining superior bargaining position, including market share, dependency, duration of commercial relationship, availability of alternative trading partners and economic dependence.

Committee's Observation

The Committee acknowledged the proposal by the State Department for Trade and noted that the proposed new section 40B(4) in clause 9 of the Bill addresses the concerns raised as it provides for the objective criteria.

123. The IEA observed that blanket "Superior bargaining power" clauses risk penalizing businesses simply for being large or efficient, potentially interfering with standard commercial contract negotiations.

Committee's Observation

The Committee acknowledged the proposal by the Institute of Economic Affairs and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;**
- (ii) The context within which an "imbalance" arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;**
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as**

a standalone prohibition thus complementing traditional rules on abuse of dominance;

(iv) The concept aligns Kenya's law with international trends, for instance Japan and the EU on unfair trading practices rules;

(v) The competition regime is not intended to punish businesses but "to enhance the welfare of the people of Kenya by promoting and protecting

effective competition in markets and preventing unfair and misleading market conduct throughout Kenya" in line with the object of the **Competition Act, Cap. 504**.

124. **WeCare** submitted that strategic partnerships entered into by the Competition Authority should be subject to public and parliamentary oversight. WeCare recommended that the Authority report such partnerships annually to the relevant Committee of the National Assembly and consult consumer and civil society organisations before finalising them.

Committee's Observation

The Committee acknowledged **WeCare's** proposal and made the following observations:

(i) Section 83 of the **Competition Act, Cap. 504**, provides for preparation and submission of the annual report of the **Competition Authority**, which ultimately is transmitted to the **National Assembly** for consideration;

(ii) The concerns by the stakeholder were therefore addressed in the principal Act.

Clause 4 (a)

125. **PwC** proposed defining "evaluations" or provide guidance on the scope, methodology, and legal effect of evaluations conducted by the Authority under section 9(1)(g). Further, clarify whether findings from evaluations can form the basis of enforcement action or are purely advisory. PwC submitted that expanding the Authority's mandate without defining the scope of new powers creates uncertainty for regulated entities. If "evaluations" can lead to enforcement action, undertakings need to understand the process and their rights. If evaluations are advisory only, this should be made explicit.

Committee's Observation

The Committee acknowledged **PwC's** proposal and noted that "evaluation" within the context of Section 9(1)(g) of the **Competition Act** is intended to provide value addition in the research and studies the

Competition Authority conducts. It therefore does not create any additional regulatory powers.

126. **Multichoice Kenya** noted that the Bill does not define the term "evaluations", making it difficult to distinguish it from functions already conferred upon the Authority and creating uncertainty regarding the scope of the Authority's mandate. Therefore, the stakeholder recommended amending the clause by either—
- (a) defining "evaluations" within the Principal Act or through guidelines; or
 - (b) clarifying the distinction between "inquiries," "studies," "research," and "evaluations," either within the Principal Act or through guidance;

Committee's Observation

The Committee acknowledged Multichoice Kenya's proposal and noted that "evaluation" within the context of Section 9(1)(g) of the Competition Act is intended to provide value addition in the research and studies the Competition Authority conducts. It therefore does not create any additional regulatory powers.

Clause 4(b)

127. **Multichoice Kenya** proposed an amendment to the clause by replacing the word "advice" with "advise" in relation to the Authority's function of advising the Cabinet Secretary and other stakeholders because the provision contains a typographical error.

Committee's Observation

The Committee agreed with the proposal by Multichoice Kenya.

Clause 5

128. **The State Department for Trade** proposed an amendment to require the Authority to publish enforcement guidelines and provide measurable indicators for assessing abuse to improve predictability and legal certainty. Some assessment factors are subjective and may result in inconsistent decisions and increased commercial disputes.

Committee's Observation

The Committee acknowledged by proposal by the State Department for Trade but noted that as drafted, clause 5 seeks to include abuse of superior bargaining position in the provision in line with other

substantive amendments proposed in the Bill on abuse of superior bargaining position. The concerns by the stakeholder have been addressed elsewhere in the Committee's observations.

129. **IEA** submitted that timely reporting helps with remedial actions where necessary, and enhancing consumer welfare. They proposed amending the clause to specify the time period within which a report should be made available, considering its usability for varied reasons including imposition of fines, or implementation of recommendations in good time.

Committee's Observation

The Committee agreed with the Institute of Economic Affairs.

130. **Google** submitted that the criteria provided for in section 4(5)(b), (d), and (e) of the Act are vague and may discourage innovation by treating access to data, innovation and intermediary services as indicators of market power. The stakeholder recommended that sections 4(5)(d) and 4(5)(e) be deleted in their entirety. The stakeholder further recommended that section 4(5)(b) be amended by deleting the reference to data so that it reads:

"(b) economies of scale;".

Committee's Observation

The Committee acknowledged the proposal by Google and made the following observations—

- (i) The proposal in subsection (5) in clause 3 of the Bill were not vague and that its intention is not to stifle innovation;
- (ii) It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail;
- (iii) The Bill has not provided for the prohibition of abuse strategic market position in a digital market, hence there is need to amend the Bill to provide for this;
- (iv) There was need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position in a digital market and prohibited practices by undertakings with strategic market position in a digital market.

131.**KBL** proposed amending the provision to read as follows;

"At the request of a regulatory body, or at its own instance and upon reasonable evidentiary grounds, the Authority may conduct an inquiry into any matter affecting competition, consumer welfare, abuse of buyer power or abuse of superior bargaining position and provide a report within a reasonable period."

Committee's Observation

The Committee acknowledged KBL's proposal and noted that the stakeholder had proposed to insert the words "and upon reasonable evidentiary grounds". The Committee was of the view that the amendment to the subsection as provided for in clause 5 was adequate and that the threshold introduced may inhibit the functions of the Competition Authority. In any case, there will be safeguards in conduct of an inquiry within the constitutional and fair administrative action framework.

Clause 6

132.**KBA** proposed amending Clause 6 by requiring the Competition Authority, when assessing market power or significant market position in relation to a digital activity, to define the relevant market by considering all reasonably available substitutes and competitive constraints, including regulated and unregulated providers, domestic and cross-border providers, formal and informal alternatives, and comparable digital and non-digital channels available to consumers. The stakeholder further proposed prohibiting the Authority from determining dominance or market power solely by reference to an undertaking's market share among licensed or domestic providers. KPMG observed that assessing market power using only licensed or domestic providers may overstate the market position of regulated undertakings and fail to reflect the competitive environment in which consumers have access to multiple alternatives.

Committee's Observation

The Committee acknowledged KBA's proposal and observed that clause 6 is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

133.**WeCare** submitted that the lower dominance threshold for digital markets should be supported, but the assessment of market power should be clear and predictable.

The stakeholder recommended that the Competition Authority publish and regularly update indicators such as data access, network effects and switching costs and report periodically on barriers affecting SMEs, women and youth in digital markets.

Committee's Observation.

The Committee acknowledged the proposal by WeCare.

Clause 6

134.**Bowmans** proposed deletion the clause in its entirety. They noted that there is an overlap between the thresholds set out in Section 23 and the provisions of the new Section 4(4), where Section 23(3) provides clear criteria for establishing dominance, but Section 4(4) provides other factors that grant significant market position in the context of digital markets.

135.**Bowmans** proposed amending the clause to capture situations where an undertaking uses its position in one market to strengthen or extend its position in adjacent or related markets. This would align the framework with established competition law principles, which recognise that such conduct can distort competition and disadvantage rivals, particularly in digital and multi-sided markets.

Committee's Observation

The Committee acknowledged Bowman's proposal and observed that clause 6 is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

136.**KBL** proposed amending the provision to clarify that the dominance threshold applies to undertakings that "produce, supply, distribute, intermediate transactions, or otherwise control" not less than one-half of the relevant market and that the metric for measuring intermediation be prescribed in the Act or subsidiary legislation.

Committee's Observation

The Committee acknowledged KBL's proposal but was of the view that the proposed amendment in the Bill was adequate.

Clause 6(b)

- 137.**KBA** proposed amending the clause by adding the following proviso to the proposed new section 23(2)(c):

Provided that, in assessing market power or significant market position in relation to a digital activity, the Authority shall define the relevant market by reference to all reasonably available substitutes and competitive constraints, including regulated and unregulated providers, domestic and cross-border providers, formal and informal alternatives, and comparable digital or non-digital channels available to consumers.

- 138.They highlighted that conduct undertaken to comply with legal or regulatory obligations may be misconstrued as anti-competitive when considered in isolation. Recognising the commercial and regulatory context would preserve the Authority's ability to address genuinely unfair, exploitative or exclusionary conduct while reducing the risk of legitimate compliance, risk management and commercial practices being characterised as abusive.

Committee's Observation

The Committee acknowledged KBA's proposal and observed that clause 6 is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

- 139.The **IEA** proposed that the proposal be amended to define the parameters to determine what significant market position is, probably in the regulations.

Committee's Observation

The Committee acknowledged IEA's proposal.

- 140.**Multichoice Kenya** noted that the introduction of multiple and, in some instances, undefined concepts create ambiguity, contributes to overlapping regulatory tests and reduces legal certainty. Relying on the well-established concepts of market power and dominance would promote consistency, clarity and ease of application in assessing competitive dynamics. Multi choice Kenya therefore, proposed deleting the reference to "significant market position" to read as follows: *"In the case of a digital market controls less than forty per cent of the market share but has market power"*

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya and noted that the proposal is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

141. **PwC** proposed amending the clause to replace “significant market position” in Section 23(2)(c) with “strategic market position” to align with the defined term under proposed section 4(4). Alternatively, if a distinct concept is intended, define “significant market position” separately. PwC submitted that parties subject to competition proceedings must be able to understand the legal standard being applied to them. An undefined term that requires extra-statutory interpretation to determine its meaning does not meet this threshold.

Committee’s Observation

The Committee acknowledged the proposal by PwC and noted that the proposal is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

142. **AMCHAM** proposed deleting the proposal to retain the provision in the Principal Act in its current form. Reliance on conventional market share thresholds does not adequately reflect the competitive dynamics of digital markets, where network effects, multi-sided platforms and rapid innovation may distort traditional market share indicators. The stakeholder further noted that replacing the term “strategic market position” with “significant market position” introduces inconsistency and legal uncertainty in the application of the law.

Committee’s Observation

The Committee acknowledged the proposal by AMCHAM and noted that the proposal is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused

rather than the high market shares. That is the gap this proposal seeks to correct.

Clause amending section 23(2)(c)

143. **Google** submitted that conventional market share thresholds may not adequately reflect network effects and rapid innovation in digital markets and that the terminology used is inconsistent. The stakeholder recommended that the proposed amendment be deleted and section 23 of the principal Act be retained in its current form, since the existing provision is sufficiently broad to cover digital markets.

Committee's Observation

The Committee acknowledged the proposal by Google and noted that the proposal is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

Clause 6(b)(ii)

144. **LSK** submitted that the term “significant market position” is not defined and is inconsistent with the defined term “strategic market position” used elsewhere in the Bill. LSK stated that undefined and inconsistent terminology within the same Bill may create uncertainty. The Stakeholder recommended the replacement of the phrase “significant market position” with the defined term “strategic market position” to ensure consistency throughout the Act. Alternatively, if a different concept is intended, include a clear definition of “significant market position” and distinguish it from “strategic market position.”

Committee's Observation

The Committee acknowledged the proposal by LSK and noted that the proposal is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

145. **KBL** proposed deleting the proposal in its entirety

Committee's Observation

The Committee acknowledged KBL's proposal and noted that the amendment is premised on the realization that in digital markets the strategic position a party holds is more consequential than market share, which is a traditional approach to assessing market power. Therefore, in the case of digital activities or markets the focus is the strategic position and how that strategic position is likely to be abused rather than the high market shares. That is the gap this proposal seeks to correct.

Clauses 6 and 7

146. **Google** submitted that the proposed tests are vague and may bring ordinary commercial arrangements within the scope of the provision. The stakeholder recommended that the provisions be amended to incorporate objective and measurable criteria, including the degree of economic dependence, availability of comparable alternative trading partners, switching costs, relative size and regulatory requirements. The stakeholder further recommended the publication of detailed guidelines for assessing whether a person has a superior bargaining position.

Committee's Observation

The Committee acknowledged the proposal by Google and observed that the concerns have been responded to in separate provisions since and that clause 6 is on a different matter. The proposed new section 40B(4) in clause 9 addresses the stakeholder's concerns. It will be important that, if the Bill is passed, rules and guidelines will be developed in consultation with the stakeholders which will incorporate the proposals by stakeholders and clarify the concept in greater detail.

Clause 7

147. **ALN Kenya** submitted that the proposed repeal of Section 24A be accompanied by a saving provision with the following terms: -

'Notwithstanding the repeal of section 24A, any investigation, complaint, or proceeding commenced or pending under section 24A immediately before the commencement of this Act shall continue and be concluded as if section 24A had not been repealed. Any order or direction made under section 24A before commencement shall remain valid and enforceable.'

148. The stakeholder submitted that the current section 24A has been in force since its insertion by the Competition (Amendment) Act, 2019. There may be ongoing investigations, complaints, or proceedings under that section at the time the Amendment Act comes into force. Without a saving provision, those proceedings

will have no legal basis on which to continue after commencement, and any orders already made under section 24A may be rendered uncertain.

Committee's Observation

The Committee agreed with ALN Kenya's proposal.

- 149.**PwC** proposed amending the savings or transitional provision clarifying that complaints or investigations commenced under section 24A before the repeal shall continue under the new Part IIIA and replicate section 24A (7) (mandatory agreement terms) in the new section 40A. PwC submitted that Section 24A (7) of the Principal Act requires agreements between buyer and supplier undertakings to include specific mandatory terms: payment terms, payment date, interest on late payment, conditions for termination, and dispute resolution mechanisms. The new section 40A does not replicate this requirement. This is a significant regression in supplier protection.

Committee's Observation

The Committee agreed with PwC's proposal.

Clause 8

- 150.**KBL** proposed retaining the proposal, however, this is subject to the adoption of their recommendations under Clause 3 regarding the definition and scope of "super bargaining position."

Committee's Observation

The Committee acknowledged KBL's proposal.

Clause 9

- 151.**The State Department for Trade** proposed limiting interoperability requirements to proportionate circumstances and require adequate safeguards for confidential business information, personal data and cybersecurity. Mandatory data-sharing and interoperability obligations may expose commercially sensitive information and increase cybersecurity risks.

Committee's Observation

The Committee acknowledged the proposal by the State Department for Trade and noted as provided in the proposed new section 40B in clause 9, the concerns do not arise as the provision provides for abuse of superior bargaining position.

152. **The OAG** noted that definition of substantial part of Kenya in the principal Act means, a part of Kenya which constitutes of a district, a town council, a municipal council or city council. They proposed amending the definition of substantial part of Kenya to align with the administrative units as defined in the Constitution of Kenya, 2010.

Committee's Observation

The Committee agreed with OAG's proposal. However, the Committee recommends the deletion of proposed new section 40A on abuse of buyer power and deleting it in the principal Act so as to retain abuse of superior bargaining power provision since there were overlaps in the two.

153. **The IEA** proposed that the Clause be amended to provide that the Authority shall intervene in "superior bargaining position" disputes only when there is demonstrable systemic harm to market competition or consumer welfare, rather than using competition law as a blunt instrument to settle private contractual disagreements between commercial parties. According to IEA, Parliament should legislate against letting "superior bargaining power" provisions turn the Competition Authority into a micro-manager of routine business-to-business contracts.

Committee's Observation

The Committee acknowledged IEA's proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;**
- (ii) The context within which an "imbalance" arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;**
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as**

a standalone prohibition thus complementing traditional rules on abuse of dominance;

(iv) The concept aligns Kenya's law with international trends, for instance Japan and the EU on unfair trading practices rules.

154. The **Competition Authority of Kenya (CA)** supported the proposal citing that it broadens the scope of the Act by empowering the Authority to investigate and take action against unfair trading practices arising from the abuse of superior bargaining position across all sectors of the economy. Further, the proposed new Section 40A and 40B will ensure that Kenya's competition framework remains responsive to increasingly sophisticated business models and the rapid growth.

155. **ALN Kenya** submitted that the proposed Section 40A and 40B set out overlapping lists of prohibited conduct. The stakeholder proposed that the two sections be amended so that Section 40A is confined to conduct that occurs in a buyer-supplier relationship (i.e conduct by a buyer towards a supplier of goods or services) and Section 40B addresses conduct in a broader counterparty relationship. ALN Kenya submitted that the proposed Section 40B should include but not be limited to digital platform and intermediary contexts, where the respondent holds a superior bargaining position over the counterparty. Further, the stakeholder submitted that acts that are common to both lists should appear in only one section, depending on which context they best fit.

156. Additionally, they highlighted that the duplication of conduct across both sections means that a single act, for instance, a delay in payment, could in principle be pursued under both section 40A and section 40B simultaneously, resulting in double exposure for the same conduct. It also makes compliance assessment very difficult as businesses cannot tell which provision applies to a given situation, or how to distinguish between the two. Separating the lists by context resolves this and gives each provision a clear, identifiable scope.

157. Alternatively, **ALN Kenya** proposed that Section 40B be reconsidered in its entirety and if retained, the following proposals be considered:

- (i) The jurisdictional trigger for section 40B should be amended to require that the respondent holds a significant market position in the relevant market, as determined by reference to the methodology applied under section 4(3) of the Act, rather than the broader and undefined concept of "superior bargaining position."

(ii) Subsections (e) to (h) should be deleted in their entirety, or alternatively qualified by an objective justification defence in the following terms:

"Provided that conduct falling within paragraphs (e) to (h) shall not constitute an abuse where the respondent demonstrates that the conduct is objectively justified by a legitimate commercial purpose, is proportionate to that purpose, and reflects terms ordinarily accepted in comparable commercial arrangements in the relevant market."

(iii) If subsections (e) to (h) are retained, they should be assessed under an effects-based framework consistent with the Act's existing treatment of restrictive trade practices under Part III, rather than as per se prohibitions.

(iv) That section 40B(2)(k) be significantly narrowed to target conduct that involves the exercise of coercive control over the counterparty's core business decisions in a manner that has no legitimate commercial justification, and that an express carve out be included for contractual governance mechanisms that are standard in comparable commercial arrangements.

(v) A specific carve-out from section 40B(2)(i) for conduct already regulated under the Data Protection Act; or an express co-ordination mechanism between the two authorities modelled on the co-ordination provisions that exist between the Competition Authority and sectoral regulators under section 9(1)(m) of the current Act.

158. ALN Kenya submitted that the Bill makes no provision on how the Competition Authority's jurisdiction under Section 40B(2)(i) is to be coordinated with that of the Data Protection Commissioner, creating a risk of duplicative investigations and inconsistent determinations in relation to the same conduct.

Committee's Observation

The Committee acknowledged ALN Kenya's proposal and observed that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision. On paragraph (i) in the proposed new section 40B(1) in clause 9, the Committee noted that it provides for the prohibited conduct of "unreasonable collection or processing of data of the counterparty". The Committee held a different view that the conduct is already regulated under the Data Protection Act since the provision is within the context of the competition regime. In any case, collaboration and coordination

between government agencies are inbuilt in the Act in sections 5(3) and 9(1)(m).

- 159.**KAM** proposed amending the proposal under the new section 40A by introducing mandatory minimum agreement terms currently set out in section 24A (7) of the Competition Act. The stakeholder submitted that these provisions would better support clarity, reduce disputes, and align with the objective of preventing abuse in buyer-supplier relationships.

Committee's Observation

The Committee acknowledged KAM's proposal and observed that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision.

- 160.**Google** submitted that the provision does not require proof of harm to competition and imposes disproportionate criminal sanctions for commercial disputes. The stakeholder recommended that the provisions be deleted in their entirety and that reliance instead be placed on section 40B. Where the provision is retained, the stakeholder recommended that section 40A(1) be amended to read:
"A person shall not engage in any conduct that amounts to abuse of buyer power and that causes or is likely to cause harm to competition in a market in Kenya..."

- 161.The stakeholder further recommended that the assessment factors be expanded to correspond with those under section 40B and that criminal sanctions be replaced with administrative penalties.

Committee's Observation

The Committee acknowledged Google's proposal and observed that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision.

- 162.**LSK** submitted that the Bill may permit both administrative penalties and criminal prosecution for the same conduct without clarifying whether the Authority must choose one enforcement mechanism or may apply both. LSK stated that the

relationship between administrative and criminal sanctions should be clear to ensure fairness, proportionality and legal certainty. They recommended an insertion of express provision clarifying the relationship between administrative penalties under section 91A and criminal liability under the offence provisions.

163. The provision should either require the Authority to elect one enforcement mechanism in respect of the same conduct or provide that any administrative penalty imposed shall be taken into account when determining a criminal penalty for the same offence.

Committee's Observation

The Committee acknowledged LSK's proposal.

164. **FKE** submitted that the Bill extends the Competition Authority's investigative powers to cover the newly introduced offence of abuse of superior bargaining position. However, the Bill, like section 31 of the Competition Act, does not prescribe clear timelines for issuing notices of investigation or for affected undertakings to submit evidence.

165. **FKE** recommended that section 31(4)(a)–(d) of the Act be amended by inserting the words “*within 21 days*” immediately after the word “*notice*”. **FKE** stated that businesses should be given adequate notice of investigations and an opportunity to respond before enforcement action is taken. The amendment would also align the provision with Article 47 of the Constitution on fair administrative action.

Committee's Observation

The Committee acknowledged FKE's proposal and observed that the provisions of section 31 in the principal Act together with rules 34 to 40 of the Competition (General) Rules, 2019 were adequate and that implementation of the provisions allows for compliance with Article 47 of the Constitution.

166. **WeCare** submitted that complaints on unreasonable collection or processing of data should be handled consistently with the Data Protection Act, 2019. They recommended that section 40B(2)(i) expressly refer to the Data Protection Act, 2019 and require consultation with the Office of the Data Protection Commissioner.

Committee's Observation

The Committee acknowledged WeCare's proposal and noted that the provision provides for the prohibited conduct of “unreasonable collection or processing of data of the counterparty”. The Committee

held a different view that the conduct is already regulated under the Data Protection Act since the provision is within the context of the competition regime. In any case, collaboration and coordination between government agencies are inbuilt in the Act in sections 5(3) and 9(1)(m).

167. **Bowmans** proposed amending the clause to introduce a competitive harm requirement, to read as follows;

"A person shall not engage in any conduct that amounts to abuse of a superior bargaining position and that causes or is likely to cause harm to competition in a market in Kenya, or a substantial part of Kenya."

168. **They** noted that this is essential to ensure that the provision operates as a competition law instrument rather than a general commercial fairness standard.

169. **Bowmans**, noted that in the alternative, and at a minimum, the Authority should be required to demonstrate that the impugned conduct caused a substantial and unjustifiable disadvantage to the dependent counterparty, with reference to competitive benchmarks, before a contravention can be established.

Committee's Observation

The Committee acknowledged Bowmans' proposal and made the following observations:

- (i) **Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;**
- (ii) **The context within which an "imbalance" arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;**
- (iii) **It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition thus complementing traditional rules on abuse of dominance.**

Clause 9 (section 40A (1))

170.**KAM** proposed amending the proposal under Section 40A(1) to incorporate a competitive harm requirement to read as follows:

"A person shall not engage in any conduct that amounts to abuse of buyer power and that causes or is likely to cause harm to competition in a market in Kenya, or a substantial part of Kenya."

171. According to the stakeholder, Section 40A(1) introduces a blanket prohibition on abuse of buyer power without requiring a showing of harm to competition or the competitive process. Further, this approach is not aligned with the objectives of the Competition Act, which emphasises the promotion of effective competition, consumer welfare, efficiency, and innovation.

Committee's Observation

The Committee acknowledged KAM's proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision.

172.**Bowmans** proposed amending section 40A(1) to incorporate a competitive harm requirement, such that the prohibition reads as follows;

"A person shall not engage in any conduct that amounts to abuse of buyer power and that causes or is likely to cause harm to competition in a market in Kenya, or a substantial part of Kenya."

173. In the alternative, and at a minimum, the Authority should be required to demonstrate that the impugned conduct caused a substantial and unjustifiable disadvantage to the affected supplier, with reference to competitive benchmarks, before a contravention can be established.

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

174.**KBL** proposed retaining the proposal, however, this is subject to the insertion of a materiality threshold, so that it provides-

"A person shall not engage in any significant or repeated conduct that amounts to abuse of buyer power in a market in Kenya or a substantial part thereof."

Committee's Observation

The Committee acknowledged KBL's proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms imbedded in abuse of buyer power provision.

Clause 9(40(A) (2))

175.Multichoice Kenya proposed amending the provision by clarifying that the examples of conduct constituting abuse of buyer power are illustrative rather than automatic infringements and should be assessed within their full commercial context. This is because, several of the listed practices, including the allocation of costs and risks, pricing arrangements, preferential terms and termination provisions, may arise from legitimate arm's length negotiations and reflect commercially justified arrangements. It was further submitted that the provision may undermine freedom of contract by treating common commercial practices as inherently abusive without considering the contractual relationship or actual market effects. An effects-based and context-driven assessment would distinguish abusive conduct from legitimate commercial negotiations, preserve contractual freedom and ensure that enforcement targets conduct resulting in unfair exploitation, foreclosure or material adverse effects.

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

176.Bowmans proposed that each item of prohibited conduct in section 40A(2) be reviewed and, where necessary, qualified to ensure that it captures only genuinely abusive conduct and does not inadvertently prohibit legitimate commercial behaviour. The new section should read as follows;

Section 40A(2)(a): "systematic or persistent delays in the payment of suppliers without objectively justifiable reason in breach of agreed terms of payment, where the delay is not attributable to a genuine commercial dispute between the parties regarding the goods or services supplied."

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

177. **Bowmans** proposed amending Section 40A(2)(b) to read as follows;

“unilateral termination or threats of termination of an established commercial relationship without notice or on an unreasonably short notice, having regard to the duration and nature of the relationship, the investments made by the supplier in reliance on the continuation of the relationship, and any applicable industry norms, and without an objectively justifiable reason.”

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

178. **Bowmans** proposed amending Section 40A(2)(d) to read as follows;

“unilateral imposition on suppliers of goods or services of a requirement to fund the cost of promotion of the goods or services, where such requirement was not contemplated by the parties at the time of entering into the supply agreement and is not the product of genuine commercial negotiation between the parties.”

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

179. **Bowmans** proposed amending Section 40A(2)(e) to read as follows;

“unilateral transfer of commercial risks that, by the express or implied terms of the supply agreement or by established practice in the relevant sector, were meant to be borne by the buyer rather than the supplier.”

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in

clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

180. **Bowmans** proposed amending Section 40A(2)(f) to read as follows;

“demands for preferential terms that are substantially unfavourable to the suppliers and that are not objectively justified by reference to the volume, value, timing, or other legitimate commercial characteristics of the transaction; or demanding limitations on supplies to other buyers where such limitations are not objectively justified by the commercial context of the relationship and have the effect of substantially restricting the supplier's ability to compete in the relevant market.”

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

181. **Bowmans** proposed amending Section 40A(2)(g) to read as follows;

“imposing purchase prices significantly below the prevailing market price for comparable goods or services in the relevant market, where the supplier has no viable alternative buyer and the pricing is not objectively justified by the commercial characteristics of the transaction, including the volume, quality, or timing of the supply.”

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

Clause 9 (section 40A (6))

182. **KAM** proposed amending the proposal under the new section 40A(6) by expanding the list of factors to include: the degree of economic dependence of the supplier on the buyer; the availability of comparable alternative buyers within a reasonable timeframe; the relative market shares and economic strength of the parties; whether the conduct results in a substantial and unjustifiable disadvantage to the supplier; and whether the conduct has caused or is likely to cause harm to competition.

183. According to the stakeholder, the proposal would cover the limitations to the terms of the individual buyer-supplier relationship and does not consider the broader competitive context. Further, the stakeholder proposes that the factors set out under Sections 40A(6) and 40B(4) be harmonized to establish a consistent analytical framework across both regimes. The stakeholder notes that the current lack of alignment between these provisions introduces unnecessary complexity and may lead to inconsistent enforcement outcomes.

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

184. **Bowmans** proposed amending section 40A(6) to include:

- i. the degree of economic dependence of the supplier on the buyer;
- ii. the availability of genuinely comparable alternative buyers within a reasonable timeframe;
- iii. the relative market shares and economic strength of the parties;
- iv. whether there is a substantial unjustifiable disadvantage to the affected supplier; and
- v. whether the impugned conduct has caused or is likely to cause harm to competition.

185. Further, **Bowmans** noted that the factors in sections 40A(6) and 40B(4) should be harmonised, so that both regimes apply a consistent analytical framework. They were of the view that there is no sound basis for applying different assessment criteria to abuse of buyer power and abuse of superior bargaining position, and the divergence creates unnecessary complexity and a risk of inconsistent outcomes.

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

Clause 9 (40A (7))

186. **KAM** proposed amending the criminal sanctions under section 40A (7) be removed and replaced with administrative penalties, in line with the enforcement

framework under section 91A. The stakeholder is of the view that criminal sanctions be limited to the most egregious cases such as: deliberate, repeated, or systematic contraventions; demonstrable and substantial harm to affected suppliers; and non-compliance with a prior administrative order or direction issued under section 91A. According to the stakeholder, an administrative enforcement approach would be more proportionate and better aligned with the objectives of competition regulation.

Committee's Observation

The Committee acknowledged KAM's proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

Clause 9 (40A) (7)

187. **AMCHAM** proposed deleting the criminal sanctions and replacing them with administrative penalties in line with the administrative enforcement framework under Clause 91A. Alternatively, the stakeholder proposed limiting criminal sanctions to deliberate, repeated or systematic contraventions that cause demonstrable and substantial harm and occur following non-compliance with a prior administrative order or direction. Imposing criminal sanctions, including imprisonment, for conduct arising from buyer-supplier relationships is disproportionate because such conduct primarily concerns commercial dealings rather than fraud, deception or deliberate harm to the public interest. The stakeholder further observed that retaining criminal sanctions alongside the proposed administrative enforcement framework creates inconsistency and may discourage legitimate commercial negotiations, innovation and pro-competitive conduct.

Committee's Observation

The Committee acknowledged KAM's proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

188. **Bowmans**, proposed that section 40A(7) be deleted and replaced with administrative penalties, in line with the enforcement mechanism introduced in proposed section 91A.

Committee's Observation

The Committee acknowledged Bowmans' proposal

Clause 9 (sections 40A & 40B)

189. **PwC** proposed amending the Bill to clarify the relationship between sections 40A and 40B, specifying whether they are mutually exclusive or can apply concurrently. Additionally, consider whether overlapping conduct should be consolidated into a single provision, or alternatively, specify the criteria for determining which provision applies in a given case.
190. **PwC** submitted that regulatory clarity requires that undertakings understand which prohibition applies to their conduct and what the consequences are. Overlapping prohibitions with identical penalties create enforcement uncertainty and may lead to inconsistent application of the law.

Committee's Observation

The Committee acknowledged PwC's proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

191. **Bowmans** proposed deleting section 40A in its entirety, noting that;
- i. the abuse of superior bargaining position provisions under proposed section 40B, suitably amended in accordance with the recommendations set out in their submissions, serve as the single instrument governing exploitative conduct in unequal commercial relationships, including buyer-supplier relationships.
 - ii. The code of practice mechanism in sections 40A(3) and 40A(4), and the provision on agreements in section 40A(5), be carried over into section 40B as additional subsections, so that the structural protections currently afforded by the buyer power regime are preserved within the consolidated ASBP framework.
 - iii. The factors listed in section 40A(6) that are not already reflected in section 40B(4) — including the nature and determination of contract terms, the payment requested for access to infrastructure, the price paid to suppliers, and the mechanism for the resolution of disputes — be added to the list of factors in section 40B(4), so that the Authority's assessment of complaints arising in buyer-supplier relationships is informed by the full range of relevant considerations.

- iv. Further, the stakeholder submitted that the definition of "buyer power" in section 2 of the Principal Act be retained for interpretive purposes but be expressed to operate as a subset of the ASBP concept rather than as a freestanding regime, so that the proportionality test inherent in the section 2 definition is preserved as a relevant consideration in the Authority's assessment of buyer-supplier complaints under section 40B.

Committee's Observation

The Committee acknowledged Bowmans' proposal and noted that due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss.

Clause 9 (section 40B (1))

- 192.**KAM** proposed amending the new Section 40B(1) to introduce a competitive harm requirement to read as follows:

"A person shall not engage in any conduct that amounts to abuse of a superior bargaining position and that causes or is likely to cause harm to competition in a market in Kenya, or a substantial part of Kenya."

193. According to the stakeholder, this amendment is necessary to ensure that the provision operates as a competition law instrument rather than a general commercial fairness standard. Alternatively, the stakeholder proposed that the Authority be required to demonstrate that the conduct results in a substantial and unjustifiable disadvantage to the counterparty, assessed against objective and competitive benchmarks, before establishing a contravention.

Committee's Observation

The Committee acknowledged the KAM's proposal and made the following observations:

- (i) **Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;**

(ii) The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position; and

(iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition thus complementing traditional rules on abuse of dominance.

194.KBL proposed deleting the proposal in its entirety. Alternatively, if the clause is retained, amend to;

- (a) remove criminal sanctions in favour of in administrative enforcement under section da 91A;
- (b) introduce materiality and reasonableness thresholds across each category of prohibited conduct;
- (c) require objective evidence of economic c dependency before liability may arise; and
- (d) provide a safe harbour for conduct undertaken pursuant to published, transparent and non-discriminatory commercial terms.

Committee’s Observation

The Committee acknowledged KBL’s proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily “dominant”; (3) economic dependence of one party to the other and the lack of alternatives;**
- (ii) The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;**
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone**

prohibition thus complementing traditional rules on abuse of dominance;

- (iv) The concept aligns Kenya's law with international trends, for instance Japan and the EU on unfair trading practices rules;
- (v) The need for criminalization serves a deterrent purpose and it is consistent with the principal Act where prohibited conduct has been criminalized (for instance under restrictive trade practices, abuse of dominant position and merger control).

Clause 9 (40B) (1)

195. **AMCHAM** proposed amending the provision to introduce a competitive harm requirement by providing that a person shall not engage in conduct amounting to abuse of a superior bargaining position where such conduct causes or is likely to cause harm to competition in a market in Kenya or a substantial part of Kenya. Alternatively, the stakeholder proposed requiring the Competition Authority of Kenya to demonstrate that the impugned conduct results in a substantial and unjustifiable disadvantage to the affected counterparty, assessed against objective and competition-based benchmarks, before establishing a contravention.

196. The proposed provision establishes a blanket prohibition on abuse of superior bargaining position without requiring proof of harm to competition or the competitive process, contrary to established competition law principles. The absence of a competitive harm threshold may result in the Competition Authority of Kenya investigating ordinary commercial disputes with no material impact on competition, thereby creating uncertainty for businesses and discouraging legitimate commercial negotiations, product development, pricing strategies and other pro-competitive conduct.

Committee's Observation

The Committee acknowledged the AMCHAM's proposal and made the following observations:

- (i) Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily "dominant"; (3) economic dependence of one party to the other and the lack of alternatives;

- (ii) The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position;
- (iii) It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition, thus complementing traditional rules on abuse of dominance.

Clause 9 (section 40B (2))

197. **KAM** proposed amending Section 40B (2) to ensure that only genuinely abusive conduct is captured and legitimate commercial behaviour is not inadvertently restricted. The stakeholder submitted that an amendment to paragraph (i) of section 40B (2) to refer to “unlawful” rather than “unreasonable” collection or processing of data, is considered to align the provision with the Data Protection Act, 2019 and other applicable legal standards. Further, KAM is of the view that the list of prohibited conduct be made exhaustive, at least in the initial stages, to enhance legal certainty.

Committee’s Observation

The Committee acknowledged KAM’s proposal but was of the view that the provisions were appropriate and adequate.

198. **ICPAK** noted that the clause does not comprehensively address all forms of abusive conduct arising from a superior bargaining position, particularly exclusionary practices. ICPAK therefore proposed amendment by adding the following proposals to read as follows:

- (l) refuse to give a competitor access to an essential facility when it is economically feasible to do so*
- (m) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;*
- (n) buying-up a scarce supply of intermediate goods or resources required by a competitor*

199. They noted that the proposed additions would strengthen the Bill by addressing key exclusionary practices and align the competition framework with international best practice, particularly section 8 of the South African Competition Act, 1998.

Committee’s Observation

The Committee acknowledged ICPAK's proposal.

200. **Multichoice Kenya** proposed amending Clause 9 by providing that the examples of abuse of superior bargaining position under section 40B(2) are illustrative and should be assessed based on evidence of unfair exploitation, material disadvantage or distortion of competition. The provision places undue emphasis on bargaining asymmetry and may capture legitimate pricing arrangements, allocation of costs and risks, contractual terms and other outcomes of bona fide commercial negotiations. Additionally, they submitted that the contextual factors set out in the Bill, including economic dependency, availability of alternative trading partners and the commercial relationship between the parties, should form the primary basis for determining whether abuse has occurred.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya but was of the view that the provisions were appropriate and adequate.

201. **Kinyeru Mwago** recommended having an interpretive note confirming its application to gig and platform-mediated transport work.

Committee's Observation

The Committee acknowledged Kinyeru Mwago's proposal but was of the view that the provisions in the Competition Act, Cap. 504, were adequate.

202. **Bowmans**, proposed that each item of prohibited conduct in section 40B(2) be reviewed and, where necessary, qualified to ensure that it captures only genuinely abusive conduct and does not inadvertently prohibit legitimate commercial behaviour. In this regard, they proposed the amending it to read as follows;

Section 40B(2)(a): "systematic or persistent delays in the payment of suppliers without objectively justifiable reason in breach of agreed terms of payment, where such delays are not attributable to a genuine commercial dispute between the parties regarding the conformity, quality, or completeness of the goods or services supplied."

Committee's Observation

The Committee acknowledged Bowmans' proposal but was of the view that the provisions were appropriate and adequate.

203. **Bowmans** proposed amending Section 40B(2)(b) to read as follows;

"unilateral termination or threats of termination of an established commercial relationship without notice or on an unreasonably short notice, having regard to the duration and nature of the relationship, the investments made by the supplier (or

counterparty) in reliance on the continuation of the relationship, and any applicable industry norms, and without an objectively justifiable reason.”

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provisions were appropriate and adequate.

204. **Bowmans** proposed amending Section 40B(2)(c) to read as follows;

“failing to provide the counterparty with the material terms, conditions or other rules associated with the transaction or service within a reasonable time prior to the conclusion of the agreement or the commencement of the provision of the service, where such failure prejudices the ability of the counterparty to make an informed commercial decision.”

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provisions were appropriate and adequate.

205. **Bowmans** proposed deleting Section 40B(2)(d) in its entirety.

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provision was appropriate and adequate.

206. **Bowmans** proposed amending Section 40B(2)(e) to read as follows;

“unilateral transfer of costs to a counterparty that were not contemplated by the parties at the time of entering into the agreement and that are not the produce of genuine commercial negotiation between the parties, including but not limited to the unilateral imposition of a requirement for the counterparty to fund the cost of promotion of goods or services.”

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provision was appropriate and adequate.

207. **Bowmans** proposed amending Section 40B(2)(f): to read as follows;

“unilateral transfer of commercial risks that, by the express or implied terms of the agreement between the parties or by established practice in the relevant sector, were meant to be borne by that party rather than the counterparty.”

Committee’s Observation

The Committee acknowledged Bowmans' proposal but was of the view that the provision was appropriate and adequate.

208. **Bowmans** proposed amending Section 40B(2)(g) to read as follows;

“demands for preferential terms that are substantially unfavourable to the counterparty and that are not objectively justified by reference to the volume, value, timing, or other legitimate commercial characteristics of the transaction, or by the counterparty's own competitive offering; or demanding limitations on supplies or services to other parties, where such limitations are not objectively justified by the commercial context of the relationship and have the effect of substantially restricting the counterparty's ability to compete in the relevant market”

Committee's Observation

The Committee acknowledged Bowmans' proposal but was of the view that the provision was appropriate and adequate.

209. **Bowmans** proposed amending Section 40B(2)(h) to read as follows

“imposing purchase prices significantly below the prevailing market price for comparable goods or services in the relevant market or service fees significantly above the prevailing market rate for comparable services in the relevant market, where the counterparty has no viable alternative and the pricing is not objectively justified by the commercial characteristics of the transaction, including the volume, quality, or timing of the supply.”

Committee's Observation

The Committee acknowledged Bowmans' proposal but was of the view that the provision was appropriate and adequate.

210. **Bowmans** proposed amending Section 40(B)(2)(i) to read as follows;

“collection or processing of data of the counterparty in contravention of applicable data protection legislation or, where no such legislation directly applies to the conduct in question, collection or processing of data that is not reasonably necessary and not objectively justifiable for the performance of the transaction or the provision of the service and that causes or is likely to cause competitive harm to the counterparty in the relevant market.”

Committee's Observation

The Committee acknowledged Bowmans' proposal but was of the view that the provision was appropriate and adequate.

211. **Bowmans** proposed amending Section 40B(2)(j) to read as follows;

“imposing conditions for the termination of service that are substantially more onerous than those that would be expected in comparable commercial relationships in the relevant sector, and that are not objectively justified by the nature of the service, by relationship-specific investments made by the party imposing such conditions, or by the terms expressly agreed between the parties.”

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provision was appropriate and adequate.

212.**Bowmans** proposed amending Section 40B(2)(k) to read as follows; *“deliberate obstruction of the core business activities of a counterparty, or unwarranted interference in the management of the business of a counterparty, other than conduct that is —*

- (i) expressly authorised by the terms of the agreement between the parties;*
- (ii) reasonably necessary for the protection of the legitimate commercial interests of the party concerned, including the protection of intellectual property, brand standards, or product quality; or*
- (iii) required by applicable law or regulation.”*

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the provision was appropriate and adequate.

New Proposal

213.**Bowmans** proposed inserting a new section 40B(2)(l): *“refusal to receive or return any goods or a material part thereof without objectively justifiable reason in breach of agreed contractual terms, other than a refusal that is attributable to the nonconformity of the goods with the contractual specification or to the counterparty’s failure to comply with agreed delivery terms.”*

Committee’s Observation

The Committee acknowledged Bowmans’ proposal but was of the view that the proposal fell outside the scope of abuse of superior bargaining position.

214.**Bowmans** proposed inserting a new section 40B(2)(m): *“bidding up prices of inputs to a level significantly above the prevailing market price for such inputs, where such conduct has the purpose or likely effect of substantially restricting the ability of competing undertakings to access those inputs in the relevant market, and where such conduct is not objectively justified by the party’s genuine commercial requirements for those inputs.”*

Committee's Observation

The Committee acknowledged Bowmans' proposal.

Clause 9 (40B (3-4))

215. **Kinyeru Mwago** proposed amending the clauses to expressly require that, where the Authority develops a sector-specific code of practice for ride-hailing or similar platform-mediated transport, registered Driver and Rider associations shall be recognised as mandatory consultative stakeholders, and not merely notified after the code is drafted.

Committee's Observation

The Committee acknowledged Kinyeru Mwago's proposal and noted that this could be addressed during implementation.

Clause 9 (sections 40B (4))

216. **PwC** proposed amending the Bill to resolve the contradiction between Sections 4(7) and 40B(4)(b) by making clear what standard applies when the Authority assesses complaints of abuse of superior bargaining position.
217. According to PwC, the two provisions contradict each other: section 4(7) says market position is irrelevant to Superior Bargaining Position, while section 40B(4)(b) requires it to be considered when assessing abuse of Strategic Bargaining Position. Section 40B(4)(b) lists "the position of the undertaking in the market" as a factor the Authority must consider when determining complaints about abuse of Strategic Bargaining Position. However, proposed section 4(7) expressly states that establishing Strategic Bargaining Position does not require proof of dominant market position or market power.

Committee's Observation

The Committee acknowledged PwC's proposal.

218. **Kinyeru Mwago** proposed that this test should be supplemented with a non-exhaustive list of sector-relevant dependency indicators, including: algorithmic deactivation risk, absence of portable ratings or reputational history across platforms, and platform control over fare-setting mechanisms. This will assist the Authority in applying the test consistently across future ride-hailing complaints.

Committee's Observation

The Committee acknowledged Kinyeru Mwago's proposal but was of the view that being specific might make the Act narrow in scope, thus defeating its objects.

Clause 9 (sections 40A (7) & 40B (6))

219.**PwC** proposed amending the Bill to clarify the mental element (mens rea) required for criminal liability under sections 40A (7) and 40B (6). Additionally, consider whether criminal sanctions are proportionate for all forms of buyer power abuse and Strategic Bargaining Position abuse, or whether they should be reserved for the most serious cases.

220.**PwC** submitted that the use of criminal sanctions (including imprisonment) for what are essentially commercial/ competition law matters is a significant policy choice. Criminal liability typically requires proof of fault (mens rea) to a higher standard. The Bill does not specify whether intent, knowledge, or negligence is required for conviction.

Committee's Observation

The Committee acknowledged PwC's proposal and noted that the need for criminalization serves a deterrent purpose. Further, this is consistent with the principal Act where prohibited conduct has been criminalized (for instance under restrictive trade practices, abuse of dominant position and merger control).

Clause 9 (section 40B (6))

221.**KAM** proposed amending by deleting the criminal sanctions under section 40B(6) and replace with administrative penalties, in line with the enforcement framework under section 91A. Alternatively, the stakeholder is of the view that criminal sanctions be limited to the most egregious cases, such as: deliberate, repeated, or systematic contraventions; demonstrable harm to competition or to a counterparty; and non-compliance with a prior administrative order issued by the Authority. According to the stakeholder, an administrative enforcement approach would be more proportionate and better aligned with the nature of the conduct regulated under the ASBP provisions.

Committee's Observation

The Committee acknowledged KAM's proposal and noted that the need for criminalization serves a deterrent purpose. Further, this is consistent with the principal Act where prohibited conduct has been criminalized (for instance under restrictive trade practices, abuse of dominant position and merger control).

222. **Bowmans** proposed amending the Clause on the criminal sanctions in proposed section 40B(6) by deleting and replacing with administrative penalties, in line with the enforcement mechanism introduced in proposed section 91A. In the alternative, if the Authority considers that criminal sanctions should be retained for the most egregious forms of ASBP, the provision should be narrowed so that criminal liability attaches only to deliberate, repeated, or systematic contraventions that cause demonstrable harm to competition or to a counterparty, and only after the Authority has first issued an administrative order which has been contravened.

Committee's Observation

The Committee acknowledged **Bowmans'** proposal and noted that the need for criminalization serves a deterrent purpose. Further, this is consistent with the principal Act where prohibited conduct has been criminalized (for instance under restrictive trade practices, abuse of dominant position and merger control).

223. **Bowmans** proposed that the mandatory minimum agreement terms currently set out in section 24A(7) of the Principal Act be carried over into proposed section 40A.

Committee's Observation

The Committee acknowledged the stakeholder's proposal and recommended that the clause should be amended to provide for mandatory minimum agreement terms as follows—

“40B. (7) An agreement between a buyer undertaking and a supplier undertaking shall include—

(a) the terms of payment;

(b) the payment date;

(c) the interest rate payable on late payment;

(d) the conditions for termination and variation of the contract with reasonable notice; and

(e) the mechanism for the resolution of disputes.”

New Proposal

224. **Hon. Rading** proposed inserting a new section 40D under clause 9 to read:

"40D.(1) Any person who suffers loss or damage as a result of conduct prohibited under this Act shall have a right to institute civil proceedings in the Competition Tribunal or a court of competent jurisdiction for -

- (a) recovery of the loss or damage suffered;
- (b) an injunction to prevent the continuation of the prohibited conduct; and
- (c) such other relief as the court or Tribunal may deem just and equitable.

(2) A consumer body recognised under this Act may institute proceedings on behalf of two or more consumers who have suffered loss or damage arising from the same prohibited conduct, without requiring the individual authority of each affected consumer.

(3) In awarding damages under this section, the court or Tribunal may award exemplary damages where the prohibited conduct was deliberate or reckless, having regard to the extent of the harm caused and the need to deter similar conduct.

(4) The right of action under this section shall not be extinguished or defeated by the absence of a prior finding, investigation, or determination by the Authority. The findings of the Authority in any prior investigation shall, however, be admissible as evidence in proceedings under this section.

225. The stakeholder submitted that the proposed amendment would give practical effect to Articles 22 and 46 of the Constitution by enabling persons who suffer loss from anti-competitive conduct to institute proceedings and seek compensation directly. The stakeholder further observed that, without a private right of action, these constitutional guarantees remain ineffective within the competition law framework. The stakeholder also argued that representative proceedings instituted by recognised consumer bodies would facilitate access to justice where individual losses are minimal but collectively substantial, as is often the case in consumer markets.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal but was of the view that it required further consultation.

226. **KBA** proposed amending Clause 9 by inserting a new provision under Part IIIA as shown below—

40D. Objective justification

In determining whether conduct constitutes unfair market conduct, abuse of buyer power or abuse of superior bargaining position, the Authority shall consider the commercial, contractual and regulatory context of the conduct, including the nature of the relationship, availability of viable alternatives, material harm, transparency, contractual basis, objective justification and any applicable legal, supervisory, regulatory or contractual obligations.

Lawful collection, use or processing of data in accordance with data-protection law, contractual terms, consent or another lawful basis shall not, without evidence of competitive material harm or abusive conduct, constitute unfair market conduct.

40F. Graduated enforcement

For a first contravention, the Authority shall first issue a warning, compliance direction, remedial notice or other administrative measure, unless the conduct is deliberate, repeated, fraudulent or causes substantial harm.

Criminal prosecution shall be reserved for deliberate, repeated or serious contraventions, or wilful failure to comply with a binding direction after a reasonable opportunity to respond and remedy the contravention.

227. They noted that technical or first-time contraventions may attract disproportionate enforcement action despite causing little or no competitive harm. Graduated enforcement would promote proportionality by encouraging corrective action for minor breaches while reserving criminal sanctions for deliberate or serious non-compliance, thereby strengthening regulatory certainty and reducing unnecessary compliance burdens.

Committee's Observation

The Committee acknowledged KBA's proposal but was of the view that it required further consultation.

228. **Hon. Rading** proposed inserting a new section 40E under clause 9 to read:

"40E. (1) A person who holds a dominant position or a strategic market position in a market shall not charge prices for goods or services that are excessive or unfair in relation to the economic value of those goods or services.

(2) In determining whether a price is excessive or unfair under subsection (1), the Authority shall consider —

(a) whether the price charged bears a reasonable relationship to the cost of producing or supplying the goods or services, including a reasonable return on investment;

(b) the prices charged for comparable goods or services in comparable competitive markets within or outside Kenya;

(c) the effect of the pricing on consumer welfare, household incomes, and access to essential goods or services; and

(d) whether the price materially undermines the constitutional rights of persons under Article 43 of the Constitution, including access to food, healthcare, water, and housing.

(3) Excessive or exploitative pricing shall be a matter of particular concern where it occurs in markets for essential goods and services including food and agricultural products,

medicine and healthcare, housing, water, energy, transport, and digital communications services.

(4) A person who contravenes subsection (1) commits an offence and shall be liable to an administrative penalty of up to ten per cent of the annual gross turnover of the undertaking in Kenya in the preceding financial year, or to such other remedies as the Authority may impose under section 91A of this Act."

229. The stakeholder was of the view that excessive pricing by dominant firms undermines the socio-economic rights guaranteed under Article 43 of the Constitution. The stakeholder further noted that similar provisions exist in several jurisdictions and that Kenya's constitutional framework, which recognizes socio-economic rights as justiciable, provides a stronger basis for introducing an excessive pricing provision.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal but was of the view that the proposal required further consultation.

230. **Hon. Rading** proposed inserting a new section 40F under clause 9 to read:

"40F. (1) In applying the provisions of this Act relating to abuse of superior bargaining position under section 40B, the Authority shall give particular regard to the vulnerability of small and medium enterprises and the disproportionate impact that such abuse has on their viability and the livelihoods of their employees.

(2) For the purposes of this section, 'small and medium enterprise' has the meaning assigned to it under the Micro and Small Enterprises Act.

(3) Without prejudice to the generality of section 40B, conduct that constitutes abuse of superior bargaining position against a small or medium enterprise includes

—
(a) imposing payment terms exceeding sixty days from the date of delivery of goods or the provision of services, without the prior written consent of the small or medium enterprise;

(b) requiring a small or medium enterprise to purchase goods or services exclusively from a specified supplier as a condition of maintaining a commercial relationship;

(c) demanding retrospective price reductions after goods have been delivered or services rendered;

(d) requiring a small or medium enterprise to contribute to the costs of wastage, shrinkage, or product returns beyond what was expressly agreed at the time of contracting; and

(e) using the threat of delisting, contract termination, or reduction of orders as a means of extracting concessions not provided for in the original agreement.

(4) *The Authority shall publish and maintain a Small Business Protection Advisory on its official website, setting out in plain language the rights of small and medium enterprises under this Act and the procedure for lodging complaints, and shall update the Advisory at least annually.*

(5) *The Authority shall designate a Small and Medium Enterprise Desk within its complaints office, responsible for receiving, triaging, and fast-tracking complaints from small and medium enterprises, and shall resolve such complaints within sixty days of receipt, subject to extension by written notice to the complainant where the complexity of the matter so requires."*

231. The stakeholder was of the view that SMEs are a key driver of employment and economic activity, and that exploitative conduct by dominant commercial partners threatens their sustainability. The stakeholder further noted that the proposed 60-day payment standard would help address SMEs' cash flow challenges, while a dedicated SME desk with expedited timelines would provide timely regulatory intervention, consistent with practices in comparable jurisdictions.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal but was of the view that it required further consultation.

Clauses 9 and 14

232. LSK submitted that the new provisions on abuse of buyer power, superior bargaining position and administrative enforcement do not expressly provide a right of appeal to the Competition Tribunal. The Stakeholder stated that an express right of appeal would avoid disputes over whether the right is implied and safeguard access to justice under Article 48 of the Constitution. They recommended an insertion of an express provision confirming that a person aggrieved by a decision of the Authority under Part IIIA or section 91A may appeal to the Tribunal, so as to remove reliance on an inferred *mutatis mutandis* application.

Committee's Observation

The Committee acknowledged LSK's proposal.

Clause 9: Proposed section 40B

233. **EY** proposed the inclusion of the following definition:

"Superior bargaining position" means a position of commercial advantage held by an undertaking in relation to another undertaking, which enables the undertaking to materially influence or determine the terms and conditions of a transaction in a manner that the other undertaking cannot reasonably resist or avoid without

suffering significant commercial disadvantage, irrespective of whether the undertaking holds a dominant position in a market.

234. **EY** further recommended that, in determining whether an undertaking possesses a superior bargaining position, strategic market position or market power, the Authority should consider the following objective factors:

- a) the availability of alternative suppliers, customers, service providers or trading partners;
- b) the degree of economic dependence of one party upon the other;
- c) the relative bargaining strength of the parties;
- d) the extent to which one party can impose terms unilaterally;
- e) the costs and practical ability of switching to alternative trading partners;
- f) the undertaking's control over access to markets, data, technology, infrastructure or customers; and
- g) any other relevant factor demonstrating a substantial imbalance in bargaining power.

235. The Stakeholder further recommended the incorporation of interpretative guidance and objective assessment criteria drawn from international best practice to distinguish legitimate commercial influence from conduct that constitutes abuse of superior bargaining position.

Committee's Observation

The Committee acknowledged EY's proposal and recommends that subsection (6) be amended to provide as follows—

'A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.'

Clause 9: Proposed section 40B(4)(d)

236. **EY** submitted that the Bill requires the Competition Authority, when determining complaints relating to abuse of superior bargaining position, to consider whether the party under investigation is an unavoidable trading partner or a critical business partner in the relevant market. The stakeholder recommended that the following definitions be inserted after section 40B:

237. For purposes of paragraph (d):

"Unavoidable trading partner" means an undertaking for which there are no reasonably available alternative suppliers or purchasers within the relevant market.

“Critical business partner” means an undertaking upon which another undertaking is substantially dependent for access to an essential input, distribution channel, customer base or market opportunity.

Committee’s Observation

The Committee acknowledged EY’s proposal.

Clause 10

238. **The OAG** noted that the proposed amendment seeks to include privatization of Government agencies and state corporations under the definition of mergers. They proposed clarifying on how privatization of Government agencies would result in mergers.

Committee’s Observation

The Committee acknowledged the stakeholder’s proposal and made the following observations—

- (i) Privatization of government entities is a competition law matter, particularly because selling state-owned assets or monopolies can heavily impact market dynamics, create private monopolies, or consolidate industry power. Therefore, privatisation needs to be pursued in tandem with competition-enhancing policy and the design of an adequate post-privatisation regulatory framework.**
- (ii) There exists no overlap between the merger control under the competition regime and the procedural and administrative functions of the Privatization Authority.**

239. **ALN Kenya** proposed that the proposed amendments to Section 41(2) be supplemented with the following:

- (i) A co-ordination mechanism requiring the Authority to conduct its review in consultation with the Privatisation Authority established under the Privatisation Act (No. 18 of 2025), and limiting the Authority's review to the competitive effects of the privatisation rather than the merits of the underlying government policy decision.**
- (ii) An expedited review timeline for privatisation transactions, which the Cabinet Secretary may prescribe by notice and which should not exceed thirty days.**

240. **ALN Kenya** submitted that the extension of merger control to privatizations serves a legitimate purpose of ensuring that the transfer of state-owned assets to private ownership is reviewed for its effects on competition. However, the stakeholder cited some practical issues. First, both the Authority (under the Competition Act)

and the Privatisation Authority (under the Privatisation Act, No. 18 of 2025) will have overlapping roles in relation to the same transaction. Second, the standard merger review process can be lengthy. Government privatisation transactions are subject to investor timelines and fiscal obligations that may not accommodate a standard review period. An expedited review track is necessary to ensure that merger control does not become an obstacle to the Government's privatisation programme.

Committee's Observation

The Committee acknowledged the ALN's proposal and made the following observations—

- (i) Privatization of government entities is a competition law matter, particularly because selling state-owned assets or monopolies can heavily impact market dynamics, create private monopolies, or consolidate industry power. Therefore, privatisation needs to be pursued in tandem with competition-enhancing policy and the design of an adequate post-privatisation regulatory framework.**
- (ii) There exists no overlap between the merger control under the competition regime and the procedural and administrative functions of the Privatization Authority.**

241.**PwC** proposed amending the Bill to clarify the interaction between the Competition Act merger control regime and the Privatization Act, including which authority has primacy and how processes should be sequenced. Additionally, consider whether modified timelines or procedures are needed for privatisation transactions. Finally, clarify whether section 42(3) (merger without approval has no legal effect) applies to privatisations, and if so, address the practical implications.

242.The stakeholder submitted that bringing privatisations under merger control is a significant policy choice that requires coordination with the existing privatisation framework. Without clarity on the interaction between the two regimes, there is a risk of conflicting processes, delays, and legal uncertainty about the validity of privatisation transactions.

Committee's Observation

The Committee acknowledged PwC's proposal and made the following observations—

- (i) **Privatization of government entities is a competition law matter, particularly because selling state-owned assets or monopolies can heavily impact market dynamics, create private monopolies, or consolidate industry power. Therefore, privatisation needs to be pursued in tandem with competition-enhancing policy and the design of an adequate post-privatisation regulatory framework.**
- (ii) **There exists no overlap between the merger control under the competition regime and the procedural and administrative functions of the Privatization Authority.**

243. **KPMG** proposed amending the provision by clarifying that privatization transactions shall only be notifiable where the applicable merger notification thresholds under the Competition Act are met. They stated that, although the Bill treats the privatization of Government agencies and State corporations engaged in trade as mergers, it does not clarify the applicable notification thresholds, timing requirements or whether the existing merger thresholds continue to apply. Limiting notification to transactions that meet the prescribed thresholds would avoid unnecessary merger filings for small privatization transactions and enhance transaction certainty.

Committee's Observation

The Committee acknowledged the stakeholder's proposal and made the following observations—

- (i) **Privatization of government entities is a competition law matter, particularly because selling state-owned assets or monopolies can heavily impact market dynamics, create private monopolies, or consolidate industry power. Therefore, privatisation needs to be pursued in tandem with competition-enhancing policy and the design of an adequate post-privatisation regulatory framework.**
- (ii) **There exists no overlap between the merger control under the competition regime and the procedural and administrative functions of the Privatization Authority.**

244. **WeCare** submitted that privatisation or partial divestiture of a State corporation should undergo a public-interest assessment. They recommended that the assessment cover valuation, data sovereignty, affordability and long term fiscal

impact and that the report be published and tabled before the relevant Committee of the National Assembly before approval.

Committee's Observation

The Committee acknowledged WeCare's proposal but was of the view that this matter is properly addressed in the Privatization Act (No. 18 of 2025).

245. **KBL** proposed that the proposal be retained subject to the introduction of clear notification thresholds, expedited review timelines and an appropriate de minimis threshold for qualifying transactions.

Committee's Observation

The Committee acknowledged KBL's proposal and noted that these procedural details could be provided for in the rules and guidelines.

Clause 11

246. The **IEA** submitted that there is the need to ensure that the product representation adheres to stated or set standards. In other countries, a product package portrait shows the exact size of its contents thereof. According to IEA, this would be aimed at ensuring consumers get value for money, and accurate descriptions for their product or service acquisitions.

Committee's Observation

The Committee acknowledged IEA's proposal.

247. **PwC** proposed amending the Bill to

- i. define "material information" or provide guidance on what information must be disclosed to avoid liability under the new sub-clause (c).
- ii. clarify sub clause (a), which appears to contain a drafting error.
- iii. Finally, consider whether the positive disclosure obligation should be limited to specific categories of goods or services, or to information that affects consumer safety or purchasing decisions.

248. **PwC** submitted that a positive disclosure obligation is a significant regulatory burden that requires clarity about its scope. Without a definition of "material information", undertakings cannot know what they are required to disclose, and enforcement becomes arbitrary. Further, the stakeholder observed that the Bill had unclear drafting of sub clause (a) which requires correction.

Committee's Observation

The Committee acknowledged PwC's proposal and was of the view that the provisions were adequate.

249.**KBA** proposed amending the provision by adding the following:

Provided that, where the good or service in question is a financial product or service regulated under the Banking Act, the Insurance Act, the Capital Markets Act, the Sacco Societies Act or any other financial sector legislation, and disclosure requirements applicable to that product or service are prescribed by the relevant financial sector regulator, compliance with those disclosure requirements shall be a defense to a charge under this section, without prejudice to the Authority's power to refer the matter to the relevant regulator.

250.They highlighted that the Bill may subject regulated financial institutions to duplicative enforcement by both the Competition Authority and sector regulators in relation to the same disclosure obligations. Therefore, compliance with sector-specific disclosure requirements would promote coordinated financial consumer protection, reduce overlapping enforcement and inconsistent regulatory outcomes, while preserving the Authority's power to refer matters to the relevant sector regulator where appropriate.

Committee's Observation

The Committee acknowledged KBA's proposal and was of the view that the provisions were adequate.

251.**WeCare** submitted that the clause should also cover misleading conduct in digital and app based transactions. They recommended that the clause expressly include algorithmic pricing, hidden fees and automatic renewal of subscriptions.

Committee's Observation

The Committee acknowledged PwC's proposal and was of the view that the provisions were adequate.

252.**KBL** proposed amending the proposal by

(a) delete proposed paragraph (a)(vii);

(b) amend paragraph (b)(vi) to

read: "...concerning any other relevant information in connection with the supply or promotion of goods or services that would be likely to affect a reasonable consumer's transactional decision"; and

(c) to provide: "...withholds material information on the quality or use of a good or service, where 'material' means information that would be likely to affect an average consumer's transactional decision, and the withholding is intentional or reckless."

Committee's Observation

The Committee acknowledged KBL's proposal but was of the view that the proposals in the clause were adequate.

Clause 11 (c)

253.**ALN** proposed amending the proposed Section 55(c) so that 'material information' means

'Information that a reasonable consumer would consider significant in deciding whether to acquire or use a good or service, including safety warnings, limitations on use, and expiry information.'

254.Further, amend the provision by inserting the word "knowingly" before "withholds", so the provision reads: -

"(c) knowingly withholds material information on the quality and use of a good or service."

255.ALN Kenya submitted that as drafted, Section 55 prohibits false and misleading representations but does not require a trader to disclose anything thus the new paragraph (c) introduces a positive disclosure obligation. Further, adding the word "knowingly" limits the offence to deliberate concealment, which is the conduct the provision is aimed at.

Committee's Observation

The Committee acknowledged ALN's proposal and was of the view that the provisions were adequate.

256.**Hon. Rading** proposed inserting the following paragraphs under clause 11 under the proposed paragraph (c) of section 55 to read as follows:

"(d) fails to disclose clearly and prominently to the consumer before the point of purchase or commitment —

(i) the total price payable by the consumer inclusive of all applicable fees, charges, taxes, platform levies, and other costs;

(ii) the basis on which personalised or algorithmically determined pricing has been applied, where the price offered to the consumer differs from the standard or advertised price;

(iii) the existence and terms of any subscription, automatic renewal, or recurring charge that will be applied after an initial purchase or trial period; and

(iv) the terms and conditions, including any penalties or restrictions, applicable to the cancellation, exit, or termination of a service or subscription; or

(e) uses data collected from or about the consumer to set a personalised price for goods or services without having first obtained the consumer's freely given, specific, informed, and unambiguous consent to the use of their personal data for pricing purposes, consistent with the requirements of the Data Protection Act, 2019."

257. The stakeholder was of the view that hidden charges, drip pricing, and algorithmically determined personalised pricing are common consumer abuses in the digital economy. The stakeholder further noted that requiring pre-purchase price disclosure and aligning the provisions with the Data Protection Act would enhance consumer protection, promote informed consumer choice, and give effect to Article 46(1)(b) of the Constitution.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal and was of the view that the proposal needed further consultation.

Clause 12

258. **The State Department for Trade** proposed developing transparent regulations prescribing the circumstances under which commitments and settlement agreements may be accepted. Lack of clear criteria for accepting commitments may result in inconsistent application.

Committee's Observation

The Committee acknowledged the proposal by the State Department for Trade.

259. **Transparency International** proposed amending the Clause to introduce statutory timelines for investigations and periodic reporting on consumer welfare investigations. They submitted that the Bill does not establish timelines within which investigations should be concluded, potentially affecting administrative efficiency and access to justice.

Committee's Observation

The Committee acknowledged Transparency International's proposal and observed that the provisions of section 31 in the principal Act together with rules 34 to 40 of the Competition (General) Rules, 2019 were adequate and that implementation of the provisions allows for compliance with Article 47 of the Constitution.

260. **PwC** proposed inserting a definition of "consumer welfare matters" that sets out the types of issues the Authority may investigate under this provision. This should

clarify whether the term extends beyond individual complaints to include market studies, thematic investigations, or systemic issues affecting consumers. The stakeholder observed that the Bill does not define what “consumer welfare matters” means, and other new provisions in the Bill continue to use the word “complaints”. Without a definition, the scope of the Authority’s expanded powers is unclear.

Committee’s Observation

The Committee acknowledged PwC’s proposal and noted that the provision was adequate.

- 261.**KBA** proposed amending the provision by introducing a statutory coordination framework requiring the Competition Authority to consult and, where appropriate, coordinate with the relevant sector regulator before commencing enforcement action against a regulated entity in matters falling within the mandate of both regulators. The stakeholder further recommended establishing a framework for information sharing, referral of matters and avoidance of duplicative investigations and enforcement proceedings. They noted that regulated entities may be subjected to parallel investigations, overlapping compliance requirements and inconsistent regulatory outcomes in the absence of a formal coordination mechanism.

Committee’s Observation

The Committee acknowledged KBA’s proposal and was of the view that this is already provided for in the Act in sections 5(3) and 9(1)(m).

- 262.**KBL** proposed amending the provision to require that the Authority may only initiate an own-motion investigation where it has reasonable grounds, supported by credible information, to believe that a consumer welfare concern exists.

Committee’s Observation

The Committee acknowledged KBL’s proposal but was of the view that the proposal would unnecessarily inhibit the Competition Authority from carrying out its functions.

Clause 13

- 263.**The State Department for Trade** proposed introducing statutory timelines for determining appeals while safeguarding due process. Lengthy appeal processes may delay implementation of important competition remedies.

Committee’s Observation

The Committee acknowledged the proposal by the State Department for Trade, noting that section 40 of the Competition Act, Cap. 504, does not address this.

264.PwC proposed defining

- i. how gross annual turnover is to be calculated for penalty purposes, specifying whether it refers to Kenyan or worldwide turnover, entity level or group level turnover, and whether it is limited to the relevant market or product line.
- ii. Additionally, clarify the interaction between section 89 (criminal penalty for non-compliance) and section 91A (administrative penalty) can both apply to the same conduct.
- iii. Finally, review whether summary recovery of administrative penalties as civil debt (section 91A (3)) provides adequate due process protections, particularly the right to be heard before enforcement.

265.PwC submitted that under Article 24 of the Constitution, any limitation of rights must be proportionate. A penalty framework that does not clearly define the turnover base risks imposing disproportionate sanctions, particularly on large diversified enterprises whose group-wide turnover may bear little relation to the conduct in question.

Committee's Observation

The Committee acknowledged PwC's proposal and observed that statute does not contain legal and procedural provisions to guide enforcement of the Competition Authority's decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution of Kenya and the Fair Administrative Action Act, to ensure the Authority's actions are lawful and procedurally fair. Enforcement recovery will be done in deserving cases where there has been administrative and civil exhaustion of available remedies.

The proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. Determination of penalty to be imposed even under current provisions is guided by guidelines that stipulate how the Authority exercises discretion.

266.**KPMG** was of the view that the proposed turnover-based penalty should be retained while requiring the Court or the Authority to consider objective statutory criteria, including the nature, gravity and duration of the contravention, before determining the appropriate penalty. They observed that the Bill introduces a penalty of up to ten per cent of an undertaking's gross annual turnover without prescribing the factors to guide its application, which may result in disproportionate penalties for procedural, technical or inadvertent non-compliance.

Committee's Observation

The Committee acknowledged KPMG's proposal and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. Determination of penalty to be imposed even under current provisions is guided by guidelines that stipulate how the Authority exercises discretion.

267.**KBA** proposed amending the provision by replacing the proposed penalty framework with one that limits liability to a person who, without reasonable cause, wilfully fails to comply with a lawful order, direction or decision of the Authority, and by reducing the penalty to the lower of one per cent of the undertaking's relevant turnover in Kenya or one hundred million shillings.

268.The stakeholder further proposed defining "relevant turnover", prescribing a minimum compliance period of thirty days, introducing a right of appeal to the Competition Tribunal with an automatic stay pending determination of the appeal, and requiring the Court or Tribunal to consider factors such as the nature, gravity and duration of the non-compliance, the harm caused, the undertaking's level of culpability, cooperation, remedial measures and previous infringements when determining the appropriate penalty. They proposed that the proposed penalty of up to ten per cent of an undertaking's gross annual turnover is disproportionate for failure-to-comply offences, particularly where compliance may involve operational, contractual or regulatory complexities rather than deliberate disregard of the Authority's orders.

Committee's Observation

The Committee acknowledged the KBA's proposal and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. Determination of penalty to be imposed even under current provisions is guided by guidelines that stipulate how the Authority exercises discretion.

269. **LSK** submitted that the penalty based on gross annual turnover may not be applicable to every "person" covered by section 89 because some persons may not carry on commercial activities or have measurable turnover. The stakeholder stated that a penalty provision should be capable of consistent application to every person falling within its scope. LSK recommended the amendment of section 89 to align the scope of liability with the penalty framework by either limiting the offence to "undertakings"; or providing an alternative penalty mechanism for persons who are not undertakings, such as a specified monetary penalty.

Committee's Observation

The Committee acknowledged the LSK's proposal and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. The determination of the penalty to be imposed, even under current provisions, is guided by guidelines that stipulate how the Authority exercises discretion.

270. **EY** submitted that the proposed fine of up to ten percent of an undertaking's gross annual turnover is punitive and may result in disproportionate sanctions where it is imposed solely on the basis of turnover. EY stated that the amendment does not provide objective criteria to guide the determination of the appropriate penalty and may expose undertakings to substantial fines that do not reflect the nature, gravity, duration or impact of the contravention. They further submitted that the existing legal framework already provides adequate enforcement mechanisms and allows courts to impose sanctions that are fair and proportionate to the circumstances of each case. The stakeholder recommended that the proposed amendment be deleted.

Committee's Observation

The Committee acknowledged EY's proposal and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. The determination of the penalty to be imposed, even under current provisions, is guided by guidelines that stipulate how the Authority exercises discretion.

271. **FKE** recommended that the words "*and shall be liable on conviction to a fine of up to ten percent of the undertaking's gross annual turnover of the preceding year*" be deleted and replaced with the words "and shall be liable to such administrative action provided for in section 91A of the Act". FKE stated that the Bill already provides several administrative enforcement measures that may be exercised by the Authority. Enforcement should therefore not be limited to monetary penalties.

Committee's Observation

The Committee acknowledged the FKE's proposal and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders. The phrase "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. The determination of the penalty to be imposed, even under current provisions, is guided by guidelines that stipulate how the Authority exercises discretion.

272. **KBL** proposed amending the provision to-

- (a) clarify that turnover refers only to turnover derived from Kenya;
- (b) introduce an appropriate monetary cap as an alternative to the percentage-based penalty; and
- (c) clarify that the administrative penalty applies as an alternative to, and not cumulatively with, criminal sanctions arising from the same conduct.

Committee's Observation

The Committee acknowledged KBL's proposal but was of the view that the proposed amendment in the Bill was adequate.

Clause 14

273. **ALN Kenya** proposed that Section 19A be amended to provide a minimum notice period of at least 30 days before any enforcement hearing and must specify the provision alleged to have been contravened, the facts relied upon and the proposed enforcement action. Additionally, Section 91A (3) should expressly provide that a penalty imposed by the Authority shall not be enforced, whether by way of asset attachment, garnishment, third-party notices to financial institutions, or any other coercive measure, until either:

(a) the period for appeal to the Competition Tribunal has expired without an appeal having been filed; or

(b) the Tribunal or the High Court has issued an order confirming the enforceability of the penalty. Enforcement without judicial or tribunal confirmation would risk violating Articles 40, 47 and 50 of the Constitution of Kenya, 2010, and would expose the Authority to constitutional challenge.

274. **ALN Kenya** submitted that allowing the Authority to enforce a penalty immediately before an appeal has been heard or a court has confirmed the decision effectively renders the right of appeal meaningless.

Committee's Observation

The Committee acknowledged ALN Kenya's proposal and noted that the statute does not contain legal and procedural provisions to guide enforcement of its decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution and the Fair Administrative Action Act, to ensure the Authority's actions are lawful and procedurally fair.

275. **KBA** proposed amending the Clause by adding subsection 91B as follows:

91B. Procedural safeguards

(1) Before taking administrative enforcement action, the Authority shall issue a written notice to the affected person stating the alleged contravention, the evidence and legal basis relied upon, the proposed enforcement action or penalty, and the period within which the person may respond.

(2) The affected person shall be given reasonable access to the evidence relied upon by the Authority, subject to confidentiality, data protection and legal privilege requirements.

(3) The affected person shall be given a reasonable opportunity to make written representations and, where a material penalty or remedy is proposed, oral representations.

(4) The Authority shall issue its final decision in writing, with reasons, within a reasonable period.

(5) A person aggrieved by a decision of the Authority may appeal to the Competition Tribunal within thirty days of service of the decision.

(6) The filing of an appeal shall stay enforcement of the decision pending determination of the appeal, unless the Tribunal determines that a stay would cause serious and imminent harm to competition, consumers or the public interest.

276. They highlighted that the Authority's expanded administrative enforcement powers may expose undertakings to disproportionate, duplicative or premature sanctions without adequate due process protections. Additionally, the proposed amendments would strengthen transparency, accountability, procedural fairness and regulatory certainty while preserving the Authority's ability to enforce the Act effectively and proportionately.

Committee's Observation

The Committee acknowledged KBA's proposal and noted that the statute does not contain legal and procedural provisions to guide enforcement of its decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution and the Fair Administrative Action Act, to ensure the Authority's actions are lawful and procedurally fair.

277. **Multichoice Kenya** noted that calculating penalties based on an undertaking's total turnover may result in disproportionate sanctions for multi-product or multi-service businesses where the infringement relates to only one business segment. In their view the Authority should take into account the nature, duration and extent of the infringement, the economic significance of the affected business segment and any mitigating or aggravating factors, including the degree of cooperation. Therefore, the stakeholder proposed amending the provision by requiring the Authority, when determining administrative penalties under section 91A, to consider the relevant line of business or activity in which the infringement occurred and to ensure that penalties are proportionate, reasonable and linked to the affected market or conduct. reflects the actual harm caused and provides greater certainty for businesses operating across diverse markets.

Committee's Observation

The Committee acknowledged the proposal by Multichoice Kenya and noted that the proposed penalty is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders.

The phrase “up to ten percent” provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. The determination of the penalty to be imposed, even under current provisions, is guided by guidelines that stipulate how the Competition Authority exercises discretion.

278.**LSK** submitted that the power to suspend, revoke or vary a right, benefit or privilege is not supported by clear criteria, procedures or proportionality safeguards. LSK stated that clear safeguards are necessary because suspending or revoking a right or privilege is a serious administrative action that must comply with Article 47 of the Constitution.

279.The stakeholder recommended amendment of section 91A to set out clear criteria and procedures for the Authority’s exercise of the power to suspend, revoke or vary rights, benefits or privileges, including prior notice, an opportunity to respond, proportionality of the action taken and written reasons for the decision. The provision should also provide for a right of appeal to the Competition Tribunal against any decision made under section 91A.

Committee’s Observation

The Committee acknowledged LSK’s proposal and noted that the statute does not contain legal and procedural provisions to guide enforcement of its decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution and the Fair Administrative Action Act, to ensure the Authority’s actions are lawful and procedurally fair.

280.**WeCare** supported the proposal. They recommended that two per cent of the penalties recovered be set aside for consumer education, market inquiries, competition research and digital literacy.

Committee’s Observation

The Committee acknowledged WeCare’s proposal and noted that the proposal would require further consultation.

281.**KBL** proposed retaining the administrative enforcement framework, subject to the following amendments;

- (a) clarify that the turnover threshold refers to -gross annual turnover derived from Kenya;

(b) introduce statutory criteria to guide the Authority in determining the appropriate level of any administrative penalty, including the gravity and duration of the infringement, the undertaking's degree of cooperation, any remedial measures taken, previous compliance history and the proportionality of the sanction; and

(c) expressly provide for a right of appeal to the Competition Tribunal against any administrative penalty imposed under this section.

Committee's Observation

The Committee acknowledged KBL's proposal and observed that the proposed new section 91A(2)(c) clarifies that the turnover threshold is the gross annual turnover in Kenya. The Committee further noted that the statute does not contain legal and procedural provisions to guide enforcement of its decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution of Kenya and the Fair Administrative Action Act, to ensure the Competition Authority's actions are lawful and procedurally fair.

Clause 14 (91A) (2) (c)

282. **KPMG** proposed amending Clause 14, by inserting a new Sub-clause to read:

(2ca) Notwithstanding subsection (2c), where the undertaking or undertakings have previously been found to have engaged in a prohibited practice under this Act, the Authority may impose an administrative penalty of up to twenty-five per cent of the immediately preceding year's gross annual turnover in Kenya and its exports of the undertaking or undertakings in question.

283. They noted that this would ensure that administrative penalties are proportionate to the full scale of an undertaking's commercial activities and strengthen the deterrent effect of the enforcement framework. Additionally, this will empower the Authority to impose an administrative penalty of up to twenty-five per cent of the immediately preceding year's gross annual turnover in Kenya and its exports where an undertaking has previously been found to have engaged in a prohibited practice under the Act

Committee's Observation

The Committee acknowledged KPMG's proposal.

New Proposals

284. **ALN Kenya** propose that a new transitional clause be inserted in the following terms:

"(1) During the twelve months immediately following the commencement of this Act (the 'transitional period'), no person shall be liable under section 40B in respect of conduct arising from an agreement entered into before commencement, provided the parties review the agreement in good faith and bring it into compliance within the transitional period.

(2) During the transitional period, the Authority shall publish compliance guidelines on each category of conduct prohibited under section 40B and shall provide an accessible mechanism through which undertakings may seek informal guidance on compliance.

(3) Any investigation commenced under section 24A of the principal Act before commencement shall be continued and concluded as if section 24A had not been repealed."

285. ALN Kenya submitted that existing commercial arrangements, supply contracts, platform terms, distribution agreements, were entered into in the absence of the proposed provisions such as those in the New Part IIIA. Many will need to be reviewed and potentially amended to achieve compliance. Immediate application from the date of commencement gives businesses no time to carry out that review. Beyond commercial practicality, the position is also legally problematic.

Committee's Observation

The Committee acknowledged ALN Kenya's proposal.

Clause 14(4)

286. **Transparency International** proposed amending the Clause to limit residual enforcement powers by clearly defining permissible administrative actions. Further, strengthen procedural safeguards by requiring notice of intended action, disclosure of evidence, opportunity to respond, written reasons, and an express right of appeal to the Competition Tribunal. **TI-Kenya** submitted that while subsection (4) requires fair administrative action before penalties are imposed, the Bill does not provide detailed safeguards regarding notice, access to evidence, timelines or appeals. The Authority may also take "any other administrative enforcement action," which is broad and may result in uncertainty.

Committee's Observation

The Committee acknowledged Transparency International's proposal and noted that the statute does not contain legal and procedural provisions to guide enforcement of its decisions and recovery of unpaid penalties and fees. These provisions are intended to cover that gap. There are appropriate safeguards built into the Act, the Constitution of Kenya and the Fair Administrative Action Act, to ensure the Authority's actions are lawful and procedurally fair.

287. **Hon. Rading** proposed inserting a new subsection to the proposed 91A under clause 14 to read:

"(5) The Authority shall, upon receipt of a formal complaint or upon commencing an investigation on its own motion, complete its investigation and issue a determination within

-

(a) ninety days for matters involving abuse of superior bargaining position against a small or medium enterprise, abuse of buyer power, or a consumer welfare matter; and

(b) one hundred and eighty days for all other matters arising under this Act, subject to a single extension by the Director-General of not more than sixty additional days, where the complexity of the matter requires, provided that written reasons for the extension are given to all parties within seven days of the extension being granted.

(6) Where the Authority fails to issue a determination within the period specified in subsection (5) and any extension granted thereunder, the complainant may apply to the Competition Tribunal for an order compelling the Authority to complete the investigation and issue a determination within such further period as the Tribunal may specify.

(7) The Authority shall publish on its official website a quarterly public accountability report disclosing -

(a) the total number of complaints received in the quarter;

(b) the number of investigations opened, completed, and pending;

(c) a summary of determinations made and penalties imposed, with the name of the undertaking concerned where a finding of contravention has been made;

(d) the average time taken to resolve complaints in the quarter; and

(e) the number of matters in which the prescribed timelines were not met and the reasons therefor.

(8) The Authority shall table the quarterly report before the National Assembly Committee responsible for matters relating to trade and industry within thirty days of the end of each quarter."

288. According to the stakeholder, timely competition enforcement and mandatory public reporting would uphold the constitutional right to fair administrative action under Article 47. The stakeholder further noted that the proposal would enhance accountability, improve transparency, and strengthen public confidence in the competition regulatory system.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal and noted that this could be addressed in regulations.

289. **Hon. Rading** proposed inserting a new section 91B under clause 14 to read:

91B (1) There is established a fund to be known as the Consumer Compensation Fund (the 'Fund').

- (2) *The Fund shall consist of —*
 - (a) *twenty-five per cent of all administrative penalties and fines collected by the Authority under this Act;*
 - (b) *monies appropriated by the National Assembly for the purposes of the Fund;*
 - and*
 - (c) *any other monies lawfully received by or on behalf of the Fund.*
 - (3) *The Fund shall be applied for the purpose of —*
 - (a) *compensating consumers who have suffered quantifiable loss as a result of conduct prohibited under this Act, in cases where individual recovery through litigation is impractical due to the small value of individual claims or the large number of affected persons;*
 - (b) *funding consumer education, awareness and outreach programmes, with particular emphasis on reaching rural, low-income, and vulnerable populations;*
 - and*
 - (c) *providing financial support to recognised consumer bodies to bring enforcement proceedings under this Act on behalf of affected consumers.*
 - (4) *The Authority shall establish and publish procedures for the administration of the Fund, including the manner of lodging claims, the evidence required to substantiate a claim, and the basis for computing and distributing compensation.*
 - (5) *The accounts of the Fund shall be maintained separately from the Authority's general funds, audited annually by the Auditor-General, and the audit report made publicly available on the Authority's official website."*
290. The stakeholder stated that allocating a portion of competition fines to consumer compensation would align enforcement with justice by ensuring that consumers harmed by anti-competitive conduct receive compensation, while maintaining an appropriate balance with the Authority's resource requirements.

Committee's Observation

The Committee acknowledged Hon. Rading's proposal and noted that it would require further consultation.

New Proposals

291. Transparency International proposed

- i. Strengthening transparency obligations by requiring publication of non-confidential regulatory decisions, market studies, enforcement reports, and regulatory guidelines.
- ii. Introducing stronger accountability mechanisms requiring periodic reporting by the Competition Authority to Parliament on enforcement activities and market outcomes. Establish objective statutory criteria governing the

- exercise of discretionary regulatory powers to promote consistency and legal certainty.
- iii. Strengthening procedural safeguards by guaranteeing notice, consultation, hearings where appropriate, reasoned decisions, and effective appeal mechanisms.
 - iv. Enhancing safeguards protecting the institutional independence of the Competition Authority while strengthening parliamentary oversight.
 - v. Ensuring that implementation of the Bill fully complies with the Constitution of Kenya, particularly the principles of transparency, accountability, participation, integrity, consumer protection, and fair administrative action.

Committee's Observation

The Committee acknowledged the proposal by Transparency International.

292.Hon. Rading proposed deleting Section 9(1)(c) of the Act and inserting the following new subsection:

"(c) promote public knowledge, awareness and understanding of the obligations, rights and remedies under this Act and the duties, functions and activities of the Authority, and for this purpose the Authority shall -

- (i) publish and freely distribute consumer rights guides in Kiswahili and English, and in such other languages as may be prescribed by the Cabinet Secretary, setting out in plain and accessible language the rights of consumers and small businesses under this Act and the procedure for lodging complaints;*
- (ii) conduct not less than four public consumer awareness campaigns per calendar year, designed to reach both urban and rural populations including through community radio, social media, and collaboration with county governments and community-based organisations;*
- (iii) establish and maintain a toll -free consumer complaints and advisory helpline, accessible to all persons in Kenya at no charge, staffed during normal working hours and capable of receiving complaints, providing guidance, and directing callers to the appropriate remedy; and*
- (iv) partner with county governments, public schools and tertiary institutions, and civil society organisations to integrate consumer rights and competition law awareness into public education and civic programmes.*

(1A) The Authority shall allocate not less than ten per cent of its approved annual budget to consumer education, awareness, and outreach activities. The Authority shall include in its annual report to the National Assembly a detailed account of expenditure under this subsection and the reach and impact of the activities undertaken."

293. According to the stakeholder, strengthening consumer awareness through a toll-free helpline, Kiswahili educational materials, and dedicated funding for consumer education would improve access to competition enforcement, particularly for rural consumers. The stakeholder further argued that these measures would promote the constitutional rights to information and public participation under Article 46(1)(b).

Committee's Observation

The Committee acknowledged the proposal by Hon. Rading.

New Provision

294. **KPMG** recommended that the Competition Authority be required to publish clear enforcement guidelines and objective assessment criteria for the new competition provisions, promote transparency, procedural fairness and stakeholder participation in the implementation and enforcement of the proposed amendments, and enhance coordination among sector regulators while providing for periodic review of the legislative framework to ensure that it remains responsive to evolving market and technological developments. It was submitted that these measures would strengthen regulatory certainty, improve enforcement and ensure that the competition framework remains responsive to emerging market developments.

Committee's Observation

The Committee acknowledged KPMG's proposal.

CHAPTER FOUR

4 OBSERVATIONS OF THE COMMITTEE

295. The Committee, having considered submissions received and held meetings on the Competition (Amendment) Bill (National Assembly Bill No. 4 of 2026), made the following observations:

(1) Object of the Bill

296. The principal object of this Bill is to amend the Competition Act, Cap. 504, to broaden the mandate of the Competition Authority in addressing anti-competitive conduct in digital markets and unfair market conduct arising from the abuse of superior bargaining position.

(2) Regulation of digital activities within the competition law sphere

297. Digital activity refers to the conduct, operations, or business practices carried out in a digital environment. It usually describes behaviour that may affect competition. This may include data collection, algorithmic ranking, targeted advertising, self-preferencing, interoperability decisions, and data sharing.

298. The definition of “digital activity” in the Bill is borrowed from the United Kingdom’s Digital Markets, Competition and Consumers Act 2024, in which section 3 defines “digital activities” as “the provision of a service by means of the internet”, among other things.

299. Digital service refers to the digital product, platform, or functionality that is offered to users or businesses. It focuses on what a firm provides and usually describes the market or platform where competition occurs. This may include search engines, social networking services, app stores, online marketplaces, cloud computing, operating systems, messaging services, and digital advertising services.

300. It is envisaged that to operationalize the provisions, pursuant to section 93 of the Competition Act, Cap. 504, the Cabinet Secretary, in consultation with the Competition Authority, will make rules in consultation with the stakeholders. The Committee was therefore of the view that the definition was adequate.

301. It will be imperative that the Rules be developed in a consultative manner, taking into consideration the views of the stakeholders in this report and when the Rules are developed, and subjecting them to the National Assembly’s processes in the scrutiny of delegated legislation.

(3) Strategic market position in a digital market

302. Strategic market position (SMP) in a digital market as a concept in the Bill is different from “a dominant position” in the sense that dominance is not a relevant consideration when considering strategic market position.
303. The purpose of strategic market position in a digital market is to address firms that are not dominant but are still in a position to abuse their strategic position.
304. The prohibition of abuse of strategic market position is consistent with Regulation 38 of the COMESA Competition and Consumer Protection Regulations, 2025 and Article 11 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy.
305. It will be important that, if the Bill is passed, rules and guidelines be developed in consultation with stakeholders to clarify the concept in greater detail.
306. The Bill has not provided for the prohibition of abuse of strategic market position in a digital market, hence there is need to amend the Bill to provide for this.
307. To address the stakeholder’s concerns, there is need to amend the Bill to provide for two additional sections on criteria for designation of an undertaking as having strategic market position in a digital market and prohibited practices by undertakings with strategic market position in a digital market.

(4) Abuse of superior bargaining position

308. Abuse of superior bargaining position, or abuse of economic dependence in competition regimes and space across the world, contains three critical elements: (1) power dynamics between trading parties where one is at a disadvantage; (2) the party at an advantage is not necessarily “dominant”; (3) economic dependence of one party to the other and the lack of alternatives.
309. The context within which an “imbalance” arises is where the circumstances of a complaint disclose an abuse of the rights between the trading parties. As earlier observed, dominance is not a relevant consideration when considering abuse of superior bargaining position.
310. It is on this premise that many jurisdictions treat abuse of economic dependence or abuse of superior bargaining position as a standalone prohibition, thus complementing traditional rules on abuse of dominance. The concept aligns Kenya’s

law with international trends, for instance Japan and the EU on unfair trading practices rules.

311. Due to overlap and similarity of provisions between abuse of buyer power in clause 9 in the proposed new section 40A and the proposed new section 40B on abuse of superior bargaining position, the provisions on abuse of buyer power may be deleted without loss of protective mechanisms embedded in the abuse of buyer power provision.

312. To address stakeholders' concerns under clause 3 in the proposed new subsection (6) where subjective terms such as "viable" and "satisfactory" have been used, there is a need to relook at the provision to make it objective.

313. The proposed amendment to subsection (6) is as follows—

A person has a superior bargaining position in a market if the person creates a significant imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty is dependent on the person in such a way that sufficient and reasonable possibilities for switching to third parties do not exist.

(5) Privatization of Government Entities

314. Privatization of government entities is a competition law matter, particularly because selling state-owned assets or monopolies can heavily impact market dynamics, create private monopolies, or consolidate industry power. Therefore, privatisation needs to be pursued in tandem with competition-enhancing policy and the design of an adequate post-privatisation regulatory framework.

315. There exists no overlap between the merger control under the competition regime and the procedural and administrative functions of the Privatization Authority.

(6) Summary recovery of administrative penalties as civil debt

316. The statute does not contain legal and procedural provisions to guide enforcement of the Competition Authority's decisions and recovery of unpaid penalties and fees. The provisions in the Bill are intended to cover that gap. There are appropriate safeguards built into the Competition Act, Cap. 504, the Constitution of Kenya and the Fair Administrative Action Act, to ensure the Authority's actions are lawful and procedurally fair. The Authority will only enforce recovery in deserving cases where there has been administrative and civil exhaustion of available remedies.

(7) 10% turnover penalty for failure to comply with an order

317. The proposed penalty in the proposed new section 91A(2)(c) in clause 14 of the Bill is intended to serve as a deterrent and discourage non-compliance with the Competition Authority's orders.

318. The phrase, "up to ten percent" provides the Authority with the bandwidth to accommodate both mitigating and aggravating factors prior to pronouncing a penalty. The determination of the penalty to be imposed, even under current provisions, is guided by guidelines that stipulate how the Competition Authority exercises discretion.

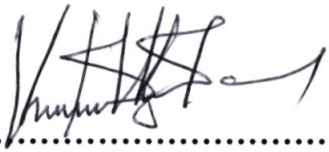
(8) Publication of rules, guidelines and codes of practice

319. It will be important that, if the Bill is passed, rules, guidelines and codes of practice be developed in consultation with stakeholders, which will incorporate the proposals by stakeholders to clarify various aspects in the Bill in greater detail. This will ensure that the Competition Authority carries out its mandate effectively while commercial activities, innovation, and businesses are unhindered by regulatory bottlenecks.

CHAPTER FIVE

5 COMMITTEE RECOMMENDATION

299. The Committee, having considered the Competition (Amendment) Bill (National Assembly Bill No. 4 of 2026), recommends that the House **approves the Bill with the amendments.**

SIGNED..........DATE.....10th Aug 2026

HON. FCPA KURIA KIMANI, CBS, MP
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL
PLANNING

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 12 AUG 2026	
DAY: Wednesday	
TABLED BY:	Vice Chairperson Hon. Benjamin Lange (CBS, MP)
CLERK-AT THE-TABLE:	Halima Ahmed

