



PRESS RELEASE

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## **LATEST DECISIONS BY THE COMPETITION AUTHORITY OF KENYA**

### **1. Key decisions on mergers and acquisitions**

#### **1.1 Proposed Acquisition Of 90% Of The Issued Share Capital Of Panthera Publishers Limited By Ramco Plexus Limited.**

The Competition Authority of Kenya has approved, with conditions, Ramco Plexus Limited's proposed acquisition of 90% of the issued share capital of Panthera Publishers Limited.

Ramco Plexus is a holding and financing company for various entities controlled by Ramco in Kenya.

These subsidiaries are engaged in various activities including manufacturing of paper packaging products such as corrugated cartons, hard and soft paper printing, production and labeling of permitted industrial polythene packages.

Panthera Publishers, a Kenyan firm, is involved in the printing and supply of diaries, notebooks, journals, and organizers as well as digital printing. The company is only involved in soft paper printing, making this the **relevant market** in which the proposed merger was evaluated.

Panthera outsources hard paper printing from various suppliers.

Based on the Significant Lessening of Competition (SLC) criteria, the market share of the merged entity will be approximately 14% and is therefore not likely to lessen or distort competition in the sector.



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The merged entity's market share will still be low when compared to other major players in the sector such as English Press Limited, Longhorn Publishers, Icon Printers Limited, Printwell Industries Limited and Modern Lithographic Limited.

These firms collectively control approximately 33% of the market and will therefore, in the Authority's view, help sustain competition even after the merger is consummated.

The CAK's assessment also showed that the soft paper printing industry has low barriers to entry and, therefore, more players are at liberty to join the market and enhance competition.

Based on public interest considerations, the Authority deemed it necessary to salvage the jobs of 21 Panthera Publishers employees in the merged entity. The proposed transaction was therefore approved on condition that these workers are not laid off.

## **2. Key decision on exemptions**

### **2.1 Rejection of Exemption Application by Institute of Certified Public Secretaries of Kenya (ICPSK) to Fix Governance Audit Fee Guidelines**

The CAK has rejected an exemption application by the Institute of Certified Public Secretaries of Kenya (ICPSK) to issue new governance audit guidelines to its members on the grounds that the proposed rules contain anticompetitive clauses.

The ICPSK, which is made up of approximately 3,500 members, is a statutory body mandated to develop and regulate the Public Secretaries' Profession in Kenya.

The body is also mandated to promote the practice of good governance and leadership through competence development of its members and dissemination of knowledge to stakeholders.

The professional association, in an application dated August 11, 2017, argued that, since governance audit is a new service in Kenya, fee guidelines would ensure auditors concentrate on growing it as opposed to competing on pricing.

ICPSK further stated that setting of minimum fees chargeable for various services will provide a fair play ground for all practitioners, preventing undercutting which lowers standards.

In the association's view, the proposed fees guidelines would also eliminate illegal practitioners from the sector. The exemption sought was for 10 years.



The anticompetitive clauses in the ICPSK's proposed guidelines are;

- i. Providing minimum recommended fees to be charged by its ICPSK members on various subsectors of the economy;
- ii. Monitor prevailing conditions and issuing revised recommended fees as and when there is need; and
- iii. Provide a fair play ground for all practitioners by providing the minimum fees charged for different corporate governance services to prevent undercutting in the industry.

Section 29 (2) of the Competition Act No. 12 of 2010 however permits the CAK to exempt all or part of a professional association's anticompetitive rules if they are necessary to maintain the professional standards of the profession or maintain its ordinary function.

Section 29 (2) of the Competition Act No. 12 of 2010 also empowers the Authority to allow anticompetitive behavior by undertakings in instances where there are compelling and exceptional public interest considerations, having regard to internationally applied norms.

It is the Authority's considered opinion that price fixing by professional associations extinguish competition with no plausible public benefits

Based on International Best Practice considerations, the CAK concluded that setting of minimum prices will not incentivize innovation, efficiencies, or technical progress aimed at reducing costs. It is the Authority's position that the proposed guidelines are only meant to protect the minimum returns to the Auditors devoid of competition.

The CAK's view is that the association did not provide evidence to show that price fixing will improve the profession or prevent its decline as spelled out in Section 29 (2) of the Competition Act No. 12 of 2010.

The CAK's opinion is that the proposed guidelines also fell short of meeting the conditions set out in Section 29 (2) of the Competition Act No. 12 of 2010 as they did not contain compelling arguments that they are required to maintain Professional Standards and the ordinary function of the Profession.

The decision to reject the Institute's exemption application sends a strong message to professional bodies that fee guidelines decrease competition, reduce innovation and efficiencies, and limit customer choice



## **2.2 Rejection of exemption application by WOW Beverages to enter into exclusive agreements with its international suppliers.**

The CAK has rejected an exemption application by WOW Beverages in which the firm was seeking to enter into exclusive distributorship agreements with seven international suppliers.

Through an application dated December 11, 2017, WOW Beverages sought an exemption from the Authority which would see the company sign exclusive distributorship agreements for an indefinite period.

WOW Beverages is a Kenyan company importing premium beverages including wines, spirits and sparkling water. Some of its products are; Jack Daniels, Famous Grouse, Macallan, and Bacardi-Martini, Catena and, Waterford.

Upon review of the proposed contracts, the anticompetitive clauses agreements include;

- A. The manufacturer grant the distributor the exclusive right, privilege and responsibility of purchasing, importing, promoting, distributing, and selling the products in and throughout the designated territory.
- B. During the contract period, the manufacturer should not;
  - i. Appoint any other person as its distributors for the sale of products in the designated territory; or
  - ii. Supply, either by itself or through an agent any of the products to any other person in the designated territory;
  - iii. Supply any of the products to any other person outside the designated territory that the manufacturer knows or ought to reasonably know that such products are intended for onward sale in the designated territory.
- C. The distributor is prohibited from advertising, promoting or otherwise actively seeking customers for the products directly or indirectly outside the designated territory.
- D. The distributor is prohibited from directly or indirectly selling, offering to sell or shipping any products to anyone outside the designated territory for delivery or resale other than for subsequent resale within the designated territory.



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- E. Wholesale prices shall be determined by the manufacturer on an annual basis taking into account the revenue management principles and recommended distribution margin per product.

WOW Beverages' justification for the proposed deal is that it will protect local consumers from defective products and guarantee accountability in the event that such products enter the Kenyan market.

The distributor also argued that exclusivity rights will guarantee protection of the company's significant investment toward ensuring compromised or adulterated products do not infiltrate the market.

The Competition Act No.12 of 2010 prohibits agreements, decisions and concerted practices which divides markets by allocating customers, suppliers or specific types of goods and limits or controls production, market outlets or access, technical development or investments.

However, the CAK can exempt undertakings from these provisions if, by doing so, the agreement will contribute to or result in;

- i. Maintaining or promoting exports,
- ii. Improving, or preventing decline in the production or distribution of goods or the provision of services,
- iii. Promoting technical or economic progress or stability in any industry, and
- iv. Obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result from the agreement.

WOW Beverages justifications were tested against the aforementioned thresholds as well as international best practice.

The CAK's assessment concluded that goods sold by unauthorized dealers are not necessarily of inferior quality and therefore potentially injurious to consumers. Consumer deception would only occur if lower quality parallel imports were marketed as legitimate.



While producers normally do not exercise control over parallel traders, our assessment is that they have to compete with formal distributors and will do their best to provide genuine products, stay in the market and win over as many consumers as possible.

Imported products are also subject to controls by competent Government authorities such as Kenya Bureau of Standards, Kenya Revenue Authority and Anti-Counterfeit Agency that ensure compliance with several statutory requirements including safety.

The CAK's view is that WOW Beverages neither provided evidence of decline of the industry resulting from parallel importation nor did it demonstrate how these imports would lead to the loss of their investment.

The Authority is of the opinion that parallel imports, through legal channels, are likely to bring more benefits to Kenyan consumers, including the enhancement of intra-brand competition which often leads to lower prices.

The CAK declined the exemption application by WOW Beverages on these grounds.

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