



**anti
counterfeit
authority**
Promoting Genuine



National Baseline Survey on Counterfeit and Other Forms of Illicit Trade in Kenya

Executive Brief Summary

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Foreword

Industrial development is no doubt one of the key drivers of economic development and an undisputable determinant of any country's share in the lucrative global trade. This reality is evidenced in the global trade where manufactured exports are the key drivers of global exports of the following lead global exporting countries: China, USA, UK, Germany, Japan and South Korea.

Their global trade dominance is courtesy of their strong manufacturing sectors that on average contribute 22% of the GDP, with China and South Korea economies in the lead with the sector's contribution to GDP at 29%. This underscores industrial development as a critical factor in the equation of trade-led economic development.

The Kenya Government, in recognition of this fact, has included manufacturing sector in the Big Four framework of development that runs between 2017 and 2022, targeting to have the sector's contribution to GDP rise from 8% in 2017 to 15% by 2022.

This target is pegged on the ability of manufacturing enterprises being able to sell their products in the domestic as well as the international markets. This must be defended from the great threat posed by illicit trade, which as observed by Organization for Economic Cooperation and Development (OECD), European Union Intellectual Property Office (EUIPO), World Customs Organization and the United States Chamber of Commerce, has been on the rise. This trade, which in 2017 was estimated by the Global Brand and Counterfeiting Report of 2018 to stand at USD 1.2 trillion is projected to be USD 1.8 trillion, unless it is stopped!

Evidenced that illicit trade is a threat to the economy has been recognized since 2008, when the Government enacted the Anti-Counterfeit Act No.13 of 2008, among many other legal instruments that have been put in place to combat this trade.

Despite this effort, illicit trade continued being a threat to the economy as evidenced in the reports of the Anti-Counterfeit Authority and the Kenya

Association of Manufacturers (KAM) on the impact of counterfeit products. In response, the Government has evolved contingent of measures geared towards taming this trade.

Among these measures is the Presidential Directive on 12th December 2017 which ordered immediate destruction of illicitly-traded products that posed a threat to Kenya's manufacturing sector as well as the consumer, and summary dismissal and prosecution of any public officer colluding with traders to encourage trade in counterfeits, piracy and other forms of illicitly-traded products.

The formation of the Multi-Agency team for combating illicit trade in July 2018 and unveiling of the National Action Plan and Implementation Framework to Combat Illicit Trade in Kenya were additional major milestones in the fight against illicit trade, which ensures a Government-wide coordinated approach.

This Baseline Survey on the Extent of Illicit Trade in Kenya is yet another milestone towards the war on illicit trade in defence of the country's vision of industrial-led trade development and an investment destination economy as a result of the assured protection of Intellectual Property Rights.

The study provides indicators that will be used to monitor illicit trade, and gains made in the war against this trade. The study provides crucial baseline information that will act as a point of reference in the design of the strategies to fight illicit trade and the results to expect.

While rendering itself as a great resource in the war against illicit trade, it brings out sobering details on the extent of this trade in the country. Among these details is the total size of illicit trade, which was estimated at KES 826 billion in 2018, having risen from KES 726 billion in 2017.

At this level, the size of this trade relative to the GDP in 2017 and 2018 was 8.9% and 9.3%, respectively, a level higher than the manufacturing sector's contribution to GDP in both years. This implies the potential of this trade

wiping out an important sector such as manufacturing sector, thus deeming the country's prospect for industry-led trade development.

The reality of this threat is further amplified by the fact that illicit trade in goods manufactured by sixteen sectors, that contribute 90% of total manufacturing sector's GDP accounted for 71% of the total illicit trade. The negative impact on industry is being transmitted through sales losses, investment opportunity losses which run into billions of shillings and lost employment opportunity.

The negative impact on Government revenue is another key revelation from the Survey, where Government revenue loss was estimated at KES 129.72 billion in 2017 and KES 153.1 billion in 2018.

In summary, the Baseline Survey has served two purposes. On the one hand, it calls to reinvigorate the war on illicit trade through intensifying current activities and concerted implementation of the proposed recommendations, especially on operationalization of the National Illicit Trade Observatory and stemming illicit trade at source through trade facilitation collaborative solutions with source countries for products that have been identified as having great threat.

On the other hand, the Survey provides an assurance to the investors, especially the IPR holders that Kenya is a country of genuine products where their rights are protected by law and action.

Hon. Betty Maina, CBS
Cabinet Secretary
Ministry of Industrialization,
Trade and Enterprise Development

Statement from the Chairperson of the ACA Board

Industrial development is at the centre of Kenya's development agenda owing to the already established correlation between economic development and industrial growth.

In recognition of this, the Government has included manufacturing sector as one of the Big Four Agenda for transformation of Kenya's economy. Industrial development under this noble initiative is however under threat from the rising level of illicit trade.

This is a threat that the Government is well aware of, leading to establishment of robust legal framework and institution mechanism to combat this vice.

Although various Government Agencies have, in the course of enforcing legislations against illicit trade pursued interventions aimed at combating illicit trade, there has been tendency for the trade to keep growing.

This challenge caught the president's attention in December 2017, leading to a Presidential Directive that ordered 'immediate destruction of illicitly traded products that posed a threat to Kenya's manufacturing sector as well as the consumer and summary dismissal and prosecution of any public officer colluding with traders to encourage trade in counterfeits, piracy and other forms of illicitly traded products'.

The formation of the Multi-Agency team for combating illicit trade in July 2018 and unveiling of the National Action Plan and Implementation Framework to Combat Illicit Trade in Kenya were additional major milestones in the fight against illicit trade, which ensures a Government-wide coordinated approach.

The specific objectives of the Action Plan are the following:-

1. Reduce illicit trade in the Kenyan market by 20% p.a.
2. Strengthen the capacity of agencies to combat illicit trade
3. Strengthen collaborations and partnerships
4. Enhance public-private partnerships towards managing the vice
5. Increase the level of awareness on illicit trade by 20% p.a.

The just concluded National Baseline Survey on the Extent of Illicit Trade and Consumer Survey on factors behind consumers demand for illicit trade are crucial tools for combating illicit trade through pursuit of the Action Plan targets and measuring performance against the baseline survey figures.

Further, the National Illicit Trade Observatory, add to the arsenal for combating illicit trade by equipping Government Agencies with capacity for real time report seizures and for the firms to report their experiences with illicit trade, especially the unfair competition and impact. These will be used to inform policy and strategy for combating illicit trade and promoting investments through demonstration of actual measures being done to tame counterfeit and piracy.

Flora Mutahi
Chairperson
Anti-Counterfeit Authority Board

Acknowledgement

The National Baseline Survey on Illicit Trade in Kenya was conducted through collaborative efforts of several players in the public, private and development sectors, which are supportive of the fight against illicit trade in Kenya.

The Anti-Counterfeit Authority (ACA) with the support of TradeMark East Africa (TMEA) coordinated the survey. The invaluable input, comments and contributions from various stakeholders is acknowledged and appreciated.

I wish to acknowledge the input from the staff of various institutions. These include the State Department for Trade, Anti-Counterfeit Authority, Kenya Copyright Board, Kenya Bureau of Standards, Kenya Revenue Authority, Kenya Industrial Property Institute, Kenya National Police Service, Kenya Plant Health Inspectorate Service, Pest Control Products Board, Pharmacy and Poisons Board, Department of Weights and Measures in the Ministry of Industrialization, Trade and Enterprise Development, Kenya Film Commission, National Crime Research Centre, Kenya Association of Manufacturers, Kenya Publishers Association, Music Copyright Society of Kenya, Agrochemicals Association of Kenya and the Kenya Association of Pharmaceutical Industry (KAPI).

Special thanks go to the ACA and TMEA teams for providing technical leadership on the survey work. The Project Implementation Team and the Steering Committee under the leaderships of Dr. John Akoten and Mr. Elema Halake, respectively, are highly appreciated.

Finally, I would like to convey our appreciation to TMEA for their continued financial support for the capacity building of the Authority especially in the fight against illicit trade.

Mr. Elema Halake
Executive Director,
Anti-Counterfeit Authority

Introduction



Trade plays a pivotal role in economic development and employment and wealth creation in any country. This role is realized through trade stimulated investments and production of goods for the domestic market as well as export markets. Ability of a country to produce and deliver the products in both markets assures investors of return and guarantees sustainable economic development through production for the assured markets. The Kenyan domestic market is not only huge but has been growing exponentially as evidenced by a GDP of KES 9 trillion and imports of KES 1.8 trillion in 2019.

“the problem is not limited to a few products and certain countries but, as the report shows, it is a global problem affecting a wide range of industries”

Governments and private sector have invested heavily in a bid to take a slice of the regional and global market. For Governments, investments have been in form of policy and trade facilitation geared towards promoting trade of the country's products in the domestic market as well as in the regional and

global markets. Private sector, on the other hand, has invested heavily in building brands, research and innovation and inventions as well as protection of their brands through registration of their Intellectual Property Rights including Trade Marks and Copyrights, among other measures towards securing shares in the domestic, regional and global markets.

The role of trade as an engine of economic development has, however, been compromised by infiltration of illicit trade in the global trading system, where genuine and original products and brands are competed out of the market by fake products made to look like the originals. OECD, in a study undertaken in 1998 seeking to establish the impact of counterfeit provided vivid details on the menace imposed on industries by counterfeits. The study observed that the “problem is not limited to a few products and certain countries but, as the report shows, it is a global problem affecting a wide range of industries. Moreover, it may have a devastating impact on society as a whole”.

OECD sustained warning on adverse effects of illicit trade to world economies through subsequent studies done in 2008, and 2016. Similar alert has been provided by World Customs Organization (WCO) in its annual reports on Illicit Trade since 2012. Besides creating an understanding of what illicit trade is all about, these studies stimulates actions towards development of measures to counter its spread and protection of genuine trade.

Counterfeit and piracy are the two most researched forms of illicit trade, that rank first among other forms of illicit trade. According to OECD/EUIPO (2016) , Counterfeiting and Piracy are terms used to describe a range of illicit activities related to Intellectual Property Rights (IPR) infringement.

Counterfeit refers to illicit trade that infringes the following types of IPRs – Trademarks, Patents, Designs and Utility Models. Piracy on the other hand refers to the form of illicit trade that infringes on copyrights.

Besides creating an understanding of what illicit trade is all about, these studies stimulates actions towards development of measures to counter its spread and protection of genuine trade.

This international norm of defining counterfeit and piracy is aligned to the definition in the Kenya Anti-Counterfeit Act No.13 of 2008.

Counterfeit and piracy are only two forms of illicit trade where the underlying laws being contravened are IPR related. The scope of illicit trade, going by the definition in Moises Naim (2005) , is however much wider. According to this author, illicit trade covers “a trade that infringes the rules – the laws, regulations, licenses, taxation system, embargoes and all the procedures that countries use to organize trade, protect their citizens, raise the standard of living and enforce codes of ethics”.

The WCO (2017), on the basis of seizure data from the WCO Customs Enforcement Network (CEN) , goes further to provide a more functional definition of illicit trade. This includes seized goods as a result of contravention of customs laws, culture and heritage related laws and international conventions, drugs and public health related laws, environmental laws targeting environmental risks from illegal trade and security related laws.

In Kenya, the Government has responded to the projected threat of illicit trade on the economy through a raft of measures aimed at taming counterfeit and other forms of illicit trade.

Among these measures is the Presidential Directive on 12th December 2017 that stated as follows:

“To protect our manufacturers and consumers from fake detergents, fake cosmetics, fake batteries, and fake kerosene – sham products that endanger the lives of Kenyans – I have directed that the Kenya Revenue Authority, and the Kenya Anti-Counterfeit Authority, destroy counterfeits on seizure. Any public officers found colluding to frustrate this process, will be summarily dismissed and prosecuted.”

This bold step was taken a notch higher through the amendment of the Anti-Counterfeit Act No. 13 of 2008 Regulations, 2010 and vide the Anti-Counterfeit (Amendment) Regulations, 2019 which now provides strict measures on dealing with counterfeit and other forms of illicit trade in the country.

The government realized that to curb all forms of illicit trade it required the coordinated efforts of different Government agencies. In view of this fact, on 10th July 2018, Inter-Agency Anti-Illicit Trade Executive Forum and Technical Working Group (Multi Agency Team for combating illicit trade) was established through Gazette Notice No.7270 with an aim of strengthening interventions towards curbing illicit trade and to facilitate the rapid exchange of information between Agencies and enhance the speed of enforcement.

Part 1

The National Baseline Survey on the Extent of Illicit Trade in Kenya

The primary goal of the baseline survey was to measure the magnitude, level and prevalence of illicit trade in Kenya.



1.1 Approach and Methodology

The primary goal of the baseline survey was to measure the magnitude, level and prevalence of illicit trade in Kenya. The measurement was done using the following three complementary methods designed to provide a holistic picture on the extent of illicit trade.

A. Measurement of illicit trade using international trade data

This method involves comparative analysis of the world declared exports to Kenya and Kenya's declared imports from the world. The difference between the two should ideally be equal to zero. A positive or negative result is a pointer to the existence of illicit trade that may be occurring due to under invoicing, misdeclaration, goods smuggled into the country, among other possible means of importing illicitly traded products into the country.

The method took into account time lag between exports and imports, the difference in value between exports and imports as a result of export value being on Free on Board (F.O.B) basics and imports being on Cost, Insurance and Freight (CIF) basis. The data was obtained from the COMTRADE data base and converted from USD to KES using annual average exchange rate as published in the Kenya Economic Survey. The data was collected at HS 2 digit level. Using this method, the magnitude of illicit trade based on imports was computed for all the 97 HS Chapters and for the target sixteen sectors for the period 2017 and 2018.

B. Seizure data method

This method has been used by the WCO since 2012 to measure the global magnitude of illicit trade from data reported by Customs under the WCO Customs Enforcement Network.

The scope of coverage is goods whose trade contravenes domestic laws of the country where the goods are seized according to the legislations in that country.

This method was used in obtaining data on illicit trade seizures from Government agencies that are mandated to enforce various anti-illicit trade legislation, targeting the following forms of illicit trade:

- i. Counterfeit
- ii. Piracy
- iii. Sub-standard goods
- iv. Uncustomed goods
- v. Unexcised goods
- vi. Restricted goods

Firm sales losses The baseline survey employs firm's sales losses to gauge the magnitude of illicit trade from the private sector perspective. Firms' sales losses as a measure of illicit trade has been advocated in OECD (2008) study.

This study observed that sales losses occur when illicit trade, and specifically counterfeit and pirated products, crowd genuine products out of the market. This leads to the lowering of the market share of the rights holder and consequent downward pressures on prices as the products fight to remain in the market as a result of 'cut throat' unfair competition from counterfeits and pirated products.

The sales loss approach to measure illicit trade has also been applied in Kenya by Kenya Association of Manufacturers (KAM) study on illicit trade in Kenya (KAM 2012), which estimated that Kenyan manufacturers are losing close to 40% of their market share to counterfeiters. Kenya Publishers Association are also quoted in the ACA (2019) - National Action Plan and Implementation Framework to combat illicit trade in Kenya (2019-2022), to have used sales losses to establish the extent of book piracy. The publishers, using this approach, estimated more than KES 2 billion loss annually through book piracy.



The sales losses were obtained through firm level survey targeting the following focal sectors:

1. IPR and non-IPR

- Agricultural inputs and agrochemicals
- Automotive
- Building, mining and construction
- Chemical & Allied
- Energy, Electrical & Electronics
- Food, Beverages & Non-Alcoholic Drinks
- Alcoholic Drinks
- Leather and Footwear
- Metal & Allied
- Paper & Board
- Pharmaceutical & Medical Equipment
- Plastics & Rubber
- Textiles & Apparel
- Timber, Wood & Furniture
- Tobacco products
- Cosmetics

2. Copyrights

For Copyrights, the sectoral coverage includes the following

- Literary works- Books;
- Literary Works-Computer Programs;
- Literary works – Other writings;

- Literary works – Electronic Database;
- Sound recording works/musical works;
- Audio visual works;
- Artistic works.



Focal Population and Sampling

1. IPR and non IPR Firms

The population for IPR/non-IPR firms was determined using the Kenya National Bureau of Statistics (KNBS) National Industrial Survey of 2018. According to this survey the total number of manufacturing firms, which was taken as the population of IPR/Non-IPR firms, stood at 2,541.

2. Copyrights

The population for Copyright companies/ individuals was based on the Kenya Copyright Board (KECOBO) total registered copyright holders, which stood at 2,397 at the time of this survey.

Sampling method

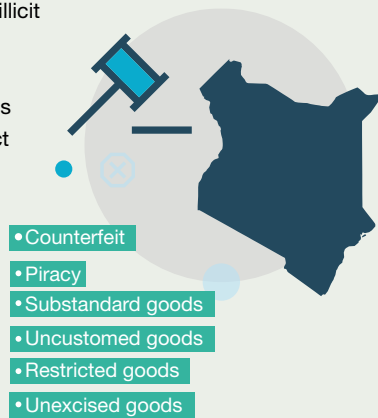
The sample size of the entire firm level survey was 433 respondents, as determined based on Cochran (1963).

1.2 Summary of Findings

1. Legal framework of combating illicit trade

Kenya has an elaborate legal framework that has evolved over the years in response to the threat that illicit trade poses to the economy.

As a result, the following forms of illicit trade that were subject of the baseline survey had specific laws and enforcement agencies to implement them: -



The only key area of concern on the legal framework was the failure of the Copyright Act (Cap. 130), 2012 in not having a provision that allows consumers to report cases of piracy to the enforcement Agency, KECOBO.

Citing the case of Anti Counterfeit Act No.13 of 2008, and specifically amendment that was made to allow consumers to report cases of counterfeit to the Anti-Counterfeit Authority, it was proposed that similar amendment be introduced in the Copyright Act.

2. Institutional framework for enforcing laws on illicit trade

There exists a robust institutional framework for enforcement of illicit trade anchored in the various laws against illicit trade.

These institutions include the following:



These institutions are fighting illicit trade through the Inter-Agency Anti-Illicit Trade Executive Forum and Technical Working Group framework which was established on 10th July 2018 with an aim of strengthening interventions towards curbing illicit trade and facilitating the rapid exchange of information between Agencies. The findings on the magnitude of illicit trade and weaknesses in seizure data recording demonstrates the need for capacity building of these institutions in order to equip them with requisite capacity to monitor and combat illicit trade.

3. Size of illicit, level and prevalence of illicit trade

a. National total size of illicit trade

Based on the international trade statistics, the total value of illicit trade was KES 726 billion in 2017 and KES 826 billion in 2018, a rise of 14%. In terms of their GDP share, this represents an increase from 8.9% in 2017 to 9.3% in 2018, slightly above the manufacturing sector's share in the GDP.

From a domestic production point of view illicit trade could be viewed as having the effect of wiping out a sector each year or stagnating sectoral growth



KES826 Billion

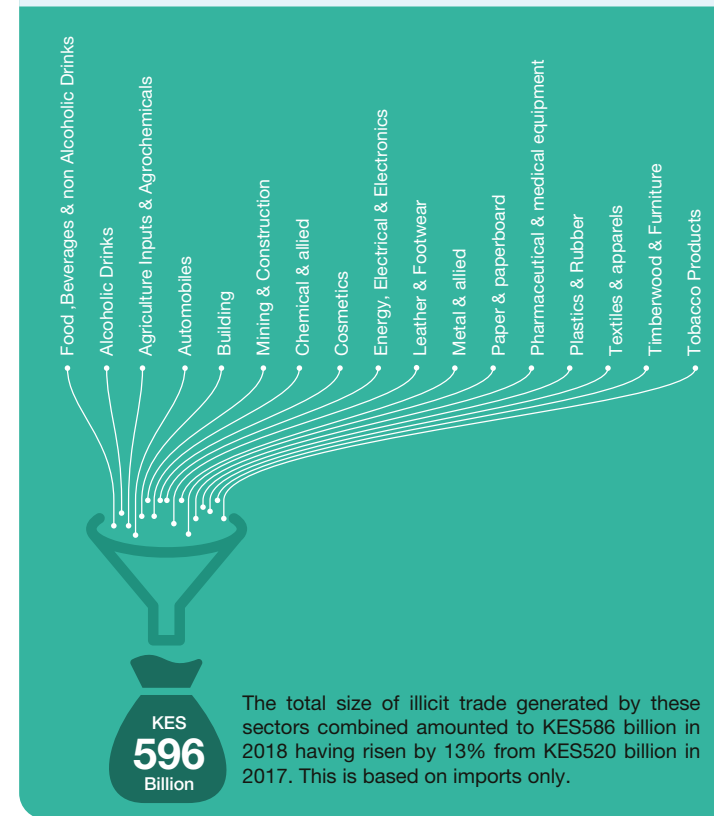
National Size of illicit Trade, 2018

Manufacturing Sector Contribution to GDP in 2017 >>> **7.7%**

Thus, from a domestic production point of view illicit trade could be viewed as having the effect of wiping out a sector each year or stagnating sectoral growth.

b. Size of illicit trade in target sectors

The following sixteen (16) sectors were targeted for the survey due to their contribution to GDP and their vulnerability to illicit trade:



The total size of illicit trade generated by these sectors combined amounted to KES586 billion in 2018 having risen by 13% from KES520 billion in 2017. This is based on imports only.

! The size of illicit trade could be much higher if data on domestic industry based illicitly traded products were to be added. This data was not available because Government agencies responsible for collection of such data had not disaggregated data to show domestic industry as a source of seized illicitly traded products.

The size of illicit trade in the sixteen-sector accounted for 71% of the national total size of illicit trade. These are therefore the sectors that merit focus and concentration in the fight against illicit trade.

Out of the above sixteen sectors, using the size of illicit trade in the sixteen sectors in 2018, the worst-hit sectors as evidenced in the share of illicit trade in these sectors as a percentage of all the sixteen sectors illicit trade are Building, Mining and Construction (23%), Energy, Electrical and Electronics (15%), Textiles and apparels (14%), Plastic and Rubber and Metal and Allied sectors (9% each). The five sectors accounted for 70% of illicit trade in the sixteen sectors in 2018.



4. Enforcement of Illicit Trade Laws by Government Agencies

a. Seizure of illicitly traded products

Government agencies' seizure of illicitly traded products demonstrated the ultimate result of the war on illicit trade because of the requirement that such products should be seized and disposed of in accordance with applicable laws and regulations.

However, out of ten Government Agencies that were mandated by the laws they were enforcing to seize illicitly traded products, only seven provided some data on seizures done between 2016 and 2018. Out of these seven institutions, ACA accounted for 84% or KES1.1billion of the total reported seizures in 2018. This was followed by KECOBO and KEBS where each accounted for 8.1% and 5.5% of the total reported seizures in 2018, respectively. Pharmacy and Poisons Board, KRA and Weights and measures accounted for 1.3%, 0.9% and 0.2% of the total reported seizures in 2018, KES1.3billion.

Share of illicit seizures by agency



ACA accounted for 84% or KES1.1Billion of the total reported seizures in 2018.

This was followed by

KECOBO	8.1%
KEBS	5.5%
PPB	1.3%
KRA	0.9%
Weights & Measures	0.2%

The low contribution of these institutions is mainly due to lack of a harmonized system for recording and retrieval of seizure data. This weakness is illustrated, as an example, by cases where institutions like KRA had so much data on seized goods but it was difficult to extract data in value from their collected data and also their data was scattered across various customs offices in the county. For Weights and Measures Department, which is a devolved function, counties were not able to provide the data on seized goods during the baseline survey.

The seizure data was also not disaggregated by source – either imports or products originating from domestic industries. These challenges will be addressed through the National Illicit Trade Observatory system where all the agencies have agreed, during the baseline survey, on the parameters for seizure data capture and forms for real time seizure data capture and submission to the National Observatory.

b. Complaints received by Government Agencies

The Government agencies reported having received complaints on the following forms of illicit trade from the private sector and the consumers: counterfeit, piracy, uncustomed goods and substandard goods. For the private sector, there were complaints every year though complaints declined gradually between 2016 and 2018, from a total of 379 complaints in 2016 to 271 complaints in 2018. The lead form of illicit trade complaints received was under counterfeit, which accounted for 71% of the total complaints received between 2016 and 2018.



41%

Increase in complaints between 2016 and 2018

The complaints received from consumers, depicted an increasing trend for all forms of illicit trade, from a total of 386 complaints in 2016 to 546 complaints in 2018.

72%

of the total were counterfeiting complaints

Counterfeit was the lead form of illicit trade complaints accounting for 72% of the total complaints received between 2016 and 2018.

The complaints prompted a number of actions, which ranged from awareness raising and education, continuous market surveillance, investigations and prosecutions and seizure of goods among other actions.

5. Firm level awareness and impact of illicit trade on firms

Firm level survey results were based on responses from a total of

370 Firms

Representing

85%

of the target sample of 433.



The survey took place between 1st October 2019 and 28th February 2020 with all questionnaires being filled and submitted online by the respondent firms.

Firm level awareness of their products being competed in the domestic market by illicitly trade products

The level of awareness of the firms on whether their products were either being counterfeited, pirated or competed by other forms of illicitly traded products was quite low. On counterfeit, 30% of the firms indicated awareness of their products being counterfeited while 56% indicated not being aware. On piracy, 38% indicated that they were aware, while 61.70% indicated that they were not aware.

c. Impact of illicit trade on firms

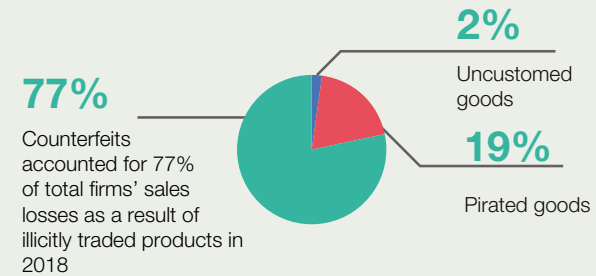
i) Sales losses

Illicit trade led to sales losses among the firms that reported having experienced unfair competition from illicitly traded products.



Total reported sales losses, however, recorded a declining trend from KES174 billion in 2016 to KES72 billion in 2018.

The decline is attributed to the war on illicit trade which, as mentioned earlier, was intensified from 2016 with ACA's hire of additional inspectors and KRA's crack down on uncustomed goods.



Source of illicitly traded products that precipitated firm level sales losses was cited as imports and domestic industries.



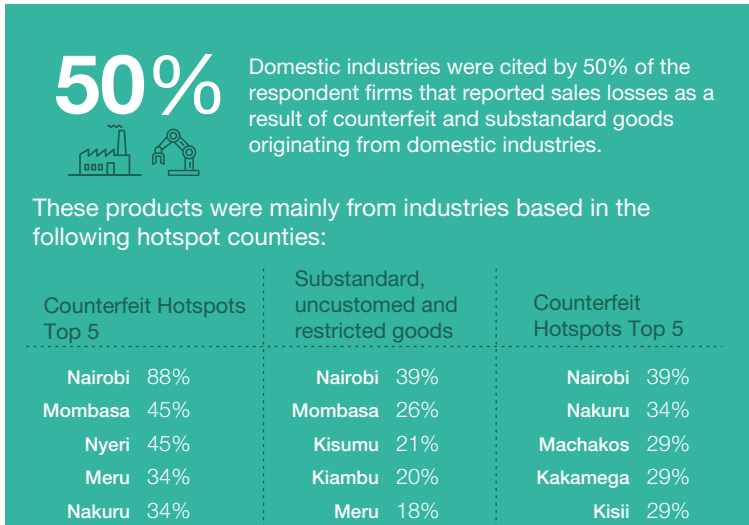
Imports were cited as a source of counterfeit and substandard goods by 51.72% and 60.00% of the firms that had reported sales losses as a result of counterfeit and substandard goods, respectively.

This implies that imports are a major source of these two forms of illicitly traded products.

The main possible source countries of imported illicit products are key trading partners of Kenya such as

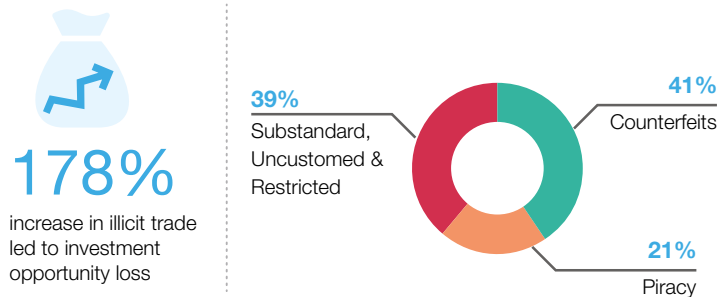
- UAE
- Netherlands
- Germany
- USA
- Italy
- UK
- Turkey
- South Africa
- France
- India
- China
- Tanzania
- Egypt
- Uganda





ii) Investment opportunity lost

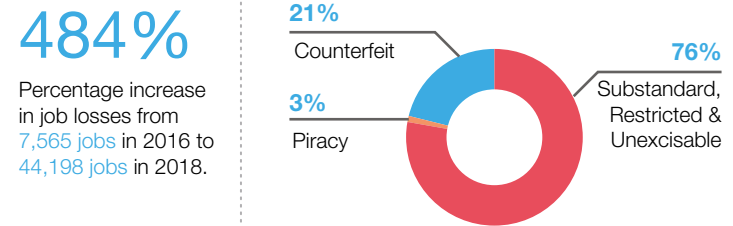
Illicit trade precipitated investment decline. This is evidenced by investment opportunity lost as a result of illicit trade, which increased by 178% from KES44 billion in 2016 to KES123 billion in 2018. The lead forms of illicit trade behind investment opportunity loss were counterfeits and piracy which accounted for 41% and 21% of total investment opportunity lost, respectively. All other forms of illicit trade (substandard, uncustomed, restricted and unexcised goods) accounted for 39%.



Therefore, prevalence of illicit trade has been discouraging investments and it has a potential of slowing down economic growth which relies on investment growth.

iii) Employment loss

Illicit trade triggers job losses in the adversely affected firms. This is evidenced by loss of employment in the respondent firms as a result of unfair competition from illicitly traded products. Job losses in these firms increased by 484% from 7,565 jobs lost in 2016 to 44,198 jobs in 2018.



The lead trigger of job losses was other forms of illicit trade (substandard, uncustomed, restricted and unexcised goods) accounting for 76% of total employment loss in 2018. This was followed by counterfeit which accounted for 21% of total employment loss in 2018. Piracy accounted for 3% of the reported job losses in 2018.

iv) Government Revenue Loss

Illicit trade triggered Government Revenue losses at two levels. The first level is the revenue loss as a result of import based illicitly traded products and the second level is as a result of revenue loss at firm level due to sales losses associated with unfair competition from illicitly traded products.

The total Government revenue losses from the two levels stood at KES153.1 billion in 2018 having increased by 18% from KES 129.72 billion in 2017. Import-based Government Revenue loss accounted for 97% and 95% of the total Government revenue loss in 2017 and 2018, respectively. The difference, 3% and 5% in the years 2017 and 2018 was accounted for by Government Revenue loss reported by the respondent firms during the survey. In total these five sectors accounted for 71% of total import-based



KES153.1 Billion

Total Government Revenue losses, 2018

The key sectors behind the massive import-based Government Revenue were:



23%

Food, Beverages and Non-Alcoholic Drinks



20%

Textiles and apparels



14%

Building, Mining and Construction



11%

Energy, Electrical and Electronics



7%

Metal and Allied

Government Revenue loss. Interventions to curb illicit trade, targeting these sectors will contribute immensely in enhancing Government Revenue by stopping the KES153.1 billion revenue leakage as a result of illicit trade.

v) Mitigating measures taken

Firms took mitigating measures to protect themselves from negative effects of illicit trade. The two broad mitigating measures taken were reporting to Government agencies and firm level initiatives aimed at protecting brands from counterfeit, piracy and other forms of illicit trade.

Reporting to Government Agencies

Majority of the firms that indicated having faced unfair competition from illicitly traded products ended up reporting to various Government agencies.



Counterfeit and substandard related unfair competition

71%

of the affected firms reported.



Piracy related unfair competition

61%

of the affected firms reported

For counterfeit and substandard related unfair competition, 71% of the affected firms reported to Government agencies compared with 61% for copyright holders. Lead Government agencies where these cases were reported include ACA, KECOBO, KEBS, KRA among others.

The level of satisfaction taken by the Government agencies was however very low, with only 33% of the firms that reported cases of counterfeit and substandard goods indicating that they were satisfied, while the balance, 67% indicated dissatisfaction. Similar scenario was noted in the case of firms reporting incidences of piracy, with 50% indicating satisfaction and remaining 50% indicating dissatisfaction.

There were also a myriad of reasons that discouraged affected firms from reporting to Government agencies, ranging from not being aware of the process for reporting, apathy due to past experiences of such reporting, to doubt on whether there would be any action taken.

Firm level measures taken to counter counterfeit and piracy

Firms that indicated having faced unfair competition from counterfeit and piracy gave a host firm level measures that they had taken to shield their products and brands from unfair competition. There were 93 and 142 distinct measures that firms reported having initiated against counterfeit and piracy respectively. These measures, which included application of bar codes, registration of Intellectual Property Rights, among others form a good basis for evolving a private sector awareness program on firm level measures that firms could take to shield their products and brands from counterfeit.

1.3 Recommendations

1. Legal Reform

- Amend Copyright Act (Cap 130), 2012 to provide for consumer reporting complaints against piracy.
- Introduce in the anti-illicit trade laws punitive measures against offenders to make it costly to engage in illicit trade.
- Introduce in the anti-illicit trade laws a reward scheme for whistleblowers to help bust illicit trade businesses. Back this with clear guidelines to help anyone identify such trade and report to relevant agencies.
- Develop a regulation and platform for central reporting and reference of illicit trade offenders.
- Develop a regulatory regime for registration and recognition of private investigators on illicit trade and allow them to testify in court.
- Ensuring all business are registered, regulated to weed out rouge traders who counterfeit products.

2. Institutional Reform

The following measures are recommended towards strengthening institutional framework for combating illicit trade

- Institutionalize the Multi-agency team on combating illicit trade through a nation-wide institutional structure that is accountable to the presidency
- Consider ACA support at the ports to reinforce Government Agencies at the port in surveillance and seizure of counterfeited products

- Capacity build Counties on enforcement of illicit trade legislations for devolved functions such as Weights and Measures as well as surveillance of illicit trade such as counterfeit and piracy working in collaboration with competent agencies such as ACA, KECOBO, KEPHIS, among others.
- Enhance accessibility of anti-illicit trade services of Government Agencies at county level through establishment of county level offices for handling complaints and supporting surveillance of illicit trade at county level.
- Create a Knowledge Management Centre to enhance information sharing among Multi Agency Team on combating illicit trade.

3. Monitoring Illicit Trade

- Include 'trade in falsely described goods' as an additional form of illicit trade to be monitored in the future, among other forms of illicitly traded products and cater for it in the observatory. This arises from the enforcement of Weights and Measure legislation.
- Create awareness among Government Agencies and the Private Sector (IPR/Non-IPR and Copyright holders) on the system of indicators to monitor illicit trade, the National Illicit Trade Observatory and their need to contribute report foreseen data and information in the observatory.
- Annual assessment of international trade-based level of illicit trade using international data download from COMTRADE Statistics database and update of the observatory.
- Seizure data – training and recruitment of contributing Government Agencies, application of the National Observatory data submission platform for real time data submission. Capacity building Government Agencies to participate in the national program for seizure data capture – training, domestication at institutional level.

- Firm level – training and recruitment of contributing IPR/Non IPR firms, application of the National Observatory data submission platform for real time data submission.

4. Systems for reporting complaints and tracking actions taken by Government Agencies

- Develop a counterfeit, piracy, substandard and restricted goods reporting system that allows one to enter a picture of the counterfeit, pirated or restricted goods and details of the manufacturer and the location at which these products were bought. This database should automatically send out a request to the Government Agencies responsible for the specific form of illicit trade. The system should then allocate the reporting person a tracking/reference number and if the investigation is complete, give the person information from the investigation to facilitate the affected person to file a legal claim against the person involved in the counterfeit, piracy, substandard or restricted goods trade.

5. Firm level measures

- Develop a program for encouraging sharing of knowledge of measures taken by other firms against counterfeit and piracy, using the 93 and 49 measures the firms reported to be pursued against counterfeit and piracy, respectively.

6. Measures to combat import based illicitly traded products

- Develop a bilateral trade facilitation program with source countries for lead sectors in import based illicit trade, aimed at customs valuation of exports and imports, under-invoicing, misdeclaration of imported goods and exchange of information on goods under illicit trade radar that are destined to Kenya.
- Share import declaration information of goods under illicit trade radar with the Multi-Agency team on combating illicit trade to ensure that envisaged importation does not end up being counterfeit of Kenyan brands or other illicitly traded products.

- Law enforcement agencies at entry points should have on-line database of registered brands and their owners to safeguard against importation of counterfeit or pirated local brands.

7. Measures to combat domestic industry based illicitly traded products

- Introduce a manufacturing enterprises registration regime, under the Ministry of Industrialization, Trade and Enterprise Development, to ensure against establishment of enterprises that manufacture counterfeit, pirated and substandard goods, industrial planning and facilitating information sharing on Kenyan manufacturing enterprises including their products (as approved by KEBS and other competent Government agencies) and their location. Business licences that are issued by County Governments to manufacturing enterprises to be issued only if the enterprise possesses a manufacturing enterprise registration certificate. This regime could start with goods under the illicit trade radar. This will weed out many manufacturing enterprises that are currently producing counterfeit or pirated products or substandard goods on the strength of Single Business Licenses issued by Counties.
- Develop a system for sharing information on registered manufacturing enterprises to facilitate sharing of information with consumers and other stakeholders of genuine products producers. This system will also be very useful in introducing such enterprises into the domestic market thereby ensuring that the industries contribute towards the fight against import of illicitly traded products which domestic industries are producing.

Part 2

The Consumer Survey on the Extent of Illicit Trade in Kenya

Illicit trade owes its existence and growth to prevailing demand from consumers who, as documented in numerous studies, purchase illicitly traded products for a variety of reasons.






The purpose of this consumer survey, is to establish the factors behind consumers' purchase of illicitly traded products.

2.1 Approach and Methodology

Illicit trade owes its existence and growth to prevailing demand from consumers who, as documented in numerous studies, purchase illicitly traded products for a variety of reasons.

The purpose of this consumer survey, is to establish the factors behind consumers' purchase of illicitly traded products. This is assessed through exploring the following: -

-  Consumers' level of public awareness on matters of counterfeiting and illicit trade
-  Consumer behaviour in relation to awareness on matters of counterfeit and illicit goods
-  Effectiveness of the various strategies to combat counterfeiting and illicit trade

The forms of illicit trade that are covered in the consumer survey include the following:

- i. Counterfeited goods
- ii. Pirated goods
- iii. Substandard goods
- iv. Uncustomed goods
- v. Restricted goods
- vi. Contraband goods

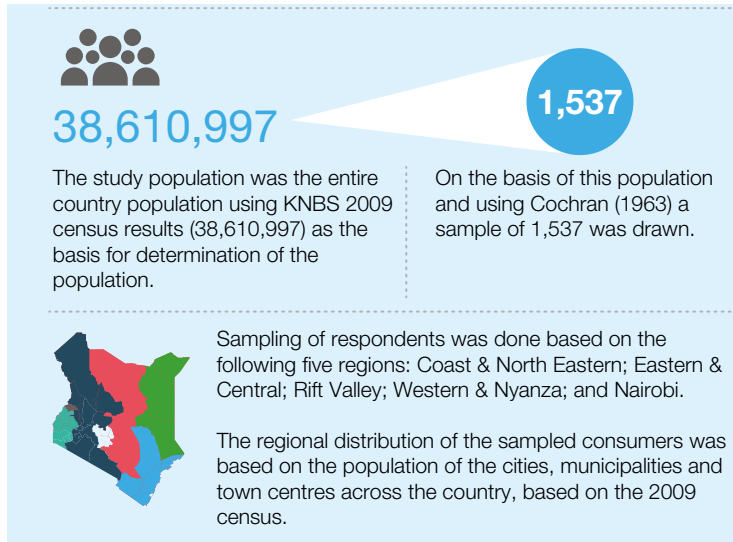
The survey was conducted in all the forty seven (47) counties across the following consumer strata, to ensure representation of all critical sectors and products in the assessment:

- | | |
|---|---|
|  Corporate Offices (Insurance, Banking, Business Management) |  Manufacturing Industries (SMEs and well established industries) |
|  Health Facilities (Hospitals, Clinics and Pharmacies) |  Supermarkets |
|  Hospitality Industry (Hotels, Clubs, Pubs) |  Counterfeit Hot Spots Areas |
|  Institutions of Learning (Schools, Colleges and Universities) |  Border Communities (communities who live in Counties that neighbor other countries) |
|  Beauty and grooming industry (Salons and Spas) |  Building/ Construction Industry |
|  Farmers (Crop and Animal Husbandry) |  Open Air Garages |
|  Entertainment Industry (music, art and other related aspects of the industry) |  Bookshops |

The objectives and the scope of the survey formed the basis and framework for design of the consumer survey instrument/questionnaire. Consequently, the survey instrument provided a platform for consumers to respond to specific questions under the following thematic areas: -

- a. Public awareness of counterfeit and other forms of illicit trade
- b. Consumer behavior in matters that relate to counterfeit and other forms of illicit trade
- c. Effectiveness of various strategies that are being pursued in combating counterfeit and other forms of illicit trade.

Closed-ended questions were used to collect quantitative data while open-ended ones were used to collect qualitative data on the above thematic areas. This approach also assisted in identification of behavioral motivators and contributors of counterfeiting and other forms of illicit trade.



The target sample was further distributed across the counties based on each County's share in the total population of the cities, municipalities and town centres across the country. The survey was conducted between September and October 2019.

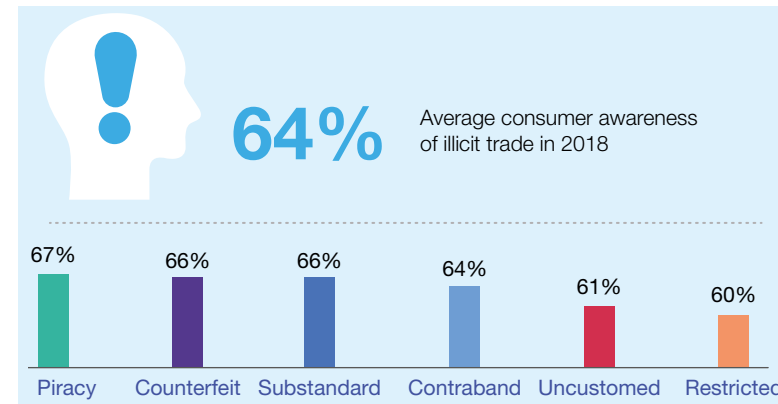
2.2 Summary of Findings

Consumers Awareness of Illicit Trade

1. Awareness of existence of various forms of illicit trade

The overall consumer awareness of the various form of illicit trade was very high, as evidenced by illicit trade public awareness index which stood at

64% in 2019. The level of awareness, however, varied across the various forms of illicit trade. The lead form of illicit trade in terms of consumer awareness was piracy at 67% level of awareness, followed by counterfeit and substandard which had 66% level of awareness each. Awareness level on contraband was at 64%, while that on uncustomed and restricted goods was at 61% and 60% respectively. These results indicate that the demand for illicitly traded products in Kenya is generally not spurred by lack of awareness. It also demonstrates effectiveness of various initiatives towards creation of public awareness on illicit trade.



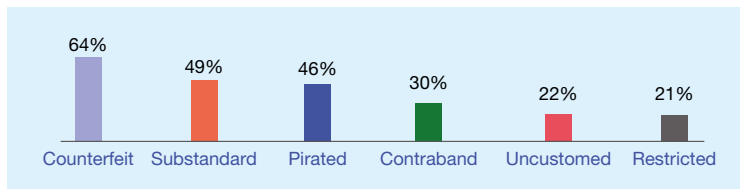
County level awareness of the various forms of illicit trade was determined on the basis of the number of respondents in each of the 47 counties who indicated their awareness of the specific forms of illicit trade as a percentage of the target respondents in that county.

Over 50% of the counties had a level of awareness above the national average for the following forms of illicit trade: counterfeit, piracy and substandard.

The forms of illicit trade with low level of awareness in over 60% of the counties were uncustomed, restricted and contraband goods. This implies a need to intensify level of illicit trade awareness in all counties and specifically focusing on counties with level of awareness below the national average.

2. Ability of the consumers to recognise illicitly traded products

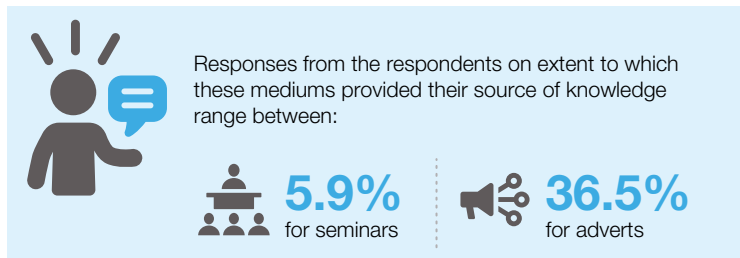
The ability of consumers to recognize that products are illicit before buying was rather low for all forms of illicit trade other than counterfeit, where 64% of the respondents indicated being able to recognize that the products were counterfeit. The ability of consumers to recognize substandard and pirated products stood at 49% and 46% of total respondents respectively.



The level was even lower for contraband, uncustomed and restricted goods, at 30%, 22% and 21% of total respondents, respectively. These findings underscore the need for education among consumers to equip them with skills to recognize illicitly traded products before they buy them. Emphasis could be placed on the forms of illicit trade that scored very low on the ability of the consumers to recognize the illicitly traded products.

3. Source of knowledge to recognize illicitly traded products

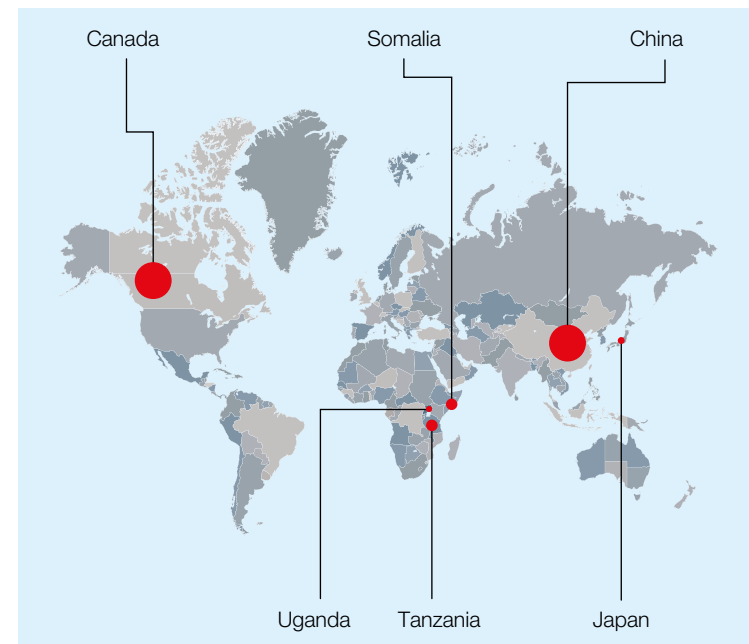
In general, the traditional medium of building consumers' capacity to recognize illicitly trade products scored very low as revealed by the number of respondents who indicated having acquired knowledge on how to recognize illicitly trade products before buying. These mediums include anti-counterfeit awareness forums, adverts, brand knowledge, seminars and sensitization forums.

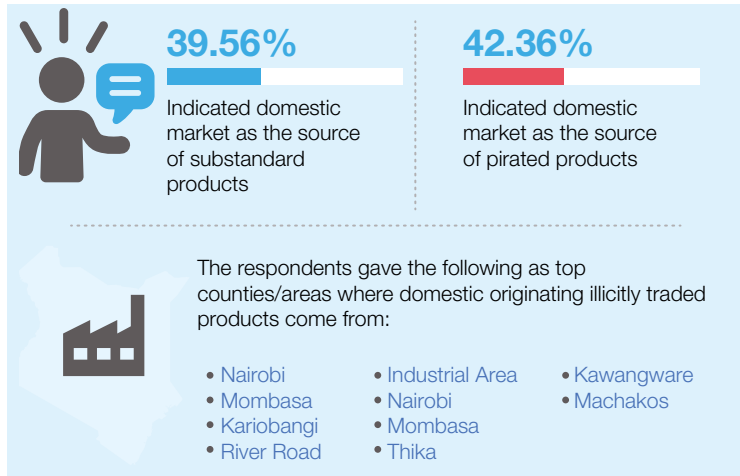


This may be more about nationwide outreach of these programs than their effectiveness. Nation-wide programs, using these mediums and more and targeting to educate consumers on the forms of illicit trade would be useful for enhancing knowledge among the consumers on how to tell illicitly traded products before purchasing.

4. Source of counterfeit and other forms of illicitly traded products

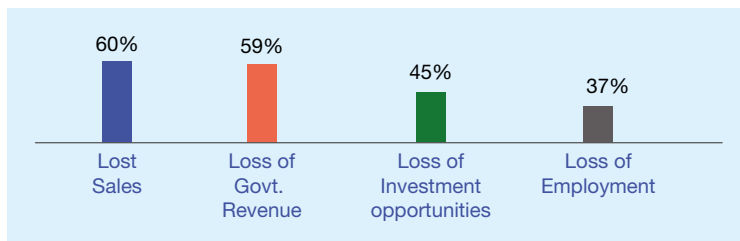
On average, imports are the dominant source of illicitly traded goods in Kenya compared to domestic market. This is in accordance to the views of the respondents, where on average 30% gave imports as the source and 26.88% gave domestic market as the source. Imports were the predominant source for counterfeit, uncustomed, restricted goods and contraband goods. According to the respondents, top five countries that were cited as sources of counterfeit and substandard goods are China, Tanzania, Uganda, Canada, Somali and Japan. Some of these countries also feature in the firm-level views of the source of illicit trade as noted in the firm-level survey.





5. Harmful effects of counterfeit and other forms of illicit trade on Kenyan Economy

The consumers are aware of the harmful effects of various forms of illicit trade on the economy. The parameters against which this awareness was gauged included loss of employment opportunity, loss of investment opportunities, loss of sales at firm level and loss of Government revenue. According to the responses on the awareness of these negative effects, the lead negative effect of illicit trade on the economy was ‘lost sales opportunity by companies/businesses’ where on average 59.51% of total respondents shared this opinion. This is followed by ‘Loss of Government Revenue’, where on average 59.13% of total respondents shared this view. Loss of investment and employment opportunities were also significant with 44.94% and 37.13% of the respondents sharing the view that these constitute negative effects on the economy.



These awareness level forms a very useful asset in dissuading consumers from purchasing illicitly traded products.

6. Legal consequences of buying illicitly traded goods

The consumers are aware of the legal consequences of buying illicitly traded products. This conclusion is supported by views of 53.37% who indicated awareness of legal consequences of buying illicitly traded products. This is a significant number, which implies even as illicit trade proliferates, a significant number of consumers are aware of what would befall those caught buying the goods.



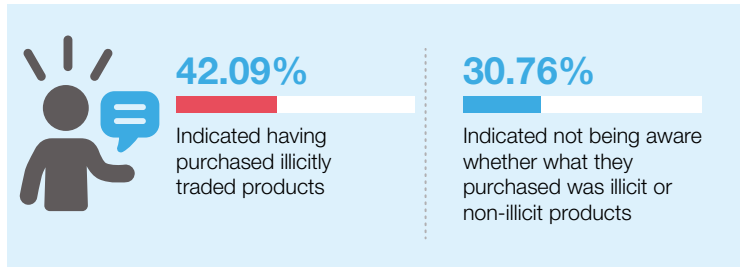
On the other hand, however, 46.63% of the respondents indicated not being aware of legal consequences that they would suffer for purchasing illicitly traded products. This number is certainly significant and a source of worry in the fight against illicit trade, as it implies that over 40% of consumers are ignorant of legal consequences, knowledge of which would act as a deterrent fact on proliferation of illicit trade.

Consumers Behaviour towards illicit trade

1. The extent to which consumers purchase illicitly traded goods

Consumer purchase is one of the most powerful measures of consumer behaviour in relation to illicit trade and acts as evidence of demand for illicit trade. It is also an indicator of how deep illicit trade has penetrated an economy.

The survey established that out of the total respondents, 42.09% indicated having purchased illicitly traded products, while 30.76% indicated not being aware whether what they purchased was illicit or non-illicit products.



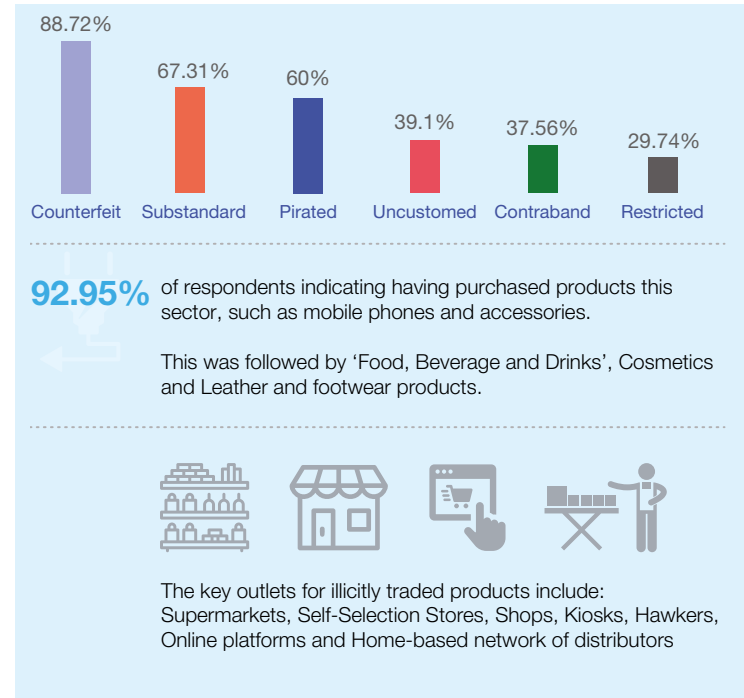
Given that this grey area could have gone either way, results of consumer purchase of illicitly traded products indicate that illicit trade is entrenched in the country and poses great threat to industry in the form of displacing the genuine products through consumer driven takeover of the market share.

2. Type of illicitly traded goods that were purchased

The most purchased form of illicitly traded products were counterfeits followed by substandard and pirated goods, where 88.72%, 67.31% and 60.00% of the respondents indicated having purchased goods under these categories of illicit trade respectively. This illustrates the great threat that illicit trade pose on IPR based products as well as non IPR products which are threatened by proliferation of trade in substandard goods.

The market for the other forms of illicitly trade products, although not as high as for the above three was also sizeable and worth of monitor. This is affirmed by respondents who indicated having purchased uncustomed, contraband and restricted goods, with their level standing at 39.10%, 37.56% and 29.74% of total respondents respectively.

The lead type of products purchased were products in the energy, electrical and electronic sector.



Generally, the outlets that were cited as the lead are online platforms, home-based network of distributors, shops, hawkers and kiosks. Supermarkets and self-selection stores played an insignificant role as an outlet for all illicitly products except counterfeits.

3. Consumers prior awareness of the form of illicitly traded products prior to purchasing

The purchase of illicitly products is not driven by consumers' deliberate choice to buy the products out of the knowledge that what they were about to buy was illicitly trade product. This is evidenced by responses from 80.44% of the respondents, who indicated that they were not aware that the products they were purchasing were illicitly traded products. Only a small fraction of respondents, 19.56% indicated having prior knowledge that the products they were purchasing were illicitly traded. This finding indicates that proliferation of illicit trade is to a large extent fuelled by ignorance.

4. Consumers likelihood to knowingly purchase of illicitly traded products in future

The consumers were categorical that they will not knowingly purchase illicitly traded products in future. This fact was alluded to by 75.8% of the respondents. For the few respondents (24.2%) who indicated that they would knowingly purchase illicitly traded products in future, the following were given as reasons that would move them to make this decision: brand name, low price, easily available, product popularity, origin of product and warranty. This demonstrates consumer awareness of illicitly traded products and their ability to recognize the products to be one of the most critical weapons to use in weakening the spread of illicit trade in Kenya.

5. Hot spot counties where illicitly traded goods were purchased



The survey has determined the extent to which illicit trade has spread across the country. This has been done through mapping of consumers by their location, thus making it possible to match cases of consumer purchase by county. The lead counties, which are termed as hotspot counties have also been identified on the basis of the cases of reported purchases of illicitly traded goods being higher than the national average.

Number of counties with reported cases of illicit products

Top 5 Counterfeit Hotspots

27

- Siaya
- Trans Nzoia
- West Pokot
- Elgeyo Marakwet
- Nandi

Top 5 Pirated Hotspots

26

- Migori
- Nyamira
- Kakamega
- Isiolo
- Baringo

Top 5 Substandard Hotspots

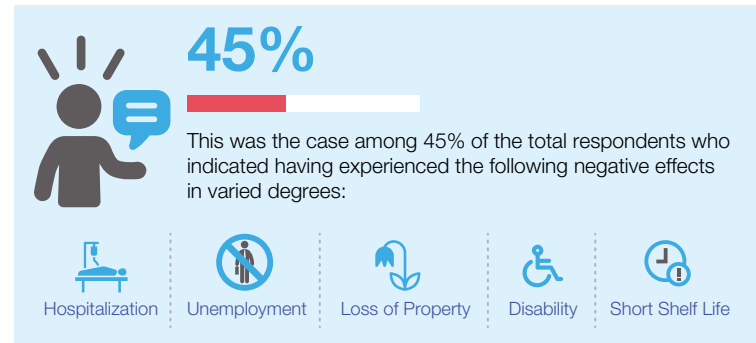
25

- Siaya
- Nandi
- Nyandarua
- Nyamira
- Busia

This calls for targeted awareness campaigns on these forms of illicit trade in these counties, education of consumers on how to recognize illicit trade before purchase and intensified surveillance.

6. Negative effects of the illicitly traded products on consumers

Consumers of illicitly traded products have faced negative effects from these products.



Besides experiencing the above negative effects, 64.6% of the respondents indicated their awareness of people known to them who suffered the above negative effects at varied degrees.

7. Consumers reporting of incidences of illicitly traded goods to Government Agencies

The level of consumers reporting cases of illicitly traded products that they purchased was quite low, with only 10% indicating having reported incidences of illicit trade to a Government agency. The rest, 90% of the respondents did not report. The lead Government agencies where consumers reported included the National Police Service, Kenya Bureau of Standards, Anti-Counterfeit Authority, Kenya Seed Company, Pharmacy and Poisons Board and Music Copyright Society of Kenya.

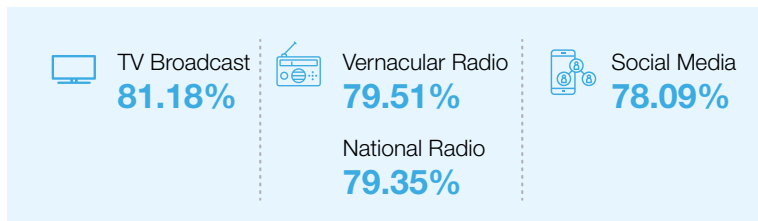
For the majority of respondents who indicated having not reported to any Government agency the reasons given included: cannot recognize counterfeit products; “the officials to report to are corrupt; costly and time-wasting process; do not know the reporting agencies; do not trust the reporting agencies; fear of reporting; and ignorance”.

Effectiveness of various strategies to combat trade in illicit trade



Among eleven strategies that have been used in the war against illicit trade, the most effective strategy is the use of TV to create awareness or disseminate information about illicit trade, as indicated by an effectiveness index of 81.18%.

This is followed by vernacular radio at 79.51%, national radio at 79.35% and social media at 78.09%. This finding indicates the need to continue the 11 strategies in the war against illicit trade, given their high ranking.



2.3 Recommendations

1. Enhance publicity and awareness of various forms of illicit trade

- Develop and implement a multi-agency illicit trade awareness program and material, and include counties in the illicit trade outreach program design and execution;
- Develop material for use in the illicit trade awareness and publicity forums; and
- Prioritize counties with low awareness of illicit trade and allocate more time and resources to reach out to target groups in these counties.

2. Enhance ability of the consumers to recognise illicitly traded products

- For each form of illicit trade, design education tool kits aimed at equipping consumers with knowledge and skills to recognize illicitly traded products before purchasing;
- IPR owners of the products that are prone to be infringed by illicitly traded products should equip consumers, through training or awareness programs on features in the products that they would use to recognize fake products; and
- Develop a public/private sector consumer education program where private sector, through support from the Government will run joint consumer education program of various products that are prone to counterfeit and piracy or being undercut by any other form of illicit trade.

3. Platforms used in building knowledge among the consumers to recognize illicitly traded products

- Review and overhaul the current platforms for building knowledge to recognize illicitly traded products among consumers. In view of the very low score on effectiveness of the platforms that are currently being used to build knowledge among the consumers on their ability to recognize illicit trade, there is need for thorough review of these platforms to determine the reason behind their low impact; and
- Ensure nationwide coverage of the platforms that will eventually be built or redeveloped. Platforms that will be used for building knowledge among the consumers for recognizing illicitly traded products will need to have a nationwide coverage in order to address the current skew in respondents who indicated having the knowledge, with some counties performing very poorly on this score.

4. Measures to combat import based illicitly traded products

- Develop a bilateral trade facilitation program with source countries for lead sectors in import based illicit trade, aimed at customs valuation of exports and imports, under-invoicing, misdeclaration of imported goods and exchange of information on goods under illicit trade radar that are destined to Kenya;
- Share import declaration information of goods under illicit trade radar with the Multi-agency team on combating illicit trade to ensure that envisaged importation does not end up being counterfeit of Kenyan brands or other illicitly traded products;
- Law enforcement agencies at entry points should have an on-line database of registered brands and their owners to safeguard against importation of counterfeit or pirated local brands; and
- Kenya should pursue with EAC and other Regional Economic Communities that it is a signatory to need for a mechanism to monitor and eliminate illicit trade in the region, especially that occurring through cross border trading. In the EAC, the effort should focus on enacting the pending Bill and draft policy on Anti-Counterfeit.

5. Measures to combat domestic industry based illicitly traded products

- Introduce a manufacturing enterprises registration regime, under the Ministry of Industrialization, Trade and Enterprise Development, to ensure against establishment of enterprises that manufacture counterfeit, pirated and substandard goods, industrial planning and facilitating information sharing on Kenyan manufacturing enterprises including their products (as approved by KEBS and other competent Government agencies) and their location. Development and execution of registration process to co-opt the private sector, especially the Kenya Association of Manufacturers, for purposes of support towards roll out of the enterprise registration regime and use of the data to inform the country on the status of manufacturing industries establishment. Business licenses that are issued by County Governments to manufacturing enterprises to be issued only if the enterprise possesses a manufacturing enterprise registration certificate. This regime could start with goods under the illicit trade radar. This will weed out many manufacturing enterprises that are currently producing counterfeit or pirated products or substandard goods on the strength of Single Business Licenses issued by Counties;
- Develop a system for sharing information on registered manufacturing enterprises to facilitate sharing of information with consumers and other stakeholders of genuine products producers. This system will also be very useful in introducing such enterprises into the domestic market thereby ensuring that the industries contribute towards the fight against import of illicitly traded products which domestic industries are producing.

6. Review retail outlets regulations with a view to introducing traceability and accountability of suppliers and retail outlets

- Develop a regulation for online retail with a view to discouraging vending of illicitly traded on these platforms; and
- Review and implement the Draft Retail Trade Regulation (2018) to ensure concerns about shops, kiosks, hawkers as avenues through which illicitly traded products are addressed.

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