Briefer

Kenya Competition (Amendment) Bill 2026

Kenya's proposed competition law amendments, which are quickly advancing in the National Assembly, would increase regulatory exposure for U.S. digital service suppliers operating in Kenya, as they are likely to be among the principal companies affected by the proposed supplemental rules—given their prominence in Kenya's search, cloud computing, marketplaces, social media, and app store services, which fall within the newly defined category of "digital activity."[1] The stated main purpose of the amendment is "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] To that end, the bill makes three main changes. First, it introduces a new status of "strategic market position", with assessment factors specific to digital markets. The Kenyan National Assembly's Departmental Committee on Finance and National Planning (the Committee), which reviewed the bill, proposes in its report of August 12, 2026, to attach conduct rules based on the EU's Digital Markets Act[3] to that status through a new section 24B. Second, it adds a Japan-inspired concept of "superior bargaining position" alongside the existing concepts of market power and abuse of dominance. Third, it introduces more severe civil and criminal penalties for infractions, as well as binding codes of conduct.[4]

The general constraints on companies enjoying "superior bargaining position" would apply across sectors, alongside the additional conduct rules for designated digital platforms.[5] In neither case is enforcement premised on proof of harm to competition, nor does the bill provide a general defense based on procompetitive benefits.[6]

U.S. policymakers should press Kenya to pause these proposed changes until more robust evidence is presented that the current competition law cannot address concrete, identified harms evident in the market. If inadequacy of the current law is demonstrated, any revised

[1] Nat'l Assemb., Bills Tracker, 2026, at 68, item 275 (Oct. 23, 2026); Nat'l Assemb., Dep'tal Comm. on Fin. & Nat'l Planning, Report on the Consideration of the Competition (Amendment) Bill, at 135 (Aug. 2026) [hereinafter Committee Report] (recommending House approval of the Bill with amendments).
[2] Competition (Amendment) Bill, 2026, Nat'l Assemb. Bill No. 4, Kenya Gazette Supp. No. 17, cls. 2–3, 9 (Feb. 19, 2026) [hereinafter Bill]; Committee Report, supra note 1, at 55–56, 132, ¶¶ 302–307; African Competition Forum, Digital Platforms Landscape Study, at 17, 54, fig. 21 (Nov. 2024); Communications Authority of Kenya, Audience Measurement and Industry Trends Report, §§ 5.3, 7.8, fig. 29 (Aug. 2026). (References to the "proposed framework" encompass the published Bill and the committee-recommended amendments, including proposed section 24B; they do not imply House adoption of those amendments); *See* Committee Report, *supra* note 1, at 135; Nat'l Assemb., The Legislative Process, at 9 (2d ed. Aug. 2022).
[3] Bill cl. 2; Committee Report, supra note 1, at 55–56, 132, ¶¶ 302–307; European Comm'n, About the Digital Markets Act, "What is the DMA about?" and "What does this mean for gatekeepers?"
[4] Bill cls. 3, 9 (§§ 4(6)–(7), 40B(6)); Committee Report, supra note 1, at 132–133, ¶¶ 308–313; Japan Fair Trade Comm'n, *Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act*, pt. II.1–2, at 5 (Nov. 30, 2010) (tentative English translation); Monopoly Regulation and Fair Trade Act, arts. 45(1)(6), 125(4), 129(1) (S. Kor., English consolidation incorporating amendments through May 12, 2026). The Korean comparison concerns criminalization, rather than an identical penalty: article 125 provides a maximum of two years' imprisonment for the relevant unfair trade practice, while Kenya's proposed section 40B(6) provides a five-year maximum.
[5] Nat'l Assemb., Dep'tal Comm. on Fin. & Nat'l Planning, Report on the Consideration of the Competition (Amendment) Bill, at 55–56, 132, ¶¶ 302–307 (Aug. 2026) [hereinafter Committee Report].
[6] Bill cl. 9 (§ 40B); Committee Report, *supra* note 1, at 55–56 (§ 24B).

proposal should require proof of competitive harm before conduct prohibitions are enforced, recognize substantiated procompetitive benefits, preserve the necessary privacy and security protections, and provide proportionate enforcement and effective review.[7]

The bill was published in the Kenyan Gazette on February 19, 2026, with the Departmental Committee on Finance and National Planning tabling its report and proposed amendments on August 12, 2026. The Committee of the Whole House stage, tentatively scheduled for November 3, was deferred but may be rescheduled at short notice. Upon passage, the Bill will proceed to the President for assent and potential enactment.[8]

Scope and conduct

Digital markets. Digital activity covers paid and free services, including marketplaces, app stores, operating systems, cloud computing and advertising.[9] The list closely tracks eight of the ten core platform services of the Digital Markets Act, omitting web browsers and virtual assistants, but it is open-ended ("includes") and extends to any service provided through the internet or any digital content.[10] Under section 4(4), a person has a "strategic market position" where it appreciably influences prices, quality, service, output, or innovation independently of competitors, suppliers, users, or consumers.[11] Section 4(5)'s assessment factors include network effects, entry barriers, scale, scope, relevant data, switching costs, use of multiple platforms, innovation, and intermediation importance.[12] Clause 6 introduces a digital dominance provision based on the undefined "significant market position" standard, [13] despite the existing Act already allowing a finding of dominance below the 40% market-share threshold where market power is established. Together with the separate superior-bargaining-position provisions, these additional standards risk compounding regulatory uncertainty unless their respective scope and relationship are clearly defined.

Strategic market position. The Committee's proposed section 24B would prohibit nine non-exhaustive practices by any undertaking designated as holding "strategic market position." Neither text sets out who designates, the criteria or thresholds, the procedure, the duration, or how to appeal; the Committee leaves these to future rules.

Platform obligations. The proposed framework would allow the Competition Authority of Kenya (CAK) to designate digital platforms for special conduct rules distinct from dominance; the proposed prohibitions (section 24B) cover:[14]

---

[7] CCIA, *Comments on the Competition Authority of Kenya's Draft Competition (Amendment) Bill, 2024*, at 3–7 (June 18, 2024) [hereinafter CCIA Kenya Comments]; CCIA, *Brazil's Digital Markets Bill*, at 4, 6–8 (July 2026) [hereinafter CCIA Brazil Brief]; CCIA, *Comments Regarding Foreign Trade Barriers to U.S. Exports for 2026 Reporting*, at 157, Docket No. USTR–2025–0016 (Oct. 29, 2025). The NTE submission addressed the 2024 proposal.
[8] Bill, cover; Nat'l Assemb., Supplementary Order Paper for Thursday, October 22, 2026, Notice Paper, "Tentative business for Tuesday, November 3, 2026," item B(ii); Nat'l Assemb., *Order Paper for Tuesday, November 3, 2026*, at 1–5.
[9] Bill cl. 2 (definition of "digital activity").
[10] Bill cl. 2 (definition of "digital activity"). See also Regulation (EU) 2022/1925 (Digital Markets Act).
[11] Bill cl. 3 (§ 4(4)).
[12] Bill cl. 3 (§ 4(5)).
[13] The existing competition act does permit a finding of dominance below 40% market share. Bill cls. 2–3, 6 (§ 23(2)(c)); Competition Act, Cap. 504, § 23(2)(b) (Kenya) (rev. ed. 2022); Bill at 87 (statutory extract of § 23(2)(b)).
[14] Committee Report, *supra* note 1, at 55–56, 132, ¶¶ 302–307.

- Commercial terms: parity clauses constraining prices or service terms across channels, restrictions on directing customers off-platform, and differentiated fees or treatment against small and medium-sized enterprises (SMEs).[15]
- Data and switching: using business-user data to compete against those users, combining personal data across services, and restricting portability or switching.[16]
- Presentation and access: self-preferencing, paid-search labelling and the balance of paid and organic results, and requiring pre-installation of designated firms' apps or services on devices.[17]

Superior bargaining position. The published bill defines this by reference to an imbalance in commercial rights and obligations, and the counterparty's lack of a viable, satisfactory alternative. The committee proposes specifying a significant imbalance and dependence without sufficient, reasonable switching options.[18] Neither version requires a demonstration of dominance or market power, although both add dependence or switching criteria absent from the CAK's 2024 proposal.[19]

The proposed bargaining-position prohibition (section 40B(2)) covers trading conditions more unfavorable than expected under normal business practices, including unjustified payment delays breaching agreed terms; unilateral termination or threats without reasonable notice and without justification; failing to provide terms in advance or varying them unilaterally without notice; cost transfers and shifts of commercial risks meant to be borne by the transferring party; unfavorable preferential terms; below-competitive purchase prices or above-competitive service fees; unreasonable collection or processing of counterparty data; unduly difficult service exit; and business obstruction or management interference.[20] CAK must consider dependence, switching, market position, the trading partner's importance, and existing written or unwritten agreements.[21]

Process. The Committee has proposed introducing provisions that were not included in the published Bill and, consequently, were never subjected to public participation. Most notably, this includes a new section 24B that would introduce DMA-style prohibitions for undertakings designated with a strategic market position. Eight of section 24B's nine prohibitions closely track Regulation 38 of the COMESA Competition and Consumer Protection Regulations, 2025; the ninth, on pre-installation, has no COMESA counterpart, and the list is expressly non-exhaustive ("but not limited to"). Section 24B also relies on the terms "gatekeeper" and "core platform," which the bill does not define. Although the Committee found that the bill needed new sections on both designation criteria and prohibited practices, its report only covers prohibitions, leaving criteria and procedure to future rules. Kenya's State Department for Trade had itself warned the Committee that largely discretionary designation criteria "may create legal uncertainty and affect investor confidence."[22]

---

[15] Committee Report, *supra* note 1, at 55–56 (§ 24B(i), (ii), (v)).
[16] Committee Report, *supra* note 1, at 55–56 (§ 24B(iii), (vi), (viii)).
[17] Committee Report, *supra* note 1, at 55–56 (§ 24B(iv), (vii), (ix)).
[18] Bill cl. 3 (§ 4(6)); Committee Report, *supra* note 1, at 133, ¶ 313.
[19] Bill cl. 3 (§ 4(6)–(7)); Committee Report, *supra* note 1, at 133, ¶ 313; CCIA Kenya Comments, *supra* note 7, at 6 n.27 (reproducing the 2024 definition).
[20] Bill cl. 9 (§ 40B(2), chapeau and (a)–(k)).
[21] Bill cl. 9 (§ 40B(4)–(5)).
[22] Committee Report, *supra* note 1, at 55–56 (§ 24B), ¶¶ 26, 57, 101–103, 305–307; Bill cls. 2–14 (no equivalent provision); COMESA Competition and Consumer Protection Regulations, 2025, reg. 38.

Beyond the DMA. Section 24B would go further than the DMA in several respects. Section 24B has no thresholds, compliance period, consent or integrity exceptions, and its list is open-ended. It also includes rules with no direct DMA equivalent: a general prohibition on differentiated fees or treatment of SMEs and a prohibition on requiring pre-installation of designated firms' apps or services.[23]

Impacts of the Proposed Bill

Competitive harm. Through this bill, CAK seeks to protect dependent businesses even in competitive markets, claiming gaps in dominance and buyer-power rules.[24] Section 40B's cost, pricing, and data rules could attract criminal or administrative sanctions without express proof of competitive harm.[25] Before introducing a legislative solution to a perceived problem, Kenya should identify the competitive harm it seeks to address, explain why existing legal tools are insufficient, and assess the likely effects of new rules on competition, consumers and innovation.[26] Any designation or intervention should be grounded in competition-law principles, including proper market definition, an assessment of market power, evidence of anticompetitive effects, and consideration of procompetitive justifications. Regulatory action should rest on a comprehensive evidentiary record providing clear and convincing support for the action taken. The need for evidence supporting an individual designation, intervention or sanction is distinct from the need to demonstrate that new legislation is justified.

Self-preferencing. The presumption of harm from self-preferencing is highly contested. A review of self-preferencing research reports mixed effects on prices, search costs and entry, while de Cornière and Taylor's model finds that preferential recommendations may benefit or harm consumers depending on seller–consumer incentive alignment and other market conditions.[27] If Kenya pursues new conduct rules, firms should be able to substantiate lower search costs or prices, or improved quality, and CAK should weigh benefits against harm.[28]

Justification safeguards. CAK's non-binding dominance guidance places the burden of proving abuse on CAK and recognizes firms' opportunity under section 35 to present objective justifications; section 40C(2) imports sections 31–40, including that conference procedure, for complaint investigations.[29] Agreement exemptions under sections 25–26 and category exclusions under section 30(2) do not expressly provide a general benefits defense for section 24B or section 40B in new Part IIIA.[30] Kenya's competition approach should allow firms to demonstrate that procompetitive benefits outweigh harm, and protect measures necessary for

[23] DMA, *supra* note 9, arts. 3(2), 3(5), 3(10), 5(2), 6(3)–(4), 6(7), 12, 19; Committee Report, *supra* note 1, at 55–56 (§ 24B(v), (vii), (ix)).
[24] CAK, Competition Authority of Kenya's Submission on the Competition Amendment Bill (National Assembly Bill No. 4 of 2026), at 3, ¶¶ 13–16 (July 21, 2026).
[25] Bill cls. 9, 14 (§§ 40B(2), (6), 91A).
[26] CCIA Kenya Comments, *supra* note 7, at 4–7; CCIA Brazil Brief, *supra* note 7, at 4–6.
[27] Juliette Caminade, Juan Carvajal & Christopher R. Knittel, An Economic Analysis of the Self-Preferencing Debate, 32 Competition, no. 2, at 38–39 (Fall 2022); Alexandre de Cornière & Greg Taylor, A Model of Biased Intermediation, 50 RAND J. Econ. 854–882 (2019), accepted manuscript, at 4, 14–15.
[28] Caminade et al., *supra* note 29, at 38–39; CCIA Brazil Brief, *supra* note 7, at 6–8.
[29] CAK, Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, at 3, 35, ¶¶ 87–88; Bill cl. 9 (§ 40C(2)); Competition Act § 35.
[30] Competition Act §§ 25–26, 30(2); Bill cl. 9 (Part IIIA, §§ 40B–40C); Committee Report, *supra* note 1, at 55–56 (§ 24B). Section 25 concerns agreements, decisions and concerted practices under Sections A or B of Part III; section 30(2) requires Cabinet Secretary approval and is limited to Part III.

privacy, data security, device functionality and intellectual property, with necessary and proportionate remedies.[31]

Security and data. Potential constraints on suppliers' use of data are a major concern in this legislation. The U.S. National Institute of Standards and Technology (NIST) identifies correlation across information sources as a security-enhancing practice, and it is common for digital suppliers to use information across services and devices for purposes including fraud prevention and security protection.[32] Any proposed constraints on data usage (e.g., Section 24B) should preserve necessary security uses of data, allowing firms to substantiate the purpose and need for a particular combination, subject to applicable privacy requirements.[33] Section 40B(2)(i)'s unreasonable counterparty-data rule may reach non-personal commercial information, unlike Section 24B's personal-data combination rule.[34] Purpose, necessity, confidentiality, and effects on competition should inform reasonableness alongside normal business practices; compliance with personal data law alone cannot resolve questions about non-personal commercial data.[35]

Commercial terms. The bill's constraints on common commercial terms risk harming consumers where those terms support platform investment, and the evidence calls for case-by-case assessments rather than prohibition. Wang and Wright model platforms that lower search costs and charge transaction fees; off-platform purchases can undermine that revenue, but parity clauses still often harm consumers in their model.[36] CAK should assess consumer prices and channel competition, require substantiated consumer benefits and consider less restrictive alternatives.[37] The committee declined a proposed qualification for genuinely negotiated transfers of promotional costs, which should be reconsidered.[38] CAK should assess ability to refuse, cost and benefit allocation, and consumer outcomes, treating agreements as evidence rather than a substitute for examining dependence and competitive effects.[39]

Enforcement and safeguards

Where CAK determines abuse is occurring, or likely, section 40B(3) permits monitoring, reporting, prudential requirements, regulations and codes developed after consultation; the text does not expressly label the codes binding.[40] Section 40C(2) imports complaint procedures, including section 40's Tribunal appeal.[41] The bill should preserve existing safeguards, expressly identify review routes for designations and prospective measures, and

[31] CCIA Kenya Comments, *supra* note 7, at 3–5, 7; CCIA Brazil Brief, *supra* note 7, at 6–8.
[32] Nat'l Inst. of Standards & Tech., The NIST Cybersecurity Framework (CSF) 2.0, at 21, DE.AE-03, NIST CSWP 29 (Feb. 26, 2024); Google, Privacy Policy, "Why Google collects data" (fraud/security and cross-service-use paragraphs) (effective Oct. 16, 2026) (company statement).
[33] CCIA Brazil Brief, *supra* note 7, at 6–8; CCIA Kenya Comments, *supra* note 7, at 3–4.
[34] Bill cl. 9 (§ 40B(2)(i)); Committee Report, *supra* note 1, at 55–56 (§ 24B(viii)); Data Protection Act, No. 24 of 2019, § 2 (Kenya) (personal data definition).
[35] Bill cl. 9 (§ 40B(2), chapeau and paragraph (i)); Data Protection Act § 2; CCIA Kenya Comments, *supra* note 7, at 3–4, 6–7; CCIA Brazil Brief, *supra* note 7, at 6–7; Committee Report, *supra* note 1, at 100, ¶ 210 (proposed qualification not accepted).
[36] Chengsi Wang & Julian Wright, Search Platforms: Showrooming and Price Parity Clauses, 51 RAND J. Econ. 32–58 (2020), author-posted version, at 1–4.
[37] Wang & Wright, *supra* note 33, author-posted version at 3–4; CCIA Brazil Brief, *supra* note 7, at 6–8.
[38] Committee Report, *supra* note 1, at 99, ¶ 206.
[39] Bill cl. 9 (§ 40B(4)–(5)); CCIA Kenya Comments, *supra* note 7, at 4–7.
[40] Bill cl. 9 (§ 40B(3)).
[41] Bill cl. 9 (§ 40C(2)); Competition Act § 40.

specify notice, appropriate consultation, written reasons and proportionate scope and duration.[42] Section 91A extends enforcement to the Act and related regulations, rules, guidelines, notices and directions, allowing remedies, suspension, revocation or variation of rights, benefits or privileges granted under the Act, and other administrative action.[43]

Affected firms should have timely access to the record evidence on which CAK proposes to rely, subject to appropriate protections for confidential information, and a meaningful opportunity to respond before a final decision. The framework should expressly provide a right to full merits appeal before a duly authorized, independent court in respect of designations, interventions and enforcement decisions. The appeal should permit examination of the factual, economic and legal basis of the decision; a general reference to review should not substitute for specifying its scope.

Route	Maximum exposure
Bargaining-position abuse across sectors (§ 40B(6))	On conviction: up to five years' imprisonment, a fine of up to KSh 10 million, or both.[44]
Administrative fine (§ 91A)	Up to 10 percent of the immediately preceding year's gross annual turnover in Kenya, subject to fair administrative action and a fair hearing.[45]
Lawful-order breach (§ 89)	Conviction: up to 10 percent of the undertaking's preceding-year gross annual turnover; no express Kenyan-turnover limitation, which could authorize penalties calculated on global turnover.[46]

The OECD describes existing administrative and criminal routes as alternatives due to double-jeopardy protections and observes that criminalization generally focuses on hard-core cartels, while dominance is generally not criminalized.[47] The bill should clarify each instrument's legal force, turnover bases, section 24B sanctions, and their relationship with section 91A; prevent duplicative administrative and criminal punishment for the same infringement; and tie penalties to seriousness and effects, with effective rights of defense and review.[48]

Conclusion

The international experience provides further reason for Kenya to proceed with caution and reconsider these proposals. As CCIA's recent research shows, many jurisdictions have rejected or narrowed DMA-style proposals, with 11 of the 14 jurisdictions outside the EU that considered adopting a framework modeled on the DMA turning away from the approach or

[42] CCIA Kenya Comments, *supra* note 7, at 7; Bill cl. 9 (§§ 40B(3), 40C(2)); Fair Administrative Action Act, No. 4 of 2015, §§ 4–7, 9 (Kenya); CCIA Brazil Brief, *supra* note 7, at 5–6.
[43] Bill cl. 14 (§ 91A(1)–(2)).
[44] Bill cl. 9 (§ 40B(6)).
[45] Bill cl. 14 (§ 91A(2)(c), (4)).
[46] Bill cl. 13 (amending § 89); Competition Act § 89. The wording does not itself establish a worldwide turnover base.
[47] OECD, OECD Peer Reviews of Competition Law and Policy: Kenya, §§ 3.1.4, 3.2.5 (2026) [hereinafter OECD Kenya Review].
[48] Bill cls. 9, 13–14; Committee Report, *supra* note 1, at 55–56; OECD Kenya Review, *supra* note 44, §§ 3.1.4–3.1.5; CCIA Kenya Comments, *supra* note 7, at 7; CCIA Brazil Brief, *supra* note 7, at 8.

implementing a substantially narrower or more moderate regime.[49] Kenya's attempt to create a novel set of competition enforcement tools, particularly with respect to digital markets, suffers from the same flaws as the growing number of experimental approaches proliferating elsewhere: lack of a defined problem being solved, weak to non-existent evidence of harm or likely harms, and an expansion of unwarranted enforcement discretion, backed by criminal penalties, that is likely to deter investment and innovation in one of Africa's most dynamic markets. US policymakers should press Kenya to suspend or slow down advancing this proposal in favor of a more deliberative process based on substantive consultation with affected market participants.

[49] Bill cl. 2; Committee Report, supra note 1, at 55–56; European Comm'n, About the Digital Markets Act, "What is the DMA about?" and "What does this mean for gatekeepers?"; Trevor Wagener & Krisztian Katona, The Anti-Brussels Effect in Digital Competition Policy and the DMA's Fading Appeal as a Global Model, at 1, 6–7, CCIA Research Center (Oct. 6, 2026).