CCAbulletin

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Issue No. 1 2020

COMPETITION AND CONSUMER AUTHORITY CAUTIONS AGAINST CORONA VIRUS RELATED DECEPTIVE PRACTICES

The Competition and Consumer Authority (CCA) is mandated to provide for the protection of consumers by means of investigation, prohibition and control of unfair business practices. Amidst the corona virus pandemic, the Authority has advised the general public to be cautious of unscrupulous traders and businesses taking advantage of consumers.

The CCA announced that it has received several complaints from the public regarding increase in prices for essential products, including basic food products, healthcare and hygiene products; and dubious products being sold in the market.

In a statement, the CCA said in accordance with Section 5 of the Consumer Protection Act 2018, "a supplier shall not, in relation to the marketing of goods or services, by way of words or conduct falsely represent that (a) that goods are of a particular standard, quality, value, grade, composition, style, model, or that the goods have a particular history or previous use; (c) that goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have. Furthermore, Section 15 (4) of the same Act states that "a supplier shall not supply or offer to supply goods which do not conform to the mandatory safety standards for the class of goods set by the Botswana Bureau of Standards or other international bodies recognised by the Botswana Bureau of Standards'.

In addition, Section 15 (5) states that,' Where the Authority discovers that a supplier is supplying unsafe goods or goods which do not conform to the mandatory safety standards referred to in sub section (4), the Authority may (a) re- call such goods,(b) halt the production, supply, advertisement or importation of such goods, (c) disclose to



the public any information relating to the characteristics of the goods which render those goods unsafe; or (d) direct the supplier to replace the goods, refund any consumer who bought the unsafe goods or compensate the consumer for any damage suffered by the consumer in using the unsafe goods at an amount determined by the Authority.'

The CCA cautioned in the statement that it would take appropriate action against any business or person found to be engaged in deceptive practices or any other trade malpractices in the supply of products intended to fight the corona virus. It further advised the general public to be vigilant and to report any price gouging by distributors/suppliers.

NOTE FROM THE EDITOR

We are pleased to present to you the first issue of the CCA Bulletin, the e-newsletter of the Competition and Consumer Authority (CCA), which has replaced the Competition Authority. The CCA came into being on 2nd December 2019, when the Minister of Investment, Trade and Industry, through an Extraordinary Government Gazette, published the Competition Act, and the Consumer Protection Act Commencement Orders. The day marked the formal transfer of the Consumer Protection Unit under the ministry to the new authority.

The merger saw Botswana following the footsteps of many other jurisdictions in the region and around the world where the enforcement of competition and consumer protection laws is done by one authority.

Through the e-newsletter, the Competition and Consumer Authority will regularly update you on what is happening on the competition and consumer protection fronts in Botswana. the region and internationally. This first edition of the CCA e-newsletter comes in the midst of the corona virus pandemic which has negatively impacted economies, markets and consumers; and has ushered in a new normal in competition law and consumer protection enforcement. It goes without saying that a lot of stories in this edition are corona virus related. We hope you will enjoy our regular updates through this e-publication. As always, your feedback is highly valued and any suggestions and comments can be sent by email to the editorial team.



Payment of Storage Fees During Lockdown Complaints

The Competition and Consumer Authority (CCA) has intervened after being inundated with complaints from the business community and members of the public, whose goods were transported in shipping containers which arrived during the lockdown period and could not be cleared nor collected due to movement restrictions.

The CCA was informed that some shipping line businesses are compelling clients to pay for storage costs (demurrage) during the lockdown phase, which has compounded the economic situation for a lot of the concerned businesses and individuals during this period of slow economic recovery. The Authority, in this regard, amicably intervened in a number of complaints related to payment of storage of containers, and announced that Mediterranean Shipping Company (Botswana), the market leader, graciously agreed to waive all demurrages fees and released the containers they held. The CCA encourages businesses and members of the public who are affected by this practice (demurrage) to consult it for resolution.

WORLD CONSUMER RIGHTS DAY 2020 COMMEMORATION

The Competition and Consumer Authority hosted the commemoration of the 2020 World Consumer Rights Day (WCRD) at Lentsweletau. WCRD is commemorated annually on 15th March to raise awareness about consumer rights and unfair business practices which undermine these rights.

Basic consumer rights recognised world-wide include: the right to safety, the right to choose, the right to information and the right to be heard.

The theme for WCRD 2020 commemoration was *The Sustainable Consumer*, highlighting the impact of climate change and the lifestyle changes that consumers can make to

play their part in promoting environmental sustainability.

The commemoration of WCRD drew participation from key stakeholders including consumer groups, the business community, government and local authorities. The Minister of Investment, Trade and Industry, Honourable Peggy Serame officiated at the event.

In her keynote address, Hon. Serame said consumers have an important role to play in realising sustainable consumption, but they cannot do it alone and need the support of businesses and governments to achieve that. To that end, she said government provides an

enabling policy, legislative and institutional framework to give consumers the information, choice and the infrastructure they need to live more sustainable lives.

The minister cited one of these enabling frameworks being the Consumer Protection Act 2018 in that it mandates suppliers to provide consumers with information on goods and services.

Having the relevant information on goods and services is a critical component for promoting sustainability in that it will empower consumers to make the right decisions and appropriate choices on sustainable products, she stated.



Commemoration of World Consumer Rights Day at Lentsweletau



Competition **Authority Transforms** and Adopts a New **Corporate Identity**

he mandate of the Competition Authority widened to include enforcement of the Consumer Protection Act, necessitating the adoption of a new corporate identity including change of name and a new logo.

Consequently, the Authority commissioned a logo design contest on 16th October 2019, in which creative local designers were invited to develop a new logo that would encapsulate the mandate of the new entity - Competition and Consumer Authority.

The contest was open to individual citizens and 100% citizen owned companies, and the winning logo designer was entitled to a cash prize of P20.000.

The Authority received 191 entries from individuals and companies. After a rigorous adjudication exercise by a panel of three judges, Webland Internet Engineers (Pty) Ltd emerged the overall winner.

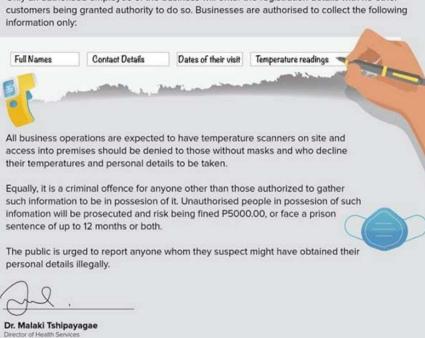
The new Competition and Consumer Authority logo was publicly released on 21st February 2020.



ADVISORY ON REGISTRATION DETAILS OUIRED ACROSS ALL SINESS SECTOR ENTRY

Public and private organizations are reminded to ensure and safeguard personal visitors/customers information contained in COVID-19 registers for purposes of contact tracing.

Only an authorised employee of the business will enter the registration details with no other



BUSINESSES MUST SAFEGUARD PERSONAL INFORMATION IN COVID-19 REGISTERS

The Covid-19 Task Force has called upon businesses, public and private organisations to safeguard customer information obtained for the purposes of contact tracing. According to the registration advisory, businesses are authorised to collect only the following information from a customer: Full names, contact details, dates of visit and temperature readings.



RESTRICTION ON THE IMPORTATION OF CLOTH FACE MASKS

The Minister of Investment, Trade and Industry has announced a restriction on the importation of cloth face masks.

In a news release dated 18th May 2020, the Ministry said in accordance with Section 3 of the Control of Goods, Prices and Other Charges Act, the Minister has ordered that: No cloth face masks shall be imported, and if cloth face masks must be imported, only Small, Medium and Micro Citizen Enterprise may do so using an Import Permit. Further, a person who contravenes these Regulations commits an offence and is liable to a fine of P5000 or imprisonment for a term not exceeding six (6) months, or to both.

Meanwhile, the use of masks/face coverings in public is mandatory. Government issued legislation making it compulsory to wear mask/face coverings in public places, businesses and common areas of residential buildings with effect from 1st May 2020.

Classes of masks deemed acceptable are medical masks (used primarily by health workers and persons working in high risk areas) and non-medical cloth masks or home-made items that cover the nose and mouth.

However, during the state of public emergency, traders are prohibited from selling surgical masks to persons who are not in the medical or health professions or those working in high risk areas.

KNOW YOUR COMPETITION ACT - PART VI

Control of Restrictive Agreements and Dominant Position

Prohibition of Horizontal Agreements

- **25.** An enterprise shall not enter into a horizontal agreement with another enterprise to the extent that such agreement involves any of the following practices —
- (a) directly or indirectly fixing a purchase or selling price or any other trading conditions;
- (b) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
- (c) bid rigging, except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made.

Criminal Sanction for Contravention of Section 25

26. Any officer or director of an enterprise who contravenes section 25 commits an offence and is liable to a fine not exceeding P100 000 or to a term of imprisonment not exceeding five years, or to both.

Prohibition of Vertical Agreements

- **27. (1)** An enterprise shall not enter into a vertical agreement with another enterprise to the extent that the agreement involves resale price maintenance.
- (2) Notwithstanding subsection (1), a supplier or producer may

- recommend a minimum resale price to the reseller of a good or service if —
- (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding;
- (b) the product has the recommended price stated on it and the words "recommended price" appearing next to the stated recommended price.
- (3) Any officer or director of an enterprise who contravenes this section commits an offence and is liable to a fine not exceeding P50 000.

Other Horizontal or Vertical Agreements

- 28. (1) A horizontal agreement or vertical agreement other than the agreement referred to under section 25 or section 27 (1) respectively, may be prohibited by the Authority if, following an investigation by the Authority, such agreement —
- (a) is found to have the object or effect of preventing or substantially lessening competition in a market for goods or services in Botswana;
- **(b)** restrains production or sale, including restraint by quota;
- (c) involves a concerted practice; or
- (d) involves a collective denial of access of an enterprise to which

- is an arrangement or association crucial to competition.
- (2) Without prejudice to the generality of subsection (1), the Authority may prohibit any horizontal agreement or vertical agreement which —
- (a) limits or controls production, market outlets or access, development or investment;
- (b) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (c) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) This section shall not apply to an agreement which, on its own or taken with another agreement —
- (a) constitutes a professional rule;
- **(b)** imposes obligations arising from a professional rule; or
- (c) constitutes an agreement to act in accordance with a professional rule, unless the professional rule constitutes an infringement of section 25 or 27, or is considered to constitute an abuse of dominant position.

Threshold for Determining Prohibition

- **29.** The Authority may carry out an investigation to determine whether the provisions of section 28 (1) should be applied if the Authority is satisfied that the parties to the agreement
 - (a) in the case of a horizontal agreement, together supply a prescribed percentage or acquire a prescribed percentage of goods or services in a market in Botswana; or
 - (b) in the case of a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, a prescribed percentage of goods or services of any description in a relevant market in Botswana.

Interconnected Enterprises

- **30. (1)** Sections 25, 27 (1), 28 (1) and 45 shall not apply to an agreement to which the only parties to the agreement are interconnected parties.
- (2) Where the parties to an agreement are not interconnected parties but nonetheless share some degree of common ownership and control, the Authority shall adopt the presumption that the agreement is subject to sections 25, 27 (1), 28 (1) and 45, unless either one of the enterprises concerned can show good cause why such presumption cannot be sustained.
- (3) For the purposes of this section, bodies corporate are interconnected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

Abuse of Dominant Position

- **31. (1)** Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority, the conduct is determined to amount to an abuse of a dominant position in any market, and such conduct shall include—
 - (a) predatory conduct;
 - (b) tying and bundling conduct;
 - (c) loyalty rebates;
 - (d) margin squeeze;
 - (e) the refusal to supply or deal with other enterprises, including refusal of access to an essential facility;
 - (f) requiring or inducing any customer to not deal with other competitors;
 - (g) discriminating in price or other trading conditions; and
 - (h) exclusive dealing.
- (2) In determining whether an abuse of dominant position has occurred, the Authority may have regard to whether the agreement or conduct in question
 - (a) maintains or promotes exports from Botswana or employment in Botswana;
 - (h) advances the strategic or national interest of Botswana in relation to a particular economic activity;
 - (c) provides social benefits which outweigh the effects on competition;
 - (d) occurs within the context of a citizen empowerment initiative of Government, or otherwise enhances the competitiveness of small and medium sized enterprises; or
 - (e) in any other way enhances the effectiveness of the Government programmes for the development of the economy of Botswana, including industrial development and privatisation.

Threshold for Determining Dominant Position

- **32.** For the purposes of investigating the potential application of the prohibition on abuse of dominant position, the Authority shall consider a dominant position capable of existing in relation to the supply of goods or services of any description if it is satisfied that —
- (a) a prescribed percentage of those goods or services are supplied by one enterprise or are acquired by one enterprise; or
- (b) a prescribed percentage of those goods or services are supplied by three or fewer enterprises or are acquired by three or fewer enterprises.





KNOW YOUR CONSUMER PROTECTION ACT: PART 111

False, Misleading and Deceptive Conduct

Prohibition of False or Misleading Representations

- 5. A supplier shall not, in relation to the marketing of goods or services, by way of words or conduct falsely represent —
- (a) that goods are of a particular standard, quality, value, grade, composition, style, model, or that the goods have a particular history or previous use;
- **(b)** that goods are new or reconditioned;
- (c) that goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have;
- (d) that goods or services have been used for a certain period to an extent or in a manner that is materially different from the facts;
- (e) that goods or services are available or can be delivered within a specified time;
- (f) that an employee, representative or agent of the supplier has the necessary authority to negotiate the terms of an agreement or contract between the supplier and consumer, whilst that employee, representative or agent does not have such authority;
- (g) the price of any goods or services;
- (h) the availability of facilities for the repair of any goods or spare parts for goods within a specified period;
- (I) the place of origin of goods; or
- (j) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Prohibition of Certain Conduct

- 6. (1) A supplier shall not use force, coercion, undue influence, pressure, duress, harassment, unfair tactics or any other similar conduct against a consumer, in connection with:
- (a) the marketing of any goods or services:
- (b) the supply of goods or services;
- (c) the negotiation, conclusion, execution or enforcement of an agreement to supply any goods or

- services; or
- (d) the recovery of goods.
- (2) In addition to any conduct contemplated in subsection (1), a supplier shall not knowingly take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, inability to understand the language of an agreement or contract, or any other similar factor.

Bait Advertising

- 7. (1) A supplier shall not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived as to the actual availability of those goods or services from that supplier, at the advertised price.
- (2) A supplier who advertises goods or services with the intention not to supply the reasonably expected quantity of the goods or services to meet public demand, shall be guilty of an offence and shall be liable upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.
- (3) Subject to the provisions of subsection (2), a supplier shall disclose in an advertisement a limitation in the quantity of goods or services in immediate conjunction with the advertised goods or services.
- (4) A supplier who places an advertisement for goods or services shall be required to include the duration on which the goods or services will be available.
- (5) Where a supplier does not specify the period for which the goods or services advertised will be available, the goods or services shall be deemed to be available for one month from the date of the advertisement.
- (6) Where a supplier and a consumer have entered into a contract for the

- supply of goods or services on the basis of an advertisement, and such goods or services are not availed as advertised, the consumer shall have the right to cancel the contract.
- (7) Where a contract is cancelled in accordance with subsection (6), the supplier shall refund the consumer the amount paid for the goods or services.
- (8) A supplier who engages in any misleading or deceptive advertising commits an offence and shall be liable upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.
- (9) The Authority shall, where a supplier engages in any misleading or deceptive advertising —
- (a) order the supplier to stop the advertisement immediately by removing the misleading advertisement; and
- (b) order the supplier to publish a corrected version of the advertisement in the medium that carried the misleading information.
- (10) Where a supplier under subsection (9) fails to comply, such supplier commits an offence and shall be liable to an offence under subsection (8).
- (11) The Authority shall pursue any voluntary undertaking or assurance of compliance from traders, and enforce undertaking by such traders where there is noncompliance, with subsection (9).

Gifts, Prizes and Free Offers

- **8. (1)** A supplier shall not offer any gift, prize or other free item with the intention of not providing such gift, prize or other free item in the manner it is offered.
- (2) A supplier shall not increase the purchase price of goods, or reduce the quantity or quality of goods or services, on the basis of gifts, prizes or other free items offered for acquiring the goods or services.

Pyramid and Related Schemes

- 9. (1) A person shall not directly or indirectly promote, or knowingly join, enter or participate, or cause any other person to promote, join, enter or participate in
 - (a) a pyramid scheme;
 - (b) a multiplication scheme;
 - (c) a chain letter scheme; or
 - (d) any other scheme declared as such by the Minister in terms of subsection (3).
- (2) For the purposes of this section —
- (a) a "pyramid scheme" is an arrangement, agreement, practice or scheme where participants in the scheme receive compensation derived primarily from their respective recruitment of other persons as participants, rather than from the sale of any goods or services;
- (b) a "multiplication scheme" is an arrangement, agreement, practice or scheme where a person offers, promises or guarantees to a participant an effective annual interest rate that is above the market rate; and
- (c) a "chain letter scheme" is an arrangement, agreement, practice or scheme in which
 - (i) there are various levels of participation,
 - (ii) existing participants canvass and recruit new participants in order to keep the activity on-going, and
 - (iii) each successive newly recruited participant is required to make some form of payment which would be distributed to some of the previously existing participants, irrespective of whether the new participant receives any goods or services in exchange for that ayment.
- (3) The Minister may, by order published in the *Gazette*, declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (1) (d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

Penalties

(4) A person who participates in an arrangement, agreement, practice or scheme under subsection (2) commits an offence and shall be liable, upon conviction, to a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years, or to both.



AFRICAN COMPETITION FORUM COVID-19 STATEMENT

The African Competition Forum (ACF) notes the advent of the COVID-19 pandemic that has ushered in unparalleled universal social and economic pandemonium in recent history. As the coronavirus generally spreads globally, and in Africa in particular, freezing virtually all economies and with an ever-rising number of fatalities and health challenges, African competition authorities are confronted with one of the toughest challenges to their operations and enforcement activities.

In line with measures announced by respective governments to combat COVID-19, including the declarations of disaster and social distancing restrictions, the competition authorities had to effect business continuity plans to ensure delivery of services while safeguarding the health and safety of personnel.

Some agencies have reprioritised their operations and moved deadlines for non-urgent programmes and enforcement, with personnel working remotely from home and all systems virtually automated.

Competition authorities, as part of their advocacy responsibilities, are also assisting their respective governments with regard to regulations and measures that facilitate business coordination to respond to the crisis, which ordinarily would be in breach of competition laws.

This includes the healthcare sector coordinating on increasing the treatment capacity and supply of essential testing and treatment. It also extends to where a coordinated response is needed to the economic crisis, such as debt repayment and rental holidays by banks

and retail property owners.

It is necessary to accommodate such collaboration between competitors in order to minimise the impact of the crisis on the citizens.

While citizens were overwhelmed by panic and fear brought about by the declaration of disaster and lockdowns aimed at containing the spread of the virus, reports of an upsurge in prices of essential items and food stuff began to emerge.

This is the result of some unscrupulous retailers and suppliers who wish to cash in on the calamity by charging exorbitant prices for essential products, in particular face masks and hand sanitiser, but also essential food products ahead of lockdowns.

This has meant that some competition authorities had to join the frontline and aggressively fight price-gouging and excessive pricing. This has required fast track action to stop the exploitative conduct and deter other businesses from following suite.

Various remedial actions are being taken against suppliers and firms found to be contravention of competition laws, including fines and/or donations to relief efforts. In this time, consumers play an important role in assisting to identify and report price gouging by retailers

Aside from enforcement measures, there has been proactive engagement with the grocery retailers, food companies, fresh produce markets, hygiene suppliers and chemical companies to curb unreasonable price increases for the duration of the lockdown period and report any price gouging by distributors/suppliers.

Source: Statement by the African Competition Forum

How Competition Agencies should Reorganise Themselves to Mitigate COVID-19 Impact

The Covid-19 pandemic has occasioned an unprecedented humanitarian and economic crisis across the World whose impact will be felt for quite some time. All stakeholders, including Governments, regulators and other State agencies, have to implement their mandates to ensure that markets remain open, functioning, and competitive. They also need to develop and implement policies that ensure the impact of this crisis is short-lived, while also mitigating its effects.

Recently, heads of Competition agencies across Africa congregated virtually under the auspices of the African Competition Forum (ACF) to deliberate on how we can prepare ourselves for an uncertain future. The meeting also recognised the critical role competition agencies play in ensuring that markets continue functioning competitively.

Competition agencies have in recent weeks attended to infractions like price gouging, abuse of dominance, cartelisation, and abuse of buyer power. The purpose of such conduct is private gain at the expense of consumer welfare and, in the current emergency, is antagonistic to containment efforts. In order to continue playing their role in the post-pandemic era, it was noted that Competition agencies should reconfigure their operations from at least four perspectives; organisational, regulatory capacity, enforcement priorities, and policy advisory role.

Competition agencies should be prepared to work with limited resources due to decreased Government revenues, even as demand for their mandates expand. As a matter of priority, agencies should review their strategic objectives and

refocus their interventions in favour of fewer but highly impactful activities.

They should also enhance collaboration and cooperation with regional Competition agencies and, nationally, with respective sector regulators. Competition agencies should also entrench a culture of Enterprise Risk Management (ERM) and Business Continuity Management (BCM). At the Competition Authority of Kenya, implementation of ERM and BCM, coupled with the digitization of our core mandate processes in mid-2019, is enabling the organisation weather this storm with minimal disruption to service delivery.

However, automation begets risks such as cyber-attacks and breach of client confidentiality and therefore specific measures should be taken to insulate an automated organisation. From a regulatory perspective, it is critical that agencies review their laws to ensure that they are resultsoriented, while at the same time flexible to deal with emergencies. The Competition Act No.12 of 2010 has enabled the Authority attend to supply chain and consumer protection challenges. Agencies should also align their interventions with the country's industrial policy. For instance, Competition agencies need to think about how they can 'lower their guns', albeit momentarily, to support a certain threshold in growth of our nation's industrial capacity.

Competition agencies are likely to experience an upsurge in joint venture applications and distress mergers, more so from the airline industry. It is also expected there will increased merger activity in the online and e-commerce space. On the

flipside, killer mergers could also increase where dominant incumbents seek to acquire upcoming competitors, more so in the digital economy which has become indispensable in the pandemic. Towards this, the Authority has realigned its workforce to enable critical review of all merger applications, but within the law. Further, the Authority is finalising investigations in the retail sector regarding allegations of a few supermarkets failing to pay their suppliers on time, which is against abuse of buyer power provisions under the Competition Act. Unfettered supply of essential commodities to consumers is paramount during a pandemic.

Lastly, the Covid-19 pandemic has seen some countries revert to price controls. As competition agencies, we need to advise our governments that price controls are counterproductive since they ultimately harm consumers, more so by facilitating proliferation of black markets. Quality and safety of goods is also not guaranteed.

Fortunately, the Kenyan government has attended to the market distortions during this pandemic through the forces of supply and demand. Specifically, the Government has ensured that essential supplies in the market are available.

Regulators should not strive to go back to the pre Covid-19 dispensation, in terms of how we organize and manage our agencies, but instead let us embrace the new normal way of doing things that is far from normal.

Source: An opinion piece by Wang'ombe Kariuki -Director-General, Competition Authority of Kenya appeared in the 5th June 2020 edition of the Business Daily



Mr. Wang'ombe Kariuki - Director-General, Competition Authority of Kenya (standing)



THE BUSINESS KRAAL

Every Mondays

1330 hrs to 1400 hrs

On Gabz fm

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