



Law for National and Regional Competition and Regulation in Eastern African Region: Capacity Building Programme

PROGRAMME

Competition Authority of Kenya

18 – 20 August 2015

Venue: Fairview Hotel, Nairobi, Kenya

The three-day course is targeted at staff of competition authorities and regulators in East Africa who are involved in investigating and deciding on conduct of firms. The course will cover:

- Key legal concepts in regulation and the challenges facing legal practitioners, investigators and analysts in applying these to particular sectors and markets.
- Legal and practical guidance on initiating an investigation and obtaining evidence, including through subpoenas and summonses, conducting on-site inspections and search and seizure operations, as well as holding interviews and interrogations.
- Issues in writing investigation reports, holding hearings and matters related to confidentiality and privilege and the challenges that could arise.
- Procedural and practical issues with negotiating settlements and resolving disputes, litigation strategies and tactics.
- Pertinent issues of concurrent jurisdiction between competition and regulatory authorities.

The course will be facilitated by highly experienced academics and practitioners including *Professor Jonathan Klaaren* (professor at the School of Law at the University of the Witwatersrand and former Director of the Nelson Mandela Institute at WITS), *Ms Wendy Ndlovu* (Manager in the Office of the Commissioner and former Chief Legal counsel at the Competition Commission of South Africa), *Mr Makgale Mohlala* (Divisional Manager of the Cartels Division at the Competition Commission of South Africa) and *Professor Patricia G. Kameri-Mbote* (Professor of Law and Dean at the School of Law, University of Nairobi and an advocate of the High Court of Kenya).

For each major topic, the sessions will include:

- presentation on the key legal principles, with reference to selected cases;
- application in a hypothetical case scenario, based on actual cases;
- wrap-up of the main points.

DAY 1: 18 August 2015

0800 Registration

0830 Welcome and introduction

- Introduction to competition policy and law, and the main areas of enforcement
- Introduction to economic regulation and legal rationales for regulation
- The natural monopoly problem; externalities and network economies

Approaches to economic regulation and competition

0900 - 1015 Legal status, mandate & structure of economic regulators & competition authorities

- Different international models
- Considering statutory powers of regulators and their exercise
- Why regulations, policies and guidelines are necessary
- The likely bases for substantive and procedural challenges
- Discussions of examples and learning from experience

1030 - 1130 Break away session: Case studies for discussion on challenges faced by regulators

- Short scenarios illustrating key debates and challenges, stimulating discussion amongst participants from their own experience. These will highlight issues, many of which will be addressed in more detail during the course, including:
 - Links of regulatory decisions and policy
 - Overlapping jurisdiction
 - Different tests that can be applied
 - Respondent's rights (to hearing etc.)
- Consideration of intrinsic challenge of decision-making with incomplete information

1130 - 1230 Key take-home points

- Groups present their hypothetical cases
- Summary of key concepts

- lunch -

Legal powers and their exercise

1330 - 1430 Obtaining and disclosing information

- Information requests
- Summons and subpoenas
- Scope and framing
- Interviews and interrogations
- Confidentiality and privilege
- Examples (such as Airtel challenge, Kenya Tea Inquiry, South Africa SCA *Woodlands* decision)

1430 - 1530 Break away session (including tea)

- Hypothetical case studies: Each group will be given a scenario and have to set out initiation, draw up plan for investigation and information gathering; draft information requests/summons

1530 - 1630 Key take-home points

- Groups present their hypothetical cases
- Summary of key concepts

DAY 2: 19 August 2015

Obtaining information through invasive methods

0830 – 0930 Approaching the exercise of invasive powers

- Obtaining warrants for search & seizure
- Meeting challenges – relevance of information and reasonableness of methods used
- Conducting On-site inspections and Search & Seizure: in theory and in practice

0930-1030 Break away session (including tea)

- Hypothetical case studies:
 - Planning search & seizure
 - Running an interrogation

1030-1130 Key take-home points

- Groups present their hypothetical cases
- Summary of key issues

Assessment of evidence

1130-1230 Assessing evidence obtained and making findings – standard of proof

- Administrative & criminal standards
- Applying evidence to meet tests
- Considering alternative explanations
- Due process

- lunch -

Negotiating settlements

1330 – 1500 Negotiating and Settling Complaints and Disputes: Legal and Practical Issues

- Information asymmetries in the negotiating and settling process
- Tactics for negotiation
- Procedural issue with negotiating settlements and resolving disputes
- Substantive effects of settlement and dispute resolution
- Examples: Tuskys/Ukwala case; Safaricom case (regulatory matters?); SA SCI Fertilizer case

1515 - 1600 Break away session

- Hypothetical case studies: Each group will be given a scenario and asked to formulate a tactical plan to negotiate and settle a complaint or dispute involving action by an economic regulator

1600 - 1630 Key take-home points

- Groups present their hypothetical cases
- Summary of key concepts

DAY 3: 20 August 2015

Public hearings & Institutional design

0830 - 1015 Conducting a formal public hearing

- Hearings: the parties, the discovery process, the evidence, cross examination
- Writing-up decisions and reasons: Chair/presiding officer; ex parte contacts, impartiality and bias; internal separation of powers; recommendations and multistage decision-making
- Findings, conclusions and reasons requirements

1030 - 1130 Break away session

- Hypothetical case studies: Each group will receive a record of a mock public inquiry and will need to make and write up a decision on an issue of competition law or economic regulation

1130 - 1230 Key take-home points

- Groups present their hypothetical cases
- Summary of key concepts

- Lunch -

Challenging decisions of competition authorities and economic regulators in courts

1330 – 1430 Judicial Review

- Obtaining judicial review: Jurisdiction, standing and timing
- Scope of judicial review: the record, appeals and reviews
- Remedial powers and Discretion

1430 - 1530 Break away session

Case studies: groups will engage with case studies on litigation strategy and tactics

1530 - 1630 Key take-home points

- Groups present their hypothetical cases
- Summary of key concepts

Main facilitators

	<p>Professor Patricia Kameri-Mbote is a professor of Law and Dean at the School of Law, University of Nairobi. She is an Advocate of the High Court of Kenya and was conferred the rank of Senior Counsel in 2012. She has served as Chair of the Department of Private Law and Acting Dean at the School of Law, University of Nairobi. She has also served as the Director of Research and Policy Outreach and Acting Executive Director at the African Centre for Technology Studies, Nairobi. She was a member of the Committee of Eminent Persons appointed by His Excellency the President of Kenya in February 2006 to advise the government on the way forward for the stalled constitution review process. Prof. Kameri-Mbote earned her doctorate from Stanford University in 1999 specializing in property rights and environmental law. She had earlier studied law in Nairobi, Warwick and Zimbabwe. She currently teaches Women, Access to Resources and the Law at the Southern and Eastern Africa Research Centre on Women’s Law (SEARCWL); Property Theory, Property Law and Law and Development at the School of Law, University of Nairobi. She has published widely in the areas of international law, environmental law, women's rights and property rights. Her research interests include public international law, environment and natural resources law and policy, human rights, women's rights, intellectual property rights, biotechnology policy and law and economic law.</p>
	<p>Professor Jonathan Klaaren is a professor at the School of Law at the University of the Witwatersrand. He is the former Director of the Mandela Institute (mid-2005 to end-2007) and the former co-Director of the School of Law's Winter Law School (2007-2009), conducted with Seattle University School of Law. Klaaren has served on numerous university committees and editorial boards. Klaaren co-authored two books on South African administrative and access to information law and co-edited two books on SA refugees law. He organized the Law and Society Association Summer Institute, 2006. He was a founding member of WISER, 2001-2002 and received University of the Witwatersrand Young Researcher's Award (Friedel Schellschop Award) in 1998. His research interests are in four broad areas and include international and comparative public law and human rights, citizenship and migration law, transnational regulation (including trade and investment law), and socio-legal studies (including legal history and the legal profession). Jonathan holds a PhD from Yale, MA from the University of Cape Town, JD from Columbia, LLB from the University of the Witwatersrand and BA from Harvard.</p>
	<p>Wendy Ndlovu is the Manager in the Office of the Commissioner and former Chief Legal Counsel at the Competition Commission and head of the Legal Services division. The legal services division provides legal support and advice to the Commission, which includes conducting litigation on behalf of the Commission. The bulk of the division’s work comes from the Commission’s mergers and acquisitions, and enforcement work. As well managing the Commission’s legal division and liaising with external legal advisors and counsel Wendy advised the Commissioner on critical legal questions. During her time at the Commission Wendy has been involved in the major cases undertaken and settlements reached, including with companies such as Telkom, Sasol, SAA and SAB-Miller.</p>



Makgale Mohlala joined the Commission in 2000. He is currently the Divisional Manager of the Cartels Division. The Division is responsible for the investigation of cartels cases and the administration of the Commission's Corporate Leniency Policy. Prior to that, he was a Principal Cartels Investigator in the Division and a Principal Analyst at the Enforcement and Exemptions Division from mid-2008 to July 2014. He has previously held the position of Principal Merger Analyst at the Mergers and Acquisitions Division, a position he occupied from early 2007 to mid-2008. Makgale Mohlala is credited for the establishment of the Cartels Division of the Commission, a division he oversaw at its early stages until it was formally launched. He led teams of investigators in some of the high profile cases investigated by the Commission such as the Cement Cartel investigation and the Construction Fast Track Settlement Project, including the 2010 FIFA World Cup Stadia investigations. Makgale Mohlala has a bachelor's degree in Law (BProc.) from Vista University and an LLM degree in Corporate Law from the University of Pretoria. He is currently pursuing an MBL degree with the University of South Africa.