



Centre for Environment  
Justice and Development



## ADDRESSING THE PROLIFERATION OF MERCURY-ADDED COSMETICS THROUGH E-COMMERCE PLATFORMS IN KENYA

A Legal Analysis of the Regulation of Online Services and consumer/  
Product Safety in E-commerce in Kenya



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# Glossary of terms and abbreviations

<b>Cosmetic</b>	Any preparation intended for placing in contact with various external parts of the human body (epidermis, hair, nails, or lips) or with the teeth and mucous membranes of the oral cavity with a view to exclusively or principally cleaning them, perfuming them, or protecting them in order to keep them in good condition, change their appearance or correct body odours.
<b>CA</b>	Competition Authority
<b>CAK</b>	Communications Authority of Kenya
<b>CS</b>	Cabinet Secretary
<b>KEBS</b>	Kenya Bureau of Standards
<b>KS</b>	Kenya Standards
<b>Mercury</b>	Means elemental mercury (Hg(0), CAS No. 7439-97-6
<b>Mercury-added product</b>	Means a product or product component that contains mercury or a mercury compound that was intentionally added
<b>PPAB</b>	Pharmacy and Poisons Board
<b>PS</b>	Permanent Secretary
<b>SLPs</b>	Skin Lightening Products

## Executive summary

This report addresses the continued prevalence of mercury-added skin lightening products (SLPs) in Kenya. It specifically considers the 'legal hooks' available to address this challenge in the context of e-commerce, which recent research by the Centre for Environment Justice and Development suggests is a critical entry point for mercury-added SLPs in Kenya.

The report sets out the policy and legal framework governing the importation, manufacture and export of mercury-added products, as well as the institutional framework governing compliance. With this background, the report then highlights the dearth of any specific policy, legal or institutional governance framework regulating the sale of illegal/banned goods on e-commerce platforms under the policy and regulatory framework governing information communications and technology. It is against this backdrop that the report evaluates the opportunities and challenges for effective regulation exploring consumer protection provisions anchored in Kenya's Competition Act. A few key findings are noted:

- ▶ The multiplicity of laws proscribing import, manufacture and/or trade of goods containing mercury and other hazardous substances has not translated into effective regulation of these substances. The trade in mercury-added skin lightening products persists despite existing legal frameworks intended to prohibit it.
- ▶ In the absence of any mechanisms for coordination, the existence of at least three regulatory agencies operating under different statutory mandates creates a risk of regulatory inefficiency in curbing trade in mercury-added products in Kenya.
- ▶ The increasing popularity of e-commerce (in part spurred by lockdowns during the Covid-19 pandemic) presents a specific set of regulatory challenges which require tailor-made policy and regulatory responses to curb the proliferation of mercury-added skin lightening products.

The report makes the following recommendations to address the proliferation of mercury-added skin lightening cosmetics:

- ▶ There is need for harmonization of the law to ensure a measure of consistency in standards, labelling requirements and effective institutional coordination towards enforcement.
- ▶ Kenya's recent ratification of the Minamata Convention offers an opportunity under the coordination of the focal point – the PS Ministry of Environment, Climate and Forestry.
- ▶ There is need for broad consumer awareness campaigns targeting consumers, private sector (and specifically the major e-commerce platforms), civil society organisations and various enforcement agencies. A core component of the awareness campaign must begin with broad dissemination of information concerning the dangers of mercury-added SLPs.
- ▶ The existing consumer complaint mechanisms under the Competition Act need to be made known to the public, with a deliberate effort made to publicise the results of any successful complaints.
- ▶ As the custodian and national focal point for the Minamata Convention, the Ministry of Environment, Climate and Forestry should consider working closely with the Kenya Bureau of Standards towards the formulation of guidelines and/or regulations for the regulation of mercury-added cosmetics or consumer products more broadly on e-commerce platforms. As a starting point, consideration could be given to drafting a draft regulatory framework for consideration by the relevant state agencies.

## Introduction

This report considers the relevant laws and institutions responsible for controlling online sales and consumer product safety. It specifically analyses the law in Kenya with the aim of assessing available legal avenues to address the proliferation of mercury-added skin lightening products (SLPs) through online platforms. In addition to setting out the range of enforcement options available, it also identifies gaps and makes recommendations for reform and enhanced regulatory effectiveness.

## Methodology

The report is based on a desktop review of relevant policies, laws, regulations and standards applicable in Kenya. These were analysed specifically considering provisions which would offer a 'legal hook' to enforce the prohibition on import, export, distribution, advertising and sale of mercury-added SLPs in Kenya. Due to time constraints, there was no engagement with any of the statutory agencies but is anticipated that effective implementation of the recommendations included in the report would require engagement with these agencies.

## Background and context

Mercury is a naturally occurring chemical element found in air water and soil. It exists in different forms<sup>1</sup>:

- ▶ Elemental (metallic) mercury – a shiny silver metal that is liquid at room temperature. In this form it was used in old thermometers and is still used in fluorescent light bulbs and some electrical switches;
- ▶ Methylmercury – this is the most common organic form of mercury found in the environment and is highly toxic. It is the result of transformations combining mercury with carbon as it cycles between the air land and water; and
- ▶ Inorganic mercury – occur naturally primarily in cinnabar and metacinnabar minerals. In this form, it can combine with different other elements and can be found in water, soil and be released into the environment as emissions from coal fired power plants. It is in this form that mercury is still used in skin lightening creams and soaps

Although mercury is naturally occurring, high exposure is a threat to human health and the environment. As such, it has been recognised as a “chemical of global concern owing to its long-range atmospheric transportation, its persistence in the environment and ability to bioaccumulate in ecosystems and significant negative effects on human health and the environment.”<sup>2</sup>

The World Health Organisation has warned that the use of mercury in many skin-lightening products poses serious health risks and can result in kidney damage, neurological disorders and other adverse health effects, pregnant women, babies and young children being particularly vulnerable to mercury's harmful effects.<sup>3</sup>

Despite the health risks, mercuric chloride is still used as a topical antiseptic and disinfectant and inorganic mercury compounds are still used in skin lightening soaps and creams and lotions.<sup>4</sup>

Kenya banned the manufacture, import and use of mercury added cosmetics, including creams, soaps, gels and lotions through **Gazette Notice No. 4310 of 1998**. This Gazette Notice introduced Kenya **Standard 1474: 1998**, Part 3 of which includes mercury among the substances whose use in cosmetic products is prohibited. The Standard has been subject to several revisions but remains in place and is currently set out in **KS EAS 377**. Pursuant to this and the Standards Act, the Kenya Bureau of Standards includes a list of banned products by name<sup>5</sup>. The list includes skin lightening creams containing mercury and its compounds. In addition, the East Africa Community Customs Management Act (EACCOMA, 2004) sets out a list of prohibited and restricted goods whose import is proscribed within the East Africa

1 UNEP, [Mercury General Information](#) and EPA, [Basic Information about Mercury](#)

2 UNEP, [Mercury General Information](#)

3 UN, Minamata Convention urges ban on mercury use in cosmetics, 21 March 2024

4 Usually in the range of 2 to 10 percent mercury by weight.

5 Banned Products, Kenya Bureau of Standards, available at <https://www.kebs.org/banned-products/>

Community. This list also includes mercury-added SLPs.

The Poisons List (Confirmation) Order published under the Pharmacy and Poisons Act also includes “mercury, oxides of; nitrates of mercury; mercuric ammonium chlorides; potassium-mercuric iodides; organic compounds of mercury which contain a methyl (CH<sub>3</sub>) group directly linked to the mercury atom; mercuric oxycyanides; mercuric thiocyanate” among the substances treated as poisons which can only be sold by “authorised sellers of poisons and licensed wholesale dealers and dealers in mining, agriculture or horticultural accessories”.

**Part II, Group B** of the Poisons List also lists the following as poisons: Mercury oxide contained in yellow oxide of Mercury Ointment and Mercuric ammonium chloride when contained in an ointment not exceeding 15 percent.

Relatedly, the Food Drugs and Chemical Substances Act also proscribes the sale of any cosmetics which contain any substance that may cause injury to health of users. Finally, the Environmental management and Co-ordination (Management of Toxic Hazardous Chemicals and Materials) Regulations, 2024 anchors Kenya’s commitments under the Minamata Convention, which it ratified in September 2023. This includes the ban on imports of mercury-added products.

On one hand, the existence of several ‘legal hooks’ under different legal regimes means there are multiple avenues to enforce compliance. However, the multiplicity of statutory regimes, each with its separate enforcing institution, without any harmonizing framework for coordinating regulation or enforcement is in fact a significant barrier to effective regulation.

Research by the Centre for Environment Justice and Development indicates that e-commerce platforms are the prevalent entry point for the availability of mercury skin lightening creams in Kenya. The prevalence of mercury added cosmetics through e-commerce platforms exacerbates the regulatory challenge because Kenya’s framework law governing information and communication – the Kenya Information and Communications Act (KICA) – does not regulate online trading platforms. Its consumer protection regulations also fail to address the challenge of consumer product safety in the context of e-commerce.

Regulatory respite is to be found in the Competition Act which contains provisions on consumer protection which are expounded by way of extensive Consumer Protection Guidelines which set out obligations of entities to ensure consumer/product safety.

# Policy, legal and institutional framework governing mercury-added products in kenya

## The Constitution

The bill of rights in the Constitution of Kenya, 2010 includes several provisions from which one can infer State obligations to ensure citizens against the health impacts from mercury-added cosmetics.

- ▶ **Article 42** provides for the right to a clean and healthy environment, which includes the right of every Kenyan to have the environment protected for the benefit of present and future generations through legislative and other measures.<sup>6</sup>
- ▶ **Article 43(1)(a)** enshrines every person's right to the highest attainable standard of health, a component of which would include the regulation of health products and technologies.<sup>7</sup>
- ▶ **Article 46** enshrines consumer protection rights including the right to goods and services of reasonable quality as well as the protection of their health, safety and economic interest.<sup>8</sup> This right is specifically relevant to the State's positive obligations to ensure consumers are protected from the proliferation of mercury-added cosmetic products through e-commerce platforms and to establish mechanisms to effectively regulate the availability of harmful products on such platforms.

6 Pursuant to this Kenya ratified the Minamata Convention in 2023 and pursuant to that has published the Environmental Management and Co-ordination (Management of Toxic and Hazardous Chemicals and Materials) Regulations, 2024 which operationalizes provisions of the Minamata Convention, including provisions regulating the manufacture, import and export of mercury-added products in Regulation 28.

7 The Kenya Public Health Policy 2014 – 2030 has the enactment of a harmonised national regulatory framework for health products and technologies (including cosmetics) as a key policy area.

8 This is directly relevant to the State obligations to effectively regulate e-commerce to protect citizens.

## Statutory Law

Flowing from the raft of constitutional provisions are various statutes also relevant to the regulation of mercury-added cosmetics in Kenya. Below is a summary of these laws and the relevant regulatory provisions.

The Law	Overriding Objectives	Key Provisions
Standards Act	Establishes the Kenya Standards which prescribes the specifications or codes of practice which all manufacture and sale of goods must comply with.	<p>Provides for the publication of Kenya Standards which prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with the specification or code of practice.</p> <p>Establishes the Kenya Bureau of Standards with the function of assisting with the <b>preparation and framing of specifications and codes of practice</b> and providing co-operation with the Government, industry, local authority or any other person with a view to securing the <b>adoption and practical application of standards</b>.</p> <p>Imposes an obligation on any person who manufactures, imports, stocks, distributes, sells or exhibits a product to <b>ensure that every product complies</b> with the Kenya Standards and bears a valid standardization mark.</p> <p>It <b>prohibits</b> persons who import, stock, distribute or sell or exhibit products from placing on the market or putting into service any product that is not sold freely or does not conform to applicable regulatory requirements from the country of origin.</p> <p>It requires a manufacturer or business operator who has reason to believe a product it has made available in the market a product which does not conform with the Act to <b>withdraw</b> or <b>recall</b> the product and to <b>cooperate</b> with the Kenya Bureau of Standards to <b>eliminate</b> or <b>mitigate</b> risks presented by non-compliant products made available in the market.</p> <p>Gives the Bureau powers to issue an order to a manufacturer or business operator to <b>inform consumers of the risks</b> in a clear and efficient manner, <b>mark the product with appropriate warning</b> on the risks presented, to <b>stop the supply and distribution of the product, or to remove the product from listing in online sales platforms</b>.</p> <p>The Act gives the Cabinet Secretary power to make regulations for the effective implementation of the enforcement obligations under the Act.</p>
Kenya KS EAS 377		Published pursuant to Section 9(1) of the Standards Act, it bans the manufacture, import and use of mercury added cosmetics including creams, soaps, gels and lotions.

The Law	Overriding Objectives	Key Provisions
Pharmacy and Poisons Act	Establishes the Pharmacy and Poisons Board which, among other things, regulates health products, technologies and the profession of pharmacy	<p>Vests the Pharmacy and Poisons Board with the function of:</p> <ul style="list-style-type: none"> <li>▶ Ensuring that all medicinal products<sup>9</sup> manufactured in, imported into or exported from the country conform to the prescribed standards of quality safety and efficacy; and</li> <li>▶ Enforcing the prescribed standards of quality, safety and efficacy of all medicinal substances manufactured, imported into or exported out the country.</li> <li>▶ Conducting post-market surveillance of safety and quality of medical products.</li> </ul> <p>Makes provision for the publication of a Poisons List which sets out list of substances not to be sold except by authorised sellers of poisons.</p>
The Poisons List (Confirmation) Order		<p>Includes “mercury, oxides of; nitrates of mercury; mercuric ammonium chlorides; potassium-mercuric iodides; organic compounds of mercury which contain a methyl (CH<sub>3</sub>) group directly linked to the mercury atom; mercuric oxycyanides; mercuric thiocyanate” among the substances treated as poisons which can only be sold by “authorised sellers of poisons and licensed wholesale dealers and dealers in mining, agriculture or horticultural accessories”</p> <p>Part II, Group B of the Poisons List also lists the following as poisons: Mercury oxide contained in yellow oxide of Mercury Ointment and Mercuric ammonium chloride when contained in an ointment not exceeding 15 percent.</p>
Food, Drugs and Chemical Substances Act	Regulates the prevention of adulteration of food, drugs and chemical substances and establishes the Public Health (Standards) Board to enforce provisions of the Act in addition imposing a duty on municipal councils to also enforce the Act.	<p>Recognises the existence of standards for cosmetics and makes it an offence for any person who labels, packages, sells or advertises any article in such a manner that is likely to be mistaken for a cosmetic of the prescribed standard.</p> <p>Proscribes the sale of any cosmetics which contain any substance that may cause injury to health of users when the cosmetic is used according to the directions on the label of or accompanying such cosmetic.</p> <p>Makes it an offence for any person to sell any chemical substance which is not in accordance with the professed standard under which it is sold.</p> <p>Imposes a duty on every municipal council to exercise powers which it is invested with in its special circumstances to provide proper safeguards for the sale of food, drugs, cosmetics, devices and chemical substances and to procure samples for analysis.</p> <p>It authorises public health officers to take initiate legal proceedings before a magistrate for any offence under the Act or regulations under it.</p>

<sup>9</sup> Section 2 of the Act defines medicinal substance to mean “any medicine, product, article, or substance which is claimed to be useful for any of the following purposes – (a) treating, preventing or alleviating disease or symptoms of disease; (b) diagnosing disease or ascertaining the existence, degree or extent of a physiological condition; or (c) preventing or interfering with the normal operation of physiological function whether permanently or temporarily and whether by way of terminating, reducing or postponing or increasing or accelerating the operation of the function in human beings or animals.

The Law	Overriding Objectives	Key Provisions
Environmental Management and Coordination (Management of Toxic and Hazardous Chemicals and Materials) Regulations, 2024		Prohibits the manufacture, import, export or distribution of materials or products containing banned toxic and hazardous substances, which include mercury, mercury compounds, mercury-added products and manufacturing processes using mercury or mercury compounds after 2020 (the phase out dates set out in the Sixth Schedule to the regulations)

In addition to the Kenyan laws highlighted above, the **East African Community Customs Management Act, 2004 (EACCMA, 2004)** also bears mention. This law provides a framework for collaboration between member countries of the East African Community (Burundi, Democratic Republic of Congo, Kenya, Rwanda, Somalia, South Sudan, Uganda and Tanzania). In relation to the regulation of **SLPs**, **Schedule II of EACCMA, 2004** includes a list of goods prohibited and restricted from import into the EAC. The list includes “all soaps and cosmetic products containing mercury.” As part of its customs enforcement actions, the Kenya Revenue Authority works closely with the Kenya Bureau of Standards to prevent illegal entry of the prohibited goods into the country.

In so far as the Kenyan statutes are concerned, the summary of laws above indicates several avenues through which the prohibition on mercury-added products, and particularly SLPs, could be enforced. Helpfully, the different regimes refer to the standards established under the Standards Act, suggesting that this law and the statutory body established under the Act – the Kenya Bureau of Standards – has a pivotal role to play in regulation and enforcement of SLPs.

That said, three likely challenges are also worth noting. First, there is a variance in the legal provisions in relation to prohibited ingredients, labelling requirements and mechanisms for inspection and assessment. Secondly, each statutory regime establishes a statutory body charged with enforcement obligations but there exists no clear mechanism for coordination in their operations. Thirdly, except for the Standards Act, none of the laws address the specific challenge of enforcement action in the context of e-commerce. Some recommendations in response to these challenges are addressed in the concluding sections of this report.

In this next section, the report considers the specific laws addressing consumer and product safety in the context of e-commerce in Kenya.

# Regulation of online services and consumer/product safety in e-commerce in kenya

## Information Communication and Technology Policy and Law

At a policy level, the National Information Communication and Technology (ICT) Policy Guidelines, 2020 set out the broad policy objectives that would provide guidance for any framework for consumer/product safety in e-commerce. What is an otherwise ambitious policy document regrettably fails to include a framework to govern consumer/product safety in e-commerce among its policy objectives.<sup>10</sup>

At the statutory level, the regulation and governance of e-commerce falls within the scope of the Kenya and Information and Communications Act (KICA). Among other things, KICA establishes the Communications Commission of Kenya (now the Communications Authority of Kenya (CAK)) as the principal statutory agency charged with facilitating the development of the information and communications sector, including e-commerce.

KICA regulates four broad areas – telecommunication services (Part III), radio communication (Part IV), Broadcasting Services and Cyber security (Part IVA) and Postal and Courier Services (Part V) It also regulates electronic transactions (Part VIA) and in relation to electronic functions vests CAK with the function of “facilitating electronic commerce and eliminating barriers to electronic commerce such as those resulting from uncertainties over writing and signature requirements”, fostering “the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium” and development of frameworks “to minimise the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions”

It is immediately apparent from this overview of the Act that consumer/product safety in online sales falls outside the scope of KICA – as e-commerce platforms do not fall within the scope of services requiring licenses under the Act. The exclusion of consumer/product safety in the context of regulating proliferation of banned products from the scope of KICA is further exemplified when one considers the Kenya Information and Communications (Consumer Protection) Regulations published under KICA. These regulations address and protect consumer rights to:<sup>11</sup>

- a. Information about rates, terms and conditions for available and proposed products and services;
- b. Be charged only for products and services they subscribe to;
- c. Select a service provider of their choice;
- d. protection of their data;
- e. Accurate bills for products and services and fair prompt redress of disputes arising from provision
- f. of products and services;
- g. Protection from unfair trade practices, including false and misleading advertising and anti-competitive behaviour by licensees; and
- h. Equal opportunity for access to the same type and quality of services as other consumers in the same area at substantially the same tariff.

The tenor the regulations reflect the focus of KICA on telecommunication, radio, broadcasting and communication services and systems rather than consumer/product safety in the context of e-commerce.

<sup>10</sup> The Digital Economy Blueprint identifies consumer protection among the enablers for Kenya’s burgeoning digital economy. It specifically highlights the need to strengthen consumer capacity to enforce contracts and resolve disputes but is silent on product safety considerations.

<sup>11</sup> Regulation 3 of the Kenya Information and Communications (Consumer Protection) Regulations

## Consumer Protection

The inclusion of consumer protection among the bill of rights provisions provides a strong constitutional basis for the protection of these rights in Kenya. The Consumer Protection Act published in 2012 provides statutory footing for the protection of these rights by expounding different facets of consumer protection. The Consumer Protection Act accounts for e-commerce trading in its recognition of 'internet agreements'.<sup>12</sup> However, the Act focusses on specific aspects of such agreements, including requirements for disclosure before they are concluded, provision of a reasonable opportunity to the consumer to accept or decline the agreement and the consumer right to a copy of the agreement and to cancellation. The Act also extensively deals with protection of consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices, including deceptive, misleading, unfair or fraudulent conduct.

The Consumer Protection Act includes an implied statutory warranty that goods supplied under a consumer agreement are of a "reasonably merchantable quality". Goods are of merchantable quality "if they are reasonably fit for the purpose or purposes for which goods of that kind are generally bought."<sup>13</sup> While the Act speaks to merchantability of products, it does not provide any specific provisions addressing product safety.

## Competition Law

The most promising provisions for enforcement of consumer/product safety in the context of e-commerce are to be found in the Competition Act. While they do not speak to e-commerce specifically, the provisions are extensive in how they deal with product safety and resulting legal obligations.

The Act's broad objectives are to promote and safeguard competition in the national economy and to **protect consumers from unfair and misleading market conduct**. It also establishes the Competition Authority and Competition Tribunal as the two principle statutory bodies to facilitate the achievements of the Act's objectives.

**Section 59** of the Competition Act sets out provisions on product safety standards and unsafe goods and specifically provides that it shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind in respect of which there is a prescribed consumer product safety standard which do not comply with that standard. It further establishes liability for provision of unsafe products. It provides that:<sup>14</sup>

- a. Where there is a supply of goods that do not comply with a prescribed consumer product safety standard;
- b. A person suffers loss and damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and
- c. The person would not have suffered the loss or damage had the goods complied with the standard, the person shall be deemed to have suffered the loss or damage by the supplying of the goods

Section 59(1)(b) and (c) of the Competition Act grant the Competition Authority the power to issue notices declaring goods to be unsafe goods and notices imposing a permanent ban on such goods. If goods in violation with such notices result in loss or damage by reason of a defect in, or dangerous characteristic of, the goods or by reason of the consumer not having particular information as to the characteristic of the goods, the consumer shall be deemed to have suffered loss or damage by the supplying of the goods.

The Competition Act grants the Competition Authority power to pass regulations setting out product information standards in respect of goods of a particular kind. This will include disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods.<sup>15</sup>

<sup>12</sup> Defined in Section 2 of the Act as a "consumer agreement formed by text-based internet communications"

<sup>13</sup> See *Wood Products Limited v Rufus Kithela Kobia* [2019] KEHC 1422 (KLR), para. 32.

<sup>14</sup> Section 59(2) of the Competition Act

<sup>15</sup> Section 60(2) of the Competition Act.

The Act also makes it an offence to supply goods during trade without compliance with the set product information standards, which will include any standards set by standardization bodies like Kenya Bureau of Standards or sector regulators<sup>16</sup>. Any consequential loss and damage is deemed to result from the supplying of the goods where there is no compliance with the product information standard resulting in loss and damage which would not have been suffered if there had been compliance with the standard.<sup>17</sup>

## The Competition Authority Consumer Protection Guidelines

Pursuant to Article 46 of the Constitution and the provisions of Part IV of the Competition Act, the Competition Authority has published Consumer Protection Guidelines which also include Administrative Remedies Guidelines for Consumer Protection. The Consumer Protection Guidelines provide an accessible exposition of statutory provisions of the Competition Act which apply to market conduct that occurs before, during and after a transaction. Some key aspects of the guideline bear note and are discussed below.

### Suppliers' obligations relating to product safety

The guidelines explicitly provide that a supplier bears primary responsibility for the supply of safe consumer products in Kenya and that where there is more than one supplier, each entity in the supply chain is responsible for assessing and (if necessary) rectifying potential safety hazards in the products they supply. The guidelines specifically stipulate that each entity in a supply chain is also under an obligation to show due diligence in the procurement and supply of consumer goods and cannot pass on that responsibility to another party in the supply chain, whether they are domestic or overseas manufacturers, suppliers or distributors.<sup>18</sup>

The implication that 'each entity' and not 'each supplier' must identify and address potential product safety hazards is an important distinction worth elaborating. Traditionally, e-commerce platforms are not considered suppliers but rather intermediaries providing a marketplace connecting buyers and sellers. The wide net cast by the framing under the guidelines arguably brings in e-commerce platforms within the scope of duty bearers. However, there is clearly need for further clarity on the point – whether through revision of the guidelines or testing through a test case or complaint.

### What constitutes an unsafe product?

For the purposes of the Act, product safety may be compromised:

- a. from a manufacturing or production error arising from a deviation from design or material specifications during production;
- b. due to a design defect arising even when a product is manufactured according to specifications. A design defect is also implicated where there is a risk of injury from the use of the product, or from reasonably foreseeable misuse of the product or failure of the product to operate as intended.<sup>19</sup>

### Scope of application of the consumer protection guidelines

The provisions of the Competition Act and the Consumer Protection Guidelines apply to a broad category of goods including goods used in personal, domestic and household use as well as any goods regulated under specialist government agencies and sector regulators (such as the Kenya Bureau of Standards and the Poisons and Pharmacy Board). That said, the guidelines helpfully clarify that goods regulated by specialist government agencies or sector regulators would not be subject to direct action under the Competition Authority.<sup>20</sup>

<sup>16</sup> Section 60(1) of the Competition Act and Consumer Protection Guidelines, para. 154

<sup>17</sup> Section 60(7) of the Competition Act

<sup>18</sup> Consumer Protection Guidelines, paras. 92 and 93. The Consumer Protection Guidelines further sets out scope of liability falling to the product manufacturer, manufacturer of component parts, a party that assembles or installs the product, a wholesaler and the retail store that sold the product to the consumer (see para. 164)

<sup>19</sup> Consumer Protection Guidelines, para. 96

<sup>20</sup> Consumer Protection Guidelines, para. 98

The Authority therefore adopts a cooperative approach to working with specialized agencies which takes the form of consulting with the Kenya Bureau of Standards and referring complaints to the relevant specialized agency.<sup>21</sup> That said, the Authority also acts as a safety net and in circumstances where the specialized regulators powers are insufficient or unsatisfactory to address safety issues, the Competition Authority will become involved in specialist matters.

## The available remedies

### *Bans*

The Consumer Protection Guidelines are clear that if “any products are subject to a ban, business(es) must not sell them.” Furthermore, a “ban on a product-related service makes it unlawful for **anyone, in trade or commerce**, to supply or offer to supply that service.” As such, bans can apply to products and product-related services. The latter of these implications has far-reaching implications as it suggests a ban could be imposed on an e-commerce platform as a product-related service where it can be demonstrated that because of the service being supplied, products available through it will or may cause harm. The Authority may issue temporary or permanent product and product-related service bans.

### *Notices and Recalls*

The Authority may require an offending supplier to inform the public about the nature of a defect or dangerous characteristic of a good. The notice may also require the supplier to set out the remedial measures the supplier intends to take. The remedial measure may include a recall where the good presents a safety risk to consumers.<sup>22</sup>

## Consumer complaints and information

A consumer may lodge a complaint with the authority for any infringement of the provisions under **Part VI** of the Act. Before lodging the complaint, the Consumer Protection Guidelines require a consumer to first contact the retailer to pursue remedial action. The guidelines encourage consumers to keep a record of all communication with the retailer such as receipts, invoices, warranties, contracts. Where no adequate remedy is provided, the complaint can be lodged with the Authority. **The Competition (General) Rules, 2019** provide a consumer complaint form (see Annexure I of the Report)

## Analysis of the multiple statutory enforcement regimes in kenya

### Analysis of the relevance of the different statutory regimes

A review of the relevant statutes and regulations shows that the Standards Act could be considered the anchor legislation around which enforcement action could be taken. The provisions requiring goods to contain the requisite standardisation mark as well as the provisions proscribing the import, stock, distribute or sell or exhibit products which do not conform with the relevant Kenya Standards would apply to online sales as the Act includes provisions specifically vesting the Kenya Bureau of Standards with enforcement powers applicable to online sales specifically.<sup>23</sup> The publication of specific banned products under this regime is especially beneficial, offering a starting point from which broad market sensitization of banned cosmetics can be initiated.

Although restricted in scope of application to medicinal substances, the Pharmacy and Poisons Act also contains provisions drafted broadly enough to apply to online sales of SLPs.<sup>24</sup> This is clear in the provisions vesting the Pharmacy and Poisons Board with authority to ensure products manufactured in, imported into or exported from the country conform to the prescribed standards of quality safety and efficacy. However, as indicated, enforcement options under this statutory regime may be more

21 Competition Act, sections 67 and 68

22 Consumer Protection Act, section 61(2) The Consumer Protection Guidelines, paras. 134 and 135 set out the information to be provided in a recall notification as well as a suppliers obligations in ensuring the objectives of a recall are achieved.

23 See Section 12(6)(d) of the Standards Act.

24 This statutory regime is equally helpful for the fact that it sets out in the Poisons List the specific mercury compounds which are proscribed.

effective where the SLP is provided under the banner of some medicinal purpose.

The Food Drugs and Chemical Substances Act offers yet another statutory enforcement route. It contains a broad prohibition on the sale of cosmetics which may cause injury to health. It additionally provides a strong enforcement option in relation to SLPs which may be deceptively labelled, packaged, and advertised.

The last and more extensively discussed provisions under the Competition Act offer the added advantage of being elaborated under Consumer Protection Guidelines. There is the added advantage of a complaints process, which includes an accessible complaints form. Additionally, the wide net cast by the framing under the guidelines arguably brings in e-commerce platforms within the scope of duty bearers. This coupled with the fact that the regime operates in complementarity with the Standards Act, make it a particularly strong enforcement route by providing a clear complaints mechanism which might provide strong deterrent effect if brought to the attention of consumers.

## Recommendations

### Coordination through the Kenya Bureau of Standards.

A review of relevant statutes and regulations positively reveals that there are number of statutory avenues through which enforcement can be achieved.

Kenya's ratification of the Minamata Convention in 2023 further bodes well on the question of coordination. For starters, it confirms Kenya's commitment among a growing number of other States to cooperate to address the challenge of mercury-added products at a global level. At the national level, the designation of the Ministry of Environment Climate Change and Forestry as Focal Point for the Convention possibly presents an opportunity to streamline coordination through the ministry.

A central challenge highlighted in this report is the multiplicity of state agencies with the remit to enforce the ban on mercury-added cosmetics. Beyond the suggestion that the Poisons and Pharmacy Board would enforce the ban in respect of cosmetics used for therapeutic purposes, while the Kenya Bureau of standards and other agencies would exercise enforcement over cosmetics used for non-therapeutic purposes,<sup>25</sup> there is no real sense of coordination between the various agencies whose efficacy is reliant on effective coordination. Given the central role vested in the Kenya Bureau of Standards, multi-agency coordination should be encouraged with the leadership of the Kenya Bureau of Standards.

As a start enhanced coordination might commence with a review of the existing regulatory framework to ensure there is a harmonization in standards requirements, labelling, inspection and enforcement mechanisms.

### Formulation of Regulations and Guidelines Related to Mercury-added Products

Given the indication from CEJAD's recent research indicating online sales are a primary entry point for skin lightening mercury cosmetics, there is a reasonable basis to propose the publication of specific regulations or the amendment of existing legal framework to adapt to the digital age. Such regulations might, for example, address the specific ambiguities or loopholes contributing to the proliferation of SLPs despite the existence of what otherwise appears to be a robust statutory regime offering multiple enforcement options. One specific set of requirements such regulations or guidelines might introduce is a requirement for registration of any business operator advertising, selling, marketing or distributing cosmetics on its online platform. Another requirement could be the explicit prohibition for e-commerce platforms and all suppliers to trade or make available any good appearing in detention lists. Finally, the existing legal framework mentioned above, notably the Standards Act and the Food, Drugs and Chemicals Substances Act, could be modernized, and include a clear mention that the obligations set out in these acts also apply for all online avenues, including e-commerce platforms.

25 Vugigi, S and Otieno F, Regulatory Compliance of Cosmetic Products in Kenya: A Narrative Review on Quality and Safety, African Journal of Pharmacy and Alternative Medicine Vol. 2 (01) - 2023

## Consumer Awareness Campaigns

There might be additional benefit in conducting awareness campaigns, bringing together civil society, business, medical and other actors. As a starting point, the campaign might use popular influencers to highlight the dangers of skin lightening mercury cosmetics, identifying specific brands available in the Kenyan market. Popular e-commerce platforms could also be provided with the list of offending products and encouraged to remove them from their platforms.

Relatedly, efforts should be made to more broadly publicise the contents of the relevant standards regulating cosmetics, as well as the detention list of banned products. Even during this research access to the standard was a challenge. This is partly due to the technical nature in which Kenya Standards are framed coupled with the fact that they are available at a fee. <sup>26</sup>

Lastly, consumers should be encouraged to report suppliers and platforms who flout existing laws. Here the existing complaints mechanism under the Competition Act would be a readily accessible channel consumers could be encouraged to explore. This might be facilitated by making the form and process of lodging a complaint widely available. Successful cases could be publicised – a practice the Competition Authority has undertaken effectively in relation to its anti-trust jurisdiction.

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<sup>26</sup> The applicable Kenya Standard for cosmetics is, for example available at a fee of Kenya Shillings Two Thousand One Hundred and Sixty-three (KES 2,163)

FOR`M II

(r. 34(2))

COMPETITION AUTHORITY OF KENYACONSUMER COMPLAINT FORM

The Competition Authority of Kenya (the Authority) is mandated to protect consumers against false and misleading representations amongst others. The Authority takes consumer complaints seriously and has developed an internal procedure to handle them. Kindly use this form to inform us about your complaint so that we can be able to address it. If you're having any difficulties filling in this form, please get in touch with us by phone or email. This form can also be downloaded from our website [www.cak.go.ke](http://www.cak.go.ke).

If this complaint is lodged by a person other than the complainant, please provide contact details of the person authorized to discuss the complaint.

Type of Complaint	
Tick as appropriate	
<input type="checkbox"/> False or Misleading Representations	<input type="checkbox"/> Unsafe Goods/Expired Goods
<input type="checkbox"/> Unfair Conduct	<input type="checkbox"/> Unsuitable Goods
<input type="checkbox"/> No expiry date	<input type="checkbox"/> Defective Goods
<input type="checkbox"/> No ingredients listed	
<input type="checkbox"/> Other _____	
Prior Action taken to redress the complaint	
1. Have you raised the complaint with the accused? <input type="checkbox"/> Yes <input type="checkbox"/> No Date complaint was raised _____ If yes, what was the response? _____ _____	
2. Have you raised the complaint with any other agency? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, please provide the following: Date complaint was raised _____ Name of the Agency _____ Case Number (if applicable) _____ Contact Person _____ Contact Phone Number _____ Case filed in Court? <input type="checkbox"/> Yes <input type="checkbox"/> No Date _____ Give details? _____ _____ _____	

Details of the complainant	
Date:	
Name of the complainant:	Mr /Mrs/Miss/Dr.....
Postal Address:	
Physical Address:	
Telephone No.	
Email:	
Details of the Accused	
Name:	Mr /Mrs/Miss/Dr.....
Postal Address:	
Physical Address:	
Telephone No.	
Email:	
<i>If there are more than 1, please provide their details on a separate page and attach it to this form</i>	
Harm caused, if any	
How would you like your complaint to be resolved?	
<input type="checkbox"/> Refund <input type="checkbox"/> Repair <input type="checkbox"/> Replace	
<input type="checkbox"/> Other. Give details _____	
How would you like to be contacted in case of further information or for feedback on the Authority's assessment of your complaint? Tick appropriately.	
By Phone <input type="checkbox"/> By Email <input type="checkbox"/> By Letter <input type="checkbox"/>	
The following is a brief statement of facts concerning this case. This information is true and correct to the best of my knowledge. I hereby request The Competition Authority of Kenya to investigate this complaint.	
Statement of facts/ Details of the complaint	
Attach additional sheet(s) if additional space is needed.	

Additional sheets attached? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Attach copies of the following documents as applicable:			
Please tick appropriately			
<input type="checkbox"/> Contracts	<input type="checkbox"/> Warranty	<input type="checkbox"/> Invoices	<input type="checkbox"/> Receipts
<input type="checkbox"/> Others (Specify) _____			

- This form is issued for the purpose of lodging a consumer complaint relating to Part VI of the Competition Act, No 12 of 2010 (the Act).
- You may claim confidentiality for the information you provide by filling the Confidentiality Claim Form downloadable from the Authority's Website: [www.cak.go.ke](http://www.cak.go.ke)
- I understand:
  - (a) a that it is an offence in terms of section 90(d) of the Competition Act for a person to provide false information to the Authority; and
  - (b) that section 91 of the Competition Act provides for a penalty of a fine, imprisonment, or both if I am found guilty of knowingly providing false information to the Authority.
- I confirm that the information given above is true and accurate to the best of my knowledge.

Name of Complainant:

Date:

Signature :

*NB: After filling this form, you may submit any further documents using the following contact information:*

Kenya Railways HQs  
 Block "D" Drop- Point; Ground Floor  
 P.O. Box 36265-00200  
 Haile Selassie Avenue  
 Email: [complain@cak.go.ke](mailto:complain@cak.go.ke); [info@cak.go.ke](mailto:info@cak.go.ke)