REPUBLIC OF KENYA

MONOPOLIES AND PRICES COMMISSION

ANNUAL REPORT 2000

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STATEMENT BY THE COMMISSIONER

It is with profound pleasure that I take this opportunity to present the annual report on the operations of the Monopolies and Prices Commission for the year ended 31st December, 2000. The pleasure is more significant due to the fact that Year 2000 ushered in the third millennium.

The Year 2000 saw this Commission reach a significant milestone in its efforts to divest itself of its pre-liberalization past. This was done through the abolition of the six provincial offices in Mombasa, Kakamega, Embu, Nyeri, Nakuru and Kisumu. The existence of the six provincial offices was a historical anachronism emanating from the Prices Control era. Even though control of prices was abandoned in 1994, the provincial offices continued to exist. This happened despite the fact that they did not

have adequate capacity to enforce competition policy and law. The abolition of the six provincial offices has allowed uniform application of competition policy and law throughout the republic.

The Monopolies and Prices Commission [MPC] has the legal mandate to encourage competition in the national economy by prohibiting restrictive trade practices, controlling monopolies and controlling concentrations of economic power. The establishment of MPC as a macro-regulator was in recognition of the reality that business firms should not be expected to be "socially responsible" on a conscious altruistic basis. Frequently it is argued that large firms can and do serve as social stewards, doing "good things" that are not profitable. This may happen occasionally in private firms, but it is not frequent or consistent. Such acts go against the grain of training,

belief, and stockholder pressures in private management, and more often than not, there are ulterior eventual private gain motives. More poignantly, the diverse social impacts of larger business choices often embrace so many elements and groups that Solomon himself could not find the best solution. Such impacts require explicit public policies. Hence the need for macro-regulators such as MPC.

Competition is the best general process for getting efficiency and assuring community/social benefits. Efficient producers can undersell others, who must cut costs or be weeded out. Competition also forces sellers to advertise their wares informatively. Competition fosters progress. It rewards the innovator and compels the others to imitate rapidly. It spreads income and wealth widely, by averting monopoly profits for the few, and by feeding profits to both existing and new operators who are

efficient. Competition enlarges freedom of choice for citizens and also provides a certain community richness by catering to the full range of consumer wants.

The above positive attributes of competition are only obtainable within an environment of an effectively and efficiently regulated market place. Otherwise an unregulated market place will be unfair, especially where the pre-existing distribution of wealth favoured particular firms. In such an eventuality, unregulated competition will spawn a gruelling and heartless way of life, lacking in warmth and charity. Unregulated competition will be stressful and divisive, pitting people against each other. In those circumstances, it will glorify the ruthless operator; the sharks of society, who gain by suppressing or exploiting human motives. The tyranny of the bottomline will be immune to decency, kindness and forgiveness. The

community will consequently suffer Since competition can be stressed too far, a wise policy demands that an impartial arbiter be appointed to regulate and assure competitiveness in the economy. In Kenya, that impartial arbiter is the Monopolies and Prices Commission.

The Monopolies and Prices Commission has striven to adroitly play its part as a veritable impartial arbiter in the market place. In doing so it has, all along, subscribed to the belief that competition is the best all-round economic optimizer. However, even with the best of intentions and verve, a rally driver will not win an international rally against corporate sponsored drivers with access to new cars, when all he has is a jalopy! All the verve and good intentions will crystallize into vanity. As for the MPC, it craves for legislative support, adequately buttressed by

financial and skilled human resources, if it has to effectively and efficiently consummate its mandate.

For one, the MPC is reeling under the weight and stresses of an antiquated law. The Restrictive Trade Practices, Monopolies and Price Control Act [Cap. 504] had the 1st of February, 1989 as its commencement date. Before 1989, Kenya had a Price Control Act which sought to control the prices of goods. Cap. 504 was intended to be a transitional piece of legislation skewed towards enabling Kenya to gradually and systematically shun price controls and embrace liberalization. Initially, the new law moved quite fast in achieving liberalization goals, such that by 1994, all prices had been decontrolled. Through Legal Notice No. 382,dated 28th October, 1994, the government removed petroleum products as the last item from the price control regime. This action theoretically liberalized

the economy totally, pre-supposing that determination of prices would be left to the market forces of supply and demand. Part IV of Cap. 504, which deals with Control and Display of Prices, is however still in existence. This continued retention of the prices control part of Kenya's anti-trust law is an unnecessary historical anachronism and should formally and definitively be repealed.

The existing law denies MPC legal, financial and operational autonomy. The law contains convoluted provisions which render its enforcement cumbersome and sometimes even impossible. Section 5 validates anti-trust conduct done under legal veil. It is necessary for the law to be reviewed so that this unnecessary veil is lifted. The present law needs to be harmonized with sectoral laws so that the MPC, as a macro-regulator, is bequeathed with a legal framework for cooperation with Sector Regulators.

The enforcement procedures contained in the present law are veritably inadequate. In the realm of consumer protection, the present law is completely silent and this is an undesirable state of affairs. More apposite during the obtaining Information Super-highway Age, Kenya's competition law needs to embrace E-Commerce and other modern Information Systems predicated ramifications.

The realm of International Trade continues to offer challenges of unparalleled enormity. There has been an ubiquitous influx of cheap imports into the local markets. This has spawned competition concerns, and more so, because the cheap imports are posing a threat to many local companies which are finding it difficult to compete. There is an urgent need to level the playing ground to obviate the spectre of the edging out of local firms, with

its resultant inimical results, especially massive loss of employment.

This problem is compounded by the on-going attempts by the developed world to introduce global competition rules through the World Trade Organization. This is an indirect way of giving the developed world's multinationals untrammelled access to the markets of the least developed and developing countries. This is inspite of the uncontroverted fact that in at least one area ; rich countries have been overtly protectionist. This is the area of agriculture. Rich countries spend 300 billion US dollars a year supporting their farmers. This is as much as the entire national product of sub-Saharan Africa! This frightening possibility buttresses the urgent need for strengthening Kenya's Competition Authority so that it is well placed to not only handle domestic competition

concerns but to also embrace future realities in a fast changing world.

This annual report has discussed areas which this Commission feels are prerequisites to effectiveness and efficiency. This has been done through chapters, inter alia, dealing with: The Interaction Between Fair Business Practices and Consumer Welfare, Regional and International Co-operation, The Role, Organisation and Management of MPC and Enforcement of Competition Policy and Law and the Need for a New Law

Finally, I wish to assure Kenyans at large, who are our employers and the MPC's raison d'etre, that we are fully committed to promotion of competition and the enhancement of the welfare of all Kenyans. Kenyans can rest assured that no infraction of competition law reported

or brought to the attention of MPC will be allowed to remain uninvestigated.

J. J. B. Kijirah
Commissioner
Monopolies and Prices Commission

CHAPTER ONE

THE MACRO-ECONOMIC ENVIRONMENT

The year 2000 was marked by the lowest economic growth rate ever recorded since independence. The economy recorded negative 0.3% growth compared to the projected 2.3%.This poor performance was caused by various factors the main one being the effects of the severe drought experienced in 1999 and 2000. This adversely affected all sectors of the economy which were still reeling from the damaging effects of the 1997/98 *El Nino* rains. The damaging effects of the *El Nino* rains on the road network and other infrastructure coupled with the drought that drastically reduced the water supply and decimated the hydro electric power supply by 41% negatively impacted on productivity in all sectors of the economy

particularly the agricultural and manufacturing sectors which together contribute over one third of the GDP

Despite the fact that the drought pushed up the food and energy prices, the rate of inflation was maintained at a single digit level of 6.2% in 2000 compared to 3.5% in 1999. The shilling remained relatively stable while the interest rates as measured by the 91 day treasury bill rate came down significantly and remained at a lower rate. Rapid price changes of petroleum products were experienced during the year as a result of instability of world oil prices and a weakening of the Kenyan shilling against the dollar.

The poor performance of the economy was made worse by capital outflows from the country. Both overseas development assistance and foreign direct investment declined further

during the period. The high real interest rates were a disincentive to the private sector which was unable to access credit for investment and expansion and start-up businesses. In addition, deterioration of the security situation in the country and a breakdown of law and order in urban areas undermined investor confidence and tarnished Kenya's image as a safe tourist destination. Public investments showed low returns and have failed to provide the enabling infrastructure for the private sector enterprises to effectively compete with imports and to export to regional markets and the rest of the world.

The continued decline in public and private sector investments has resulted in declining capital formation over a period of time including the year under review when capital formation declined to 15.5% of GDP from 16.2% of GDP in 1999. This

is contrary to the target gross investment ratio of 25% of GDP on a sustained basis required to attain the desired 6% economic growth rate and significantly reduce poverty. In addition, the gross savings ratio required to achieve the desired level growth is 20% compared to 7.9% recorded in 2000.

The various sectors of the economy recorded reduced growth. The poor performance in the agricultural sector was attributed to drought and low commodity prices among other factors. Coffee prices declined as a result of a glut in the international market.

The manufacturing sector suffered a substantial decline by 1.5% in 2000 compared to a growth of 1% in 1999. This is associated with reduced power supply due to rationing, higher alternative power generation costs, inefficient

telecommunications, rail and port services and high transport costs due to poor roads. This resulted in reduced plant capacity utilization leading to lower output , loss of jobs and increased product prices. The building and construction industry also recorded a down turn as evidenced by the decline in cement consumption, a drop in the value of building plans approved and buildings completed and the loans advanced to the sector by commercial banks.

The international trade and balance of payments recorded poor performance despite the increase in the volume of world trade by 12.4% in 2000. Trade deficit worsened as the value of imports grew by 20.1% while that of exports grew by only 9.8%.

These factors had an adverse negative impact on economic growth, employment and poverty. The overall growth of the economy in real terms declined from 4.8% in 1995 to -0.3% in 2000 while the percentage of average Kenyans living below the poverty line is estimated to have grown from 52% in 1997 to 56% by December 2000.

In the face of all the problems, the government managed to weather the adverse effects of the drought and other economic shocks by instituting various emergency interventions and continued implementation of prudent economic reforms measures. The government sought emergency food relief and assistance in emergency power generation from the World Bank to counter the negative impact of the drought,

During the period, the government spelt out a detailed economic programme contained in the Interim Poverty Reduction Strategy Paper (IPRSP) which reflects a broad consensus on the country's development vision, national objectives, priority policies, programmes and projects. The IPRSP formed the basis for allocation of budgetary resources. In order to widen participation, inclusion and ownership of development programmes and projects all the way to the community level, a decision was made to conduct more comprehensive and elaborate consultations down to the grassroots level in preparing the final PRSP

Major economic reforms carried out in various sectors include institutional reforms within the agricultural sector aimed at increasing ownership and control by farmers. In the educational sector, both primary and secondary schools curricula were revised while aggressive initiatives to promote

Kenya and its products internationally was undertaken in order to improve market access. In order to streamline government operations and improve service delivery, phase one of the public sector reforms which saw a number of public servants retrenched was completed.

Other reforms undertaken during the period included preparing a number of enterprises for privatization and fiscal policy measures pursued by tightening the procedures for tax exemption. In this regard Kenya Revenue Authority managed to collect more revenue than had been anticipated largely due to improved receipts from VAT, import duties and excise duties.

CHAPTER TWO

THE ROLE, MANAGEMENT, AND ORGANISATION OF THE MONOPOLIES AND PRICES COMMISSION

Role of MPC

Kenya's competition law is encapsulated in the Restrictive Trade Practices, Monopolies and Price Control Act[Cap. 504 of the Laws of Kenya]. The principal objective of Kenya's Competition Law is to encourage competition in the domestic market by prohibiting restrictive trade practices, controlling monopolies, concentrations of unwarranted economic power and prices.The second objective of the Kenyan Law is to set up the necessary institutional framework for effective administration and enforcement of Kenya's Competition Law and Policy. The Monopolies and Prices Commission [MPC] is

established under section 3 of Cap. 504 as the institution vested with the power of administering and enforcing competition law in Kenya.

Management and Organisation of MPC

Section 3 of Cap. 504 decrees that the Monopolies and Prices Commission is a department in the Ministry of Finance and Planning headed by the Commissioner for Monopolies and Prices who is answerable to the Minister. The organizational structure of the Commission is summarized in Annex 1

Currently, Mr. J. J. B. Kijirah is the Commissioner for Monopolies and Prices. He is in charge of the day to day operations and activities of the Commission which during the

offices in Mombasa, Kakamega, Embu, Nyeri, Nakuru and Kisumu. The existence of the six provincial offices was a historical anachronism emanating from the Prices Control era. Even though control of prices was abandoned in 1994, the provincial offices continued to exist. This happened despite the fact that they did not have adequate capacity to enforce competition policy and law. The abolition of the six provincial offices has allowed uniform application of competition policy and law throughout the republic.

Capacity Building

The Commission has striven, within very limited means, to secure training opportunities for its staff. During the year under review one officer completed a Masters programme in Economic Policy management at Makerere University.

year under review was divided into three divisions, viz; Administration, Investigations and Enforcement.

All the Heads of the Divisions were reporting to the Commissioner. The department is manned by Administrators, Economists, Lawyers, Monopolies and Prices Officers and support staff. The organizational structure of the divisions is summarised in Annex 11.

Re-Organisation Of The Commission

The Year 2000 saw this Commission reach a significant milestone in its efforts to divest itself of its pre-liberalization past. This was done through the abolition of the six provincial

CHAPTER THREE

ENFORCEMENT OF COMPETITION POLICY AND LAW AND THE NEED FOR A NEW LAW

Institutional Framework

Competition cases in Kenya are handled by five principal institutions. These are Legislature (Parliament), Office of the Minister in-charge of Finance, the Office of the Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya. Each one of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.

Legislature (Parliament)

Parliament is the principal custodian of public interest in Kenya and it creates both the institutional and legislative frameworks for the promotion and protection of public interest. In the competition area, Parliament enacted the current legal instrument, i.e. the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya. And because the market is dynamic, the Law that regulates the functioning of the market must be reviewed from time to time so as to align it with the dynamic changes in the market place. Our submission here is that Parliament has a functional responsibility of ensuring the updating of the country's Competition Law so that the Law is able to support and promote effective competition so as to further the economic interests of the public and the efficiency of business.

Office of the Minister for Finance

The overall responsibility for competition Policy in Kenya is in the hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act Cap.504 of the Laws of Kenya subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices, who, with a team of economists, financial analyists, lawyers and other apposite market analysts is the principal custodian of Kenya's Competition policy.

The Commissioner, whose appointment is mandated under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations are carried out by the Commissioner's staff in the Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out informal research into markets where competition problems are thought or alleged to be present.

The Office of the Commissioner for Monopolies and Prices

The Commissioner for Monopolies and Prices is appointed pursuant to the provisions of Section 3(1) of Kenya's Competition Law and he, in turn, directly and indirectly controls, manages and influences competition in exercise of the powers conferred upon him by the Law and such limitations as the Minister may think fit. The Law does not provide the authority that is responsible for the appointment of the Commissioner for Monopolies and Prices. However, once the Commissioner is appointed he is independent and has a range of statutory duties and responsibilities. He heads the Monopolies and Prices Commission and has responsibilities for efficient administration and enforcement of Competition Law. He has also responsibilities in the consumer protection

field. He seeks to maximise consumer welfare in the long term, and to protect the interests of vulnerable consumers by:

a) empowering consumers through information and redress.

b) protecting them by preventing abuse.

c) promoting competitive and responsible supply.

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes with traders. However, he may be able to suggest who would be in the best position to help.

The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to Section 64(1) of the Restrictive Trade Practices, Monopolies & Price Control Act, Cap.504 of the Laws of

Kenya,a quasi-judicial authority, that is the RTPT, is appointed every other five years since 8th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya of not less than seven years standing and four members. The members of the RTPT have a five years secure term of office and may be appointed for other terms of office at the expiry of the five years.

It must be stressed here that once constituted by the Minister for Finance, the RTPT is absolutely independent of the Office of the Minister and the Office of the Commissioner for Monopolies and Prices. The principal function of the Tribunal is to arbitrate over competition policy disputes resulting from ministerial orders made on the recommendation of the Commissioner for Monopolies and Prices. The RTPT has

powers to overturn, modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties.

Orders and decisions of the Tribunal are only appealable to the High Court of Kenya and such appeals are only feasible within 30 days following the communication of the Tribunal's decisions/orders to the concerned parties.

The High Court of Kenya

Pursuant to the provisions of Sections 20(1), 25(1) and 32(1) in respect to ministerial orders made pursuant to the provisions of Sections 18(1), 24(1) and 31(1) respectively, dissatisfied appellants to the RTPT may appeal to the High Court of Kenya against that decision within thirty days after

the date on which a notice of that decision was served on them and the decision of the High Court should be final.

It should be noted here that ministerial orders made on determination of maximum prices, prescription of percentage fixed goods and determination of costs under sections 35, 36 and 37 respectively are not appealable to RTPT or High Court. However, these orders must be laid before Parliament as soon as may be possible after they are made, and if a resolution is passed within the next 28 days on which the National Assembly sits next after such orders are laid before it that the order/orders be annulled, it/they shall henceforth be void, but without prejudice to the validity of anything done thereunder, or to the making of any new order.It should, however, be pointed out that Part IV of Cap. 504 which deals with this area has not been activated since 1994.

The Need For a New Law

The Restrictive Trade Practices, Monopolies and Price Control Act was meant to be a transitional piece of legislation skewed towards smoothly and gently moving Kenya from a Price Control Regime to a market driven one. By the end of the year 2000, which is the reference point for this annual report, the transitional piece of legislation had been in existence for 12 years. By any standards this is 12 years too long.

The Act still retains Part IV which contains provisions dealing with the Control and Display of Prices. This atavistic retention has subsisted irrespective of the reality that the Government of Kenya has shunned implementation of Price

Control measures since 1994.The retention is therefore veritably superflous.

Although Kenya is arguably the first country in the Eastern, Central and Southern Africa Region [excepting then apartheid South Africa] to have enacted a competition law, other African Countries which introduced Competition Regimes much later have in place more robust and autonomous competition authorities. Apposite examples, inter alia, are Malawi, Zimbambwe, Zambia and South Africa. Other compelling reasons for a review, and even an overhaul, of the Kenyan law are:

1. The Kenyan law has convoluted provisions which require simplification and focussed articulation as concerns specific areas of the national economy.

2. There are inherent and sometimes fatal weaknesses in the enforcement provisions contained in the existing law. For example, under section 24, the Minister may order disposal of inimical interests. There are no follow-up provisions to ensure that the Minister's orders are complied with. Another example relates to the non-existence of provisions spelling how MPC should relate with the Attorney General and the Police Department in criminal prosecutions.

3. There is need for the MPC to be granted prosecutorial powers under the law. This should be akin to the position obtaining in local authorities which have been granted prosecution powers under the Local Government Act[Cap 265 of the Laws of Kenya.

4. There is need to grant Kenya's Competition Agency operational and financial autonomy.

5. There is need to grant Kenya's Competition Agency legal authc ity for consumer welfare enforcement and surveillance.

6. There is need to grant the Restrictive Trade Practices Tribunal requisite autonomy.

7. There is need to vest Kenya's Competition Authority with legal powers to handle extra-territorial Mergers and acquisitions.

8. There is need to harmonise Cap. 504 with sectoral laws whose provisions make enforcement of competition law difficult.

9. There is need to grant Kenya's Competition Authority concurrent jurisdiction with Sector regulators in all matters germane to competition policy and law.

10. There is need to grant Kenya's Competition Authority legal authority to delve into the areas of Advocacy, Education and Publicity.

11. There is a palpable need for granting Kenya's Competition Authority legal powers to conduct dawn and other raids. This is in keeping with international practice in this area.

12. There is need to review the law so that the Small and Micro Enterprises Sector is fully brought on board. More specifically, there is need to amend Cap. 504 to give SME's special treatment in the form of block exceptions in order to facilitate them to access their respective markets.

Procedures

Annexes (III) to (V) indicate the various procedures followed.

Cases Handled by the Commission

The most important responsibility which is bestowed upon MPC by the law is to encourage competition in the economy by prohibiting restrictive trade practices, controlling

market failures, and these will need to be addressed through some form of regulatory regime.

There are various regulators in certain sectors of the Kenyan economy such as Coffee Board of Kenya, Tea Board of Kenya, Electricity Regulatory Board, Communication Commission of Kenya (CCK), Capital Markets Authority, Dairy Board of Kenya, etc. These regulatory bodies have separate pieces of legislation guiding them in their functions and their mandate constitutes:

i) Promoting social goals concerning universal services;

ii) Protecting user interests and considering user complaints;

iii) Changing the industry structure;

iv) Moving towards a level playing field (no discrimination policy); and

CHAPTER FOUR

SECTOR REGULATORS AND COMPETITION POLICY

The optimal benefits of liberalization and deregulation are only realised when the resultant markets are competitive. The expansion of markets regionally and internationally, and IT development, have opened industries that were traditionally regarded as natural monopolies and this has resulted in increased opportunities of promoting competition e.g. energy sector. New technologies have spawned a competitive environment. For example, in telecommunications, new technologies are challenging the predominance of a single national network like Kenya Post and Telecommunications, and are opening up to competition from cellular phone services. Nevertheless, some areas in the economy might remain susceptible to non-competitive behaviour or other

voluntrary applications in accordance with section 28 of Cap. 504.

Effective and efficient surveillance ensures that the law is obeyed. This, the MPC has done very well. The effective and efficient surveillance notwithstanding, during the year under review, the Commission handled eighteen restrictive trade practices cases. Nine of these cases were finalized while the others continue to receive the Commission's attention. The Commission also handled thirty seven mergers/acquisitions cases. Of these twenty three were finalized while the rest continue to receive the Commission's attention.

monopolies, controlling concentrations of economic power and controlling prices. Even though the mandate to control prices has not been activated since 1994, it is quite clear that MPC has been given a very wide mandate.The mandate in question is not only timeless, it is also all-encompassing. It is no wonder that most of the Commission's time and effort is spent in surveillance of the economy to ensure that competition is encouraged. This vast responsibility can not adequately be encapsulated in the mere enumeration of the number of cases handled. Indeed just as the effectiveness of a Police Department cannot be measured by the number of crimes committed and handled, the effectiveness of a Competition Authority can not be gauged through the number of cases handled. Cases handled may connote non-compliance with the law except in the area of mergers where there may be

v) Assuring technical preconditions for effective operations.

In all competitive markets, regulation is essential in order to contain and limit restrictive trade practices, the abuse of market power, and to control and regulate mergers and takeovers, because, in all these, consumers have a broad choice. In natural monopolies or public utilities, prices have to be regulated based on the cost of service and risk/reward ratio in order to enhance the welfare of all stake holders. A well designed regulatory framework promotes competitive utility management, encourages efficiency, attracts private investment in the sector and promotes cost recovery and commercial tariffs in the sector.

Economic regulation is undertaken to control specific industries, markets and business practices, thus focusing on price, markets and the obligation the industry has to provide

the public with adequate goods and services. The distinction between technical regulation and competition regulation is however often blurred as competition issues in a regulated sector may pose certain dilemmas, the outcome of which depends on how the allocation of jurisdiction in these matters is understood and the effectiveness of the agencies involved. Moreover friction may exist regarding the prioritization of objectives and the methods used by regulatory authorities and competition Authorities e.g. technical decisions regarding spectrum use in the telecommunications sector, and the accompanying decisions about licenses profoundly affect the intensity of competition in the sector.

Regulation is implemented as a substitute for competition forces, e.g. by enforcing price ceilings, whereas competition Law is aimed at protecting and enhancing the competitive

process and setting boundaries for acceptable business conduct. Unlike regulation, competition Law is not suited to protecting individual firms or sectors from competitive forces, rather it is aimed at providing firms the opportunity to enter markets and at providing choices for consumers and fair trading practices.

The objective of sector regulation is therefore, to counteract market failures such as negative externalities. It is generally accepted that economic regulation is necessary for industries where competitive forces do not lead to optimal outcome.

Regulation is usually proactive and consists of regulations, legislation, directives, rules and the terms and conditions of licenses, all of which are aimed at preventing harmful business practices. By contrast, competition Law and policy with the

exception of merger control, is applied retrospectively by the competition Authorities only once a concern in this respect is raised or identified. Despite the potential contradictions in the objectives and methods of different regulators, there should be no difference between the broad objectives of competition authorities and those of different regulators, which will invariably include affordable prices, quality improvements and choice for the consumer. Regulation should be seen as a means to mimic competitive conditions in the market, hence making it possible for competition Authorities to have concurrent jurisdictions with the sector regulators on competition issues.

In some developing countries, regulatory legislation calls upon electricity regulators and telecom regulators to promote competition in these sectors, but these enactments are

however silent on the regulators role in dealing with anti-competitive behavior of firms in the concerned sectors and the regulators relationship with the competition Commissions. The interaction between competition agencies and sector regulators is a complex matter which has received considerable attention at other levels e.g. the OECD. Competition authorities might have certain potential advantages over sectoral specific regulators because they are:

i) More attuned to pursue economic efficiency;

ii) Convinced that competition will produce significant benefits and this will be demonstrated in many sectors as possible;

iii) Familiar with what constitutes a competitive market and what threatens it; and

iv) Likely to rely on structural remedies which would probably prove to be a better instrument for developing competition than dependence on a set of rules.

There is clearly a need for a sector regulatory regime within the broader frame work of competition policy based on the type of industry and the potential for competition. While competition policy remains the responsibility of the Monopolies and Prices Commission, other departments like DGIPE should play an advisory role in relation to policies associated with each of the relevant sectors. Regulators should concede jurisdiction on competition matters to competition authorities and seek their advice and opinion on other regulatory decisions. This reform requires amendments and harmonization of the legislation establishing the individual regulatory authorities. Therefore the Monopolies and Prices

commission, in consultation with the sector regulators should handle the following:

i) Deal with competition issues and the final decision making powers should preferably rest with the Commission as competition legislation is macro in nature and coordinates with other policies in the economy especially trade and industrial policies to engender economic development;

ii) In regulated industries with little potential for competition, the regulator should remain the sole actor, although the Commission should be able to investigate abuses of dominance by the incumbent, where applicable; and

iii) In industries with high degree of competition e.g. the telecommunication sector, the Commission should have jurisdiction on all competition matters and be required to consult with the relevant regulator like CCK

Therefore a complementary approach towards promoting competition by the regulators as well as the competition agency should be adopted. There should be cooperative mechanism between sector regulators and competition agencies to ensure consistency in decision making. Sector regulations, if coordinated fairly and efficiently will automatically result in competitiveness in the economy. Therefore the Kenyan government should enforce strongly the regulatory mechanisms in the various sectors of the economy to ensure fairness among market players.

CHAPTER FIVE

EFFECTS OF ECONOMIC LIBERALIZATION ON COMPETITION IN THE COUNTRY

Kenya's economic history has been dominated by state run enterprises, primary production, price controls and state owned banks. It took a lot of time to convince the government and the people that this kind of scenario would not lead to rapid development but rampant abuse and mismanagement. In the recent years, the focus is market based and is aimed at improving the economic policy environment, attracting greater foreign and domestic investment, liberalizing and privatizing state controlled enterprises, enhancing the banking and financial structures, reducing corruption and transforming the role of the state

from a principal producer and controller of the economy to a facilitator and regulator.

In recent years the economy has been at a crucial cross roads with the slowest growth rate, declining infrastructure and investment levels, increasing external debt, burden, natural calamities such as drought and about 50% of the population living below the poverty line. The government has launched various reform measures to break this cycle of economic decline through liberalizing the economy, improving economic governance, removing outdated economic policies and addressing some of the country's pressing social needs.

The purpose of these reforms is to promote a modern mixed economy that allows both market efficiency and responsible regulation by the government. Towards this end, the country

requires a market monitored by a strengthened regulatory body that regulates market operations, investigates claims of market abuse and takes action against companies engaged in prohibited and unfair business practices.

One of the major items on the country's economic reform programme in 2000 was to reduce the budget deficit to manageable levels. This was achieved to a small extent by reduced government borrowing thereby reducing pressure on domestic interest rates which were maintained at a stable and relatively low levels compared to the previous years. The statutory cash ratio was also reduced from 12% to 10% in order to encourage the banks to lower interest rates on the loans. The continued implementation of such reform measures that are meant to reduce the interests rates further down to reasonable and stable levels will go along way in encouraging

and promoting a competitive financing environment. As was the case in the past, banks continued with their practice of increasing interest rates in a simultaneous and unorthodox manner. This culminated in a public outcry last year, which pressurized parliament to initiate regulatory measures.

The implementation of the Parastatal Reform and Privatization programme that has been ongoing for the last nine years continued with the second phase which is aimed at seeking public-private sector partnerships to improve or develop infrastructure services. The purpose of such reform measures are; to accelerate economic growth through improved delivery of services; improve access and quality of services; reduce costs of provision; enable government to raise revenue; enhance participation of the citizens and ensure that social objectives in delivery of services are met. In summary the

main goal of the programme is to promote economic efficiency in the allocation of resources and consumer welfare. The pursuit of these two goals will be a major step towards achieving a competitive environment in the country.

In the area of government procurement procedures and guidelines, the government approved updated comprehensive procurement procedures for implementation in all public institutions. This involved decentralising tendering procedures by giving more powers and responsibilities to the accounting officers and making them fully accountable for all procurement decisions. The implementation of these guidelines and procedures will assist in curbing anti-competitive practices such as collusive tendering and other irregularities in awarding of contracts by the government.

The institutional reforms within the agricultural sector were intensified in order to give the farmers more control over the management of the marketing bodies for better delivery of services and enable them reap maximum benefits for their labour. This move will eventually eradicate the mismanagement and inefficiency in many of these bodies that have exploited the farmers over a long period of time.

The government recognizes the important role of foreign direct capital investments in promoting economic growth and further recognizes that attracting foreign investments requires robust and growing domestic entrepreneurship and investments, an efficient infrastructure network and access to markets among other factors. Various reform measures aimed at encouraging both domestic and foreign investments were

carried out during this period. As part of the roads sub sector reform programme, the Kenya Roads Board was launched in July 2000 to oversee the rehabilitation and maintenance of the roads network.

In an attempt to attract more investments and revive the declining manufacturing sector occasioned by depressed local demand and trade barriers imposed on our products in international market, the government joined the COMESA Free Trade Area. This joint venture with other members of the region will involve tariff reforms that will ensure free trade, expanded markets and promote competition within the region.

In order to reap the benefits of the measures taken to liberalize the various sectors, it was realized that there is a dire

need to review the legal and regulatory framework to make it more supportive of the reform measures that the government is undertaking. This realization was enhanced by some of the issues that came out to the public domain as a result of cases being investigated by the Commission during this period. Major flaws within the various laws including The Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 were clearly exposed and as a result of this, there were widespread calls to review the legal and regulatory framework that will promote market efficiency and responsible regulation by the government.

CHAPTER SIX

FAIR BUSINESS PRACTICES AND CONSUMERS:

HOW RESTRICTIVE BUSINESS PRACTICES AFFECT CONSUMER WELFARE

Introduction

History shows that Economies which have been and still are practising fair trading and effective consumer driven production systems have been and still are attaining higher rates of development and standards of living for consumers than Economies where restrictive business practices have been and still are being practised where economic development declined or stagnated - resulting in falling standards of living for the majority of their consumers. The former may be exemplified by countries such as U.S.A, Canada, Japan and

member states of European Union whereas the latter group is exemplified by countries such as Russia and States in Sub-Saharan Africa. There is no doubt therefore that domestic Competition coupled with suitable sectoral policies in areas such as industry, employment, incomes, investment, taxation, etc will improve the welfare of the consumer.

It should be noted here that competition across national boundaries, particularly between states at varying levels of Development and domestic competitiveness may or may not improve the welfare of the consumers - particularly consumers in the less developed economy. For instance, unrestricted competition between a trans-national corporation based in a Developed Economy with small and micro enterprises in a Developing Economy may result in the collapse of the small industries in the Developing Economy

with consequential loss of employment not only for the owners but also the employees.

What are the Contributions of Fair Business Practices to the Welfare of the Consumer?

In a competitive environment, providers of goods and services intensely compete for consumer favours which are expressed through purchases of goods and services which satisfy the consumer needs. Each time a consumer buys a product or service, he/she is voting for continued production of the particular product or service. In a bid to meet consumer needs, producers allocate their productive resources to the production of goods and services in the order of the votes cast by consumers.

On the other hand, consumers allocate their purchasing resources to the goods and services in the order of the value

and satisfaction obtained from the consumption of a particular good or service. The consumers choice of what product or service to buy from a "Consumer-demand" driven market, is influenced by a multitude of factors: the main ones being level of income, price, taste, quality, availability of substitutes, peer pressure, etc. As these factors are changing at all times, consumer needs also keep on changing continuously, thereby influencing the pattern of voting for goods and services by the consumer. This dynamic process puts pressure on the providers of goods and services to adopt changes in their production and supply processes so as to match changing consumer needs. The ability to match the continuous change of consumer needs by providers of goods and services in a free and fair market is vital for survival in a competitive market. Competition for consumer votes compels producers of goods and services to strive for technical or productive

efficiency in order to produce what consumers need at least cost by continuous improvements in managerial performance, work practices and use of material inputs. Also , the providers strive to ensure that their productive resources are allocated to the production of goods and services which have a guaranteed home because such goods and services provide consumers with greatest benefits relative to their price (money cost) . Producers whose products and services find a home will thrive and grow whereas producers of less competitive products and services will die a natural death. It is this Competition process which enables competitive firms to attract resources and customers because they can use particular resources more productively and achieve higher levels of returns. The same Competitive pressures drive firms to make timely changes to technology and products in

response to changes in consumer/customer needs and productive opportunities.

The implication of all this rivalry among producers of consumer needed goods and services guarantees economic development and growth, creation of more wealth from available resources and consumer satisfaction. These developmental and community benefits are the products of effective competition and regulatory framework .

Is there any evidence to show that Restrictive Business Practices Affect the Welfare of the Consumer negatively?

A restrictive business practice may be defined as an act performed by one or more entities engaged in production or supply of goods and services which in respect of other entities offering the skills, motivation and Seed Capital required in

order to compete at fair market prices in any field of production or supply reduces or eliminates their opportunities so to participate; or in respect of other entities able and willing to pay fair market prices for goods or services, either for production, resale or final consumption, reduces or eliminates their opportunities to acquire those goods and services. These acts include price fixing by cartels, predatory pricing, refusal to deal, discrimination in supply, market allocation, tied-sales, collusive tendering and bidding, misrepresentation and misinformation on product or service facts, etc. There is no doubt whatsoever that the active presence of one or more of these activities in a given market will cause injury to the rights of the consumer. For instance,

- Price fixing by providers of goods and services results in higher prices which in turn reduces the ability of consumers to meet their needs.

- Predatory Pricing and practices result in the elimination of actual and potential competition in any given market which in turn exposes the consumer to limited choice and anti-competitive pricing.

- Refusal to deal forces the consumer to do without the good or service or incur higher costs of procurement from alternative sources. There is no justifiable commercial reasons why a provider of goods and services to the community should discriminate when selling his/her goods or services.

- Market allocation by providers of goods and services reduces competition and choice in the given market and may lead to monopoly pricing with the implied loss of disposable incomes to the consumer.

- Tied-Sales and full line enforcing compels consumers to purchase goods or services which they do not need, if they can afford or search for alternative sources of the particular good or service or go for substitutes.

- Misrepresentation and misinformation of the facts on goods and services offered to consumers can cause injury to the economic benefits of the consumer and also endanger the safety of the consumer. For instance, the sale of banned cosmetics and bleaching agents by TNCs in Africa has been and still continues to threaten the safety of the consumer. More recently, claims of miracle cures of HIV/AIDS infection through the consumption of herbal concoctions has brought untold misery to the infected and their supporters. The contention here is that the consumer is more likely to obtain the correct information on the products and services he or she needs to enable him or her make a more informed choice of the product or service to purchase among the competing products and services so as to protect his or her safety and economic interests in a competitive market.

Common Problems of the Consumer

In the Marketplace, the consumer is often confronted with complex issues affecting the particular product or service that he needs. These may include:

- The technical nature of the product or service - e.g. electrical equipment, medical treatment.

- Ignorance or lack of awareness of his/her rights - e.g. where to seek redress in case of injury as a result of consuming a particular product.

- Competing interests - eg. Closing of a factory which is emitting poisonous gases and smell may lead to demonstrations on the grounds of loss of employment.

- Illiteracy - e.g. Consumers inability to read and comprehend technical instructions and directions on the use and handling of products such as chemical and

pharmaceuticals may result in the injury of the consumer or loss of property such as burning of houses when inflammable liquids are wrongly stored.

- Court process - the rigours of Court Process may scare consumers from seeking redress in the courts.

Conclusion

The consumer is everywhere and is the king of production without whom production and supply of goods and services would never be made. He is therefore an important factor in Economic Development of any given jurisdiction. But he needs to be sensitized, organized and supported by public agencies, the media and well-wishers for him to safeguard his interest.

CHAPTER SEVEN

REGIONAL AND INTERNATIONAL CO-OPERATION

Globalization has taken the centre-stage in world trade during the past decade. It is undeniable that the world's economy is being transformed in an almost breathtaking pace, driven by technological advances and the increasing liberalization of the world's trading system tending towards creating an integrated market. This new world economic order is creating unprecedented inter-dependence between countries both regionally and internationally. Businesses are taking advantage of the new openness of markets and competing on a world-wide scale leading to cross-border mergers and creation of new corporations of truly global dimensions.

These changes mean that competition issues are also taking on global dimensions, and many developing countries are adopting competition policy and law. The emergence of larger multinational companies, with technological means and esources to do business on a global level, brings with them the danger that these same firms may be tempted to take anti-competitive measures, the effects of which will be felt in a multiplicity of jurisdictions. In the face of these dangers, the need for enhanced regional and international cooperation between competition Law enforcement authorities is evident.

The Monopolies and Prices Commission, as do other Competition Authorities, co-operates in matters of technical assistance and also liaises with others in dealing with cross-border mergers, hardcore cartels, etc, for effective enforcement and application of competition policies and laws.

Constant interaction, cooperation and case coordination between the competition agencies is also in the interests of firms involved because it helps in:

- avoiding conflicting decisions and incompatible/ incoherent remedies.
- setting modalities for exchange of information between competition agencies.

This co-operation which Kenya is part of, is pragmatic in nature and mindful of the economic and social problems facing the competition agencies.

For the year 2000, Kenya participated in the following regional and international events relating to enforcement of competition policy and Law:

1. An official from Monopolies and Prices Commission attended the EAC meeting of Trade, Industry and Investment Committee which was held between 12th -14th September in Arusha, Tanzania. The meeting handled matters pertinent to harmonization of member states investments codes, members of states competition policies, EAC private sector Development strategy and East African Industrial development.

2. Two officials from the Monopolies and Prices Commission attended the EAC cooperation workshop on the member states competition policies in Kampala Uganda held between 11th and 12th May, 2000, which came up with recommendations which were to be taken into account during the formulation of an EAC competition Authority.

3. One official participated in the regional seminar on Competition Law and Policy for African Countries, which was preceded by the National workshop on the implementation of the Zambian Competition Act organized by UNCTAD between 24th and 27th July, 2000 in Livingstone, Zambia.

4. An official from Monopolies and Prices Commission attended the fourth UN review conference to review all aspects of the Set of Multilaterally Agreed Principles and Rules for the control of Restrictive Business Practices from 25th to 29th September, 2000, which was followed by the WTO working group meeting on the interactions between trade and competition policies held between 2nd and 3rd October, 2000. Both meetings took place in Geneva Switzerland.

5. One official attended the Antimonopoly Act and Competition Policy group training course in Osaka, Japan organized by the Japanese Federal Trade Commission and sponsored by JICA between 28th August and 30th September 2000.

CHAPTER EIGHT

CHALLENGES AND THE WAY FORWARD

INTRODUCTION

One does not need to belabour the point regarding the importance of competition in any economy. Whereas political vibrance assures political democracy, robust competition assures economic democracy. Both invariably buttress comprehensive democracy.

Competition is an essential element in the efficient working of markets. It encourages enterprises and efficiency and widens choice. It enables consumers to buy the goods they want at the best possible price. By encouraging efficiency in industry,

competition in the domestic market - whether between domestic firms alone or between those and overseas firms - also contributes to our international competitiveness.

The overall aim of competition policy is to encourage and enhance the competitive process. It is not the purpose of the policy to protect particular firms that may be adversely affected by competition. Inevitably, there are winners and losers from competition. When the competitive process itself is frustrated, however, intervention is justified. The law provides a number of ways in which the situation can be examined and, if necessary, altered.

Competition is not regarded as an end to itself. With some exceptions, there is no assumption under Kenyan legislation that a particular type of action or a particular situation which

reduces competition is wrong in itself and the assessment of the degree of competition in a market must be sensitive to the fact that markets are rarely static. Kenya's Law provides for case-by-case examination and only when a matter is found to be, or likely to be, against the public interest can it be prohibited. The term "the public interest" is a broad one, although the statutes provide some guidance on the matters that should be taken into consideration. These are not limited to consumer interests, although those are certainly of major importance.

While there can be exceptions, it can generally be assumed that steps taken to promote competition will not only further the benefits of consumers but also the wider public interest.

To assure the sustenance of these benefits demands the existence of a competition regime. With the obtaining ubiquitous untramelled liberalization-cum-globalization, promotion of competition has been internationally embraced. The International Community through specialized agencies such as the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD) has embraced the supremacy of competition in the International Market place.

Kenya is part of the International Community. Relatively, and in juxtaposition with developed economies such as the USA, the UK and Japan, Kenya is a debutante in the competition matters domain. Kenya must, however, recognize that all the successful developed economies have vibrant competition authorities which dispassionately oversee the Market place.

Kenya does not need to reinvent the wheel. For its economy to succeed, it requires a strong competition regime similar to the regimes subsisting in the developed World. As the rookie, Kenya must learn from the experience of the denizens and accordingly, take appropriate measures.

Regionally, Kenya is a member of the East African Community and COMESA. Both groupings have embraced promotion of competition in their Charters. Specifically, Article 75 of the EAC- Treaty recognizes the need for coordinated competition policies to be incorporated in the protocol that will establish the proposed East African Customs Union.

The Kenyan anti-trust position is encapsulated in the Restrictive Trade Practices, Monopolies and Price Control

Act (Chapter 504 of the Laws of Kenya). Before 1989, Kenya had a Price Control Act which by and large sought to control prices of goods. The provisions of the new Act have engendered the regulation of Mergers, Unwarranted Concentrations of Economic Power and Restrictive Trade Practices. It has, however, rather atavistically in this age of liberalization, contained virtually all the price control provisions contained in the replaced Act. There is need, however, to look at the history behind the present law.

The introduction of a Competition Regulatory Regime was first broached in 1982 by the Working Party on Government Expenditures (WPGE). The proposal is contained in Chapter III, Pages 24-27 of the WPGE Report which noted that, as direct Government intervention in the economy via state-owned commercial enterprises diminishes, "more reliance will

be put on policy instruments to influence farm management and industrial decisions on product choice, investment and employment." The Report further noted that, "as private sector activities and community efforts increase in scope and magnitude, opportunities for abuses, favouritism and exploitation may also increase."

More specifically, paragraphs 87-91 spelt out the WPGE views on the type of legislation and institutions that Kenya needed to facilitate the desirable changes from a controlled economy to a market oriented free economy. Paragraph 90 in particular stipulated that, "It is, therefore, recommended that legislation with respect to unfair practices be enacted and that a Monopolies and Prices Commission be established to enforce it. This Commission should also assume the functions of the present Price Control Division. The Commission

should be empowered to collect annually standardized financial information on all public companies and to investigate complaints relating to unfair market prices and practices. Such a commission should have quasi-judicial powers analogous to those of the Industrial Court, and should be able to impose sanctions for practices in restraint of fair trade as defined in the legislation."

Later on, Sessional Paper number 1 of 1986 articulated unequivocally the path Kenya was destined to follow in the realm of competition. It said:

"Price Controls in Kenya are administered to stabilize the prices of necessities and to restrain monopoly producers from raising prices above competitive levels in the absence of sufficient import competition.

To make price Controls more effective as a tool to increase productivity and growth, the functions of price control will be integrated with those of control over restrictive market practices; and to make controls more equitable for both consumers and producers, the rules and procedures will be streamlined:

1. A department of Price and Monopoly Control (DPMC) will be created in the Ministry of Finance, under new legislation to be prepared, to monitor actions in restraint of trade and to enforce rules prohibiting unfair practices;

2. Administration of price controls will be streamlined and applications for adjustments acted upon within 90 days, in the absence of which price adjustments will be automatically permitted;

3. The Determination of Costs Order will be revised to include costs that are not currently a basis for price

adjustments and will permit the introduction (on an experimental basis at first) of importality formulae on which to base adjustments; and

4 Items that are not produced by monopolies and are not essentials for low-income families will be considered for decontrol on a gradual basis

It is clear from the sessional paper that Cap. 504 was intended to be a transitional piece of legislation to enable Kenya move from a price control regime to a true Market (Competition) Regime. In the 1988 Budget Speech which announced the publication of the draft bill which eventually crystallized into Cap 504, the Vice President and then Minister for Finance, Professor George Saitoti, declared that Kenya was committed to a market driven competition regime. This was evidence that Kenya was not only committed to a transitional promotion of competition arrangement; it was willing to

eventually liberalize the market and fully embrace competition. This settled the matter internally: Kenya was poised to adopt a fully liberalized market regime to be regulated by a Macro Competition regulator, the present day MPC.

In the East African scene, Kenya is a member of the East African Community. Article 78(1) of the Treaty of the East African Community which deals with competition Provides that:

"The partner states agree that any practice that adversely affects the objectives of free and liberalized trade shall be prohibited. To this end the partner states agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community"

If one needs evidence of an unambiguous position that the Kenyan government policy articulates untrammelled competition in the market place, this is it. Unequivocally, the government has committed itself to prohibit any practice that adversely affects the objectives of free and liberalized trade.

To further buttress its commitment to local and international competition, the Kenya Government has stated that facilitation of both local and international trade will be two of its most important industrialization strategies. In a forward to Sessional Paper No 2 of 1996 on Industrial Transformation to the Year 2020, the then Minister for Commerce and Industry, Hon. Joshua Angatia, with regard to international trade, said: "... As a country, we must look outward to our neighbours and the world both to seek opportunities for our enterprises

and to invite others to participate in building our economy. We cannot create a future if we can turn our backs on the challenges of international trade and commerce"

The sessional paper further reiterated the need to assure promotion of competition among local traders through strict enforcement of anti-monopoly and anti-trust laws The sessional paper also definitively stated:

The multilateral trade negotiations of the Uruguay round culminated in the establishment of the World Trade Organization (WTO). It set out an ambitious agenda which included reducing trade barriers further. Kenya is a signatory to this Agreement and must work within its trade regulations and recognize that international trade will become more competitive. However, new trade opportunities will emerge

as a result of the new multilateral arrangements that will encourage international trade provided Kenya can establish export oriented industries."

The above positions demonstrate that the government of Kenya is committed to the promotion of Competition. Sessional Paper No.1 of 1986 and the Budget Speech of 1988 committed Kenya to the promotion of competition internally. Sessional Paper No 2 of 1996 committed the government to promotion of competition through the path of comparative advantage and hence, internationally. The paper also committed Kenya to the World Trade Organization (WTO) agreement which arose from the Uruguay Round and stressed that Kenya would abide by WTO trade agreements which promoted international trade .

Challenges

Although Kenya was amongst the first African Countries to enact a competition policy and also to establish an enforcement machinery (the MPC), the transitional arrangement promulgated through Cap. 504 still obtains. Countries such as Zimbambwe and Zambia whose Competition Authorities were established much later, now have autonomous Competition Authorities. The New South African Competition Authority which was established barely two years ago is both financially and operationally autonomous. It also enjoys concurrent jurisdiction with sector regulators in all matters germane to competition law and policy.

The MPC, by law, is a department of the Treasury . Although the law has bestowed upon the Commissioner the Control and Management of the MPC, his legal remit is subject to the control of the Minister for Finance. Furthermore, although Cap 504 was intended to be a transitional piece of legislation, it has not been reviewed since its promulgation. Although all prices were decontrolled by 1994, Cap 504 atavistically still retains the rather obnoxious price control provisions. It is as if we are not very sure that the competition regime will succeed and, if that happens, then we shall seek solace in the reintroduction of a price Control regime! One hopes that this is not the raison d'etre for the retention of the price control provisions. A recrudescence of this price control ghost has been manifesting itself occasionally in Kenya's Parliament where members have sought to have prices regulated in some

sectors of the economy. It should be cautioned that Kenya has obligations both regionally and internationally to promote competition and to enforce anti-monopoly/anti-trust law.

The legal provisions encapsulated in Cap 504 are rather convoluted. The provisions of the existing law do not provide for elaborate and definitive enforcement procedures. For instance in the EU Countries, competition authorities have powers to conduct dawn raids. Nearer home, the South African and Zambian authorities have been granted such powers. Here in Kenya, MPC is reduced to the position of being reliant upon the information given by the "suspects". The Law also does not clarify how MPC should liaise with the Attorney General's office and with the Police Department in enforcement matters. In the EU a legal framework has been promulgated to capture extra territorial infractions of antitrust

law, including Mergers, and Acquisitions. The Kenyan law should accord the MPC a legal framework to handle anti-trust cases which spawn international ramifications

The Kenya Law, perhaps because it was drafted when liberalization was not fully embraced, has whimsical tendencies. For example in all areas where orders are made, that is sections 18, 24 and 31, the law says that the Minister "may" make the orders. When we are dealing with an area as important as antitrust which is one of the pillars of a buoyant economy, this is an undesirable situation. In all appropriate cases, the concerned authorities should be obligated to make requisite orders.

Whereas Competition Authorities from the developed World have provisions for application of the de Minimus rule when

dealing with mergers, this is not the case in Kenya. The Kenyan system prohibits horizontal mergers per se. This is a system that may be abused by egregious subjection of businessmen and businesses to negative bureaucracy.

In matters of economics and business, time is of the essence. When dealing with restrictive trade practice complaints, concentrations of economic power and mergers/takeovers, the time within which investigations should be completed should be established by law, subject to the caveat that the period may be extended where the parties do not fully cooperate with MPC.

The existing provisions of the law do not give the Kenyan competition authority a legal framework to delve into the areas of Advocacy, Education and Publicity. Successful

Competition regimes have all acknowledged that Advocacy, Education and Publicity are key to the success of competition Authorities. For example, the success of both the UK and the South African Competition authorities has been ascribed to their successful education and publicity programmes.

In the recent past, and particularly due to liberalization of state enterprises, there has been a proliferation in the number of sector-regulators. A legal mechanism should be provided to allow coordination and cooperation between the Macro-Regulator (MPC) and sector regulators to ensure that competition principles are systemically upheld.

With regard to consumer welfare, the law should give the competition authority a legal operational framework. This is not the case today. A simple example is apposite. Under the

Trade Descriptions Act (Cap 505), false or misleading indications as to price constitute an offence. Even though price is involved here, the Monopolies and Prices Commission has no mandate. Rather it is the Weights and Measures department which deals with such infractions.

A plethora of Laws spawn anti-competitive tendencies. These, inter alia, include, many of the Acts establishing professional societies such as the Law Society of Kenya, the Industrial Property Act, the Seeds and Plants Varieties Act, the Coffee Act, the Trade Licensing Act etc. These Laws should be harmonized so that they accord with the dictates of modern competition law.

The provisions of the law establishing the Trade Practices Tribunal expose members to intimidatory possibilities. They

are paid on ad hocacy basis. The remuneration is in the form of subsistence and travelling allowances determined by the Minister. Yet they are supposed to handle appeals against the Orders of the Minister.

The members of the Tribunal are appointed by the Minister. And yet the aggrieved persons appeal against the Minister's orders to the Tribunal. This is against natural justice. It is like the judge (Minister) appointing a prosecutor (the Commissioner) who prosecutes the case before the judge (Minister) having the appeal from his case heard by an appellate judge (the Tribunal) appointed by the judge (Minister) himself. This, to the studious bystander, is a preposterous scenario. The basic checks and balances are lacking. To make matters worse, the Minister makes the rules

that regulate the operations of the tribunal. This is an eminently higgledy-piggeldy way of ordering things.

The enforcement of antitrust law inexorably requires the antitrust staff to interact with businessmen who are being investigated Businessmen who attract the attention of the antitrust authority are almost invariably the successful ones. The government of Kenya through Sessional Paper No. 2 of 1996, at page 18, has accepted that the Civil Service may be inefficient and unfriendly to the business community , It has also at the same page 18 of the said paper stated that there is need to reduce corruption . The inefficiency and the unfriendly attitude of the Civil Servants to the business community may be predicated upon the idea that businessmen who are harassed by inefficiency and the pugnacious attitude

of Civil Servants will be bamboozled into a state of apparent helplessness and be proselytized into bribery tendencies.

Inefficiency and corruption will not promote competition. To obviate these possibilities, the Competition Authority should be manned by a professional cadre of staff who should be well remunerated. The same treatment should be accorded the tribunal. Both should also be granted financial and operational autonomy.

The above exposition will suffice to demonstrate the impediments/deficiencies inherent in the existing law. The said impediments/deficiencies pose veritable legal and operational challenges to the MPC and the Nation.

The Way Forward

It has been demonstrated that the government of Kenya has committed itself to the promotion and sustenance of a Competitive Market place nationally, regionally and Internationally. The need for a regulatory regime has also been discerned. In order to successfully police antitrust issues, the deficiencies identified above and any others which have not been pointed out should be remedied. More particularly the following recommendations are made:

1. The MPC should be granted financial and operational autonomy. There is also need to establish a Board of Directors/Commissioners. Both the Chief Executive and the Board should be accorded security of tenure.

2. The Tribunal should be accorded requisite autonomy.

3. Both the Competition Authority and the Tribunal should be manned by a cadre of professional staff who should be well remunerated.

4. There is need to harmonize various laws so that anti-competitive practices can be adequately policed. These laws, inter alia, include, the Banking Act, the Seeds and Plant Varieties Act, the Trade Licensing Act, Laws establishing deregulated public corporations, etc.

5. The Law should provide for the application of the de minimus rule in the area of Mergers. A minimum threshold should be established.

6. The Law should provide for the capture of extra-territorial infractions in merger/acquisition cases.

7. Provisions which promote whimsical tendencies e.g. Sections 16, 18, 24 and 31 of Cap 504 should be amended to obligate the concerned authorities to take appropriate action. This suggestion will become

superfluous once the Competition Authority is made autonomous.

8. The time frame within which cases should be investigated should be provided for in the law.

9. The atavistic retention of Part IV of Cap. 504, which relates to the Control and Display of prices should be done away with. Through Legal Notice No. 382 dated 28th October, 1994, the government removed petroleum products as the last item from the price control regime.

10. Even though competition should be allowed to rule supreme in an untramelled manner, unfair competition is one of the areas that should be overseen by an antitrust authority. Kenya is a member of the World Trade Organization (WTO) and is bound by the Organizations antidumping provisions. As the antidumping international perspective is a possibility in the area of international trade, an antidumping legislative regime should be promulgated for the Kenyan antitrust agency.

11. A legal framework to enable the Kenyan Competition Authority to handle Consumer Welfare Issues should be established.

12. A legal mechanism of Coordination and Cooperation between MPC and Sector Regulators to ensure that competition principles are systemically upheld should be established.

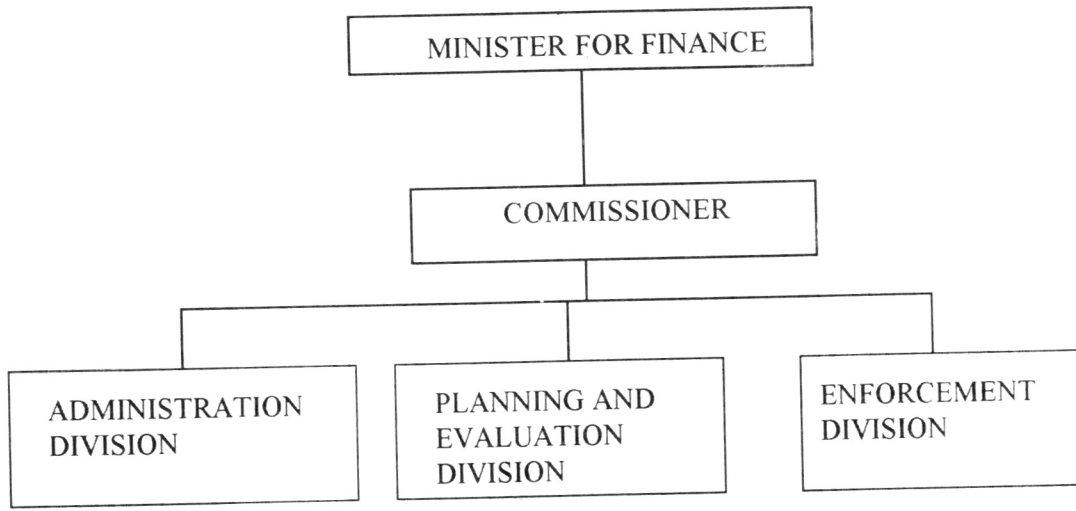
CONCLUSION

We have seen that Kenya is committed to the promotion of competition nationally, regionally and internationally. Through the strengthening of the Macro Regulator (MPC), by way of according it requisite operational and financia autonomy, the country will enhance its fulfillment of regiona and international obligations relating to competition matters The economic democracy which will be spawned by th

efficiency and effectiveness of a strengthened Competition Agency will engender positive benefits for all Kenyans; be they investors, employees or consumers.

Annex I:

ORGANISATIONAL STRUCTURE OF THE MONOPOLIES & PRICES COMMISSION



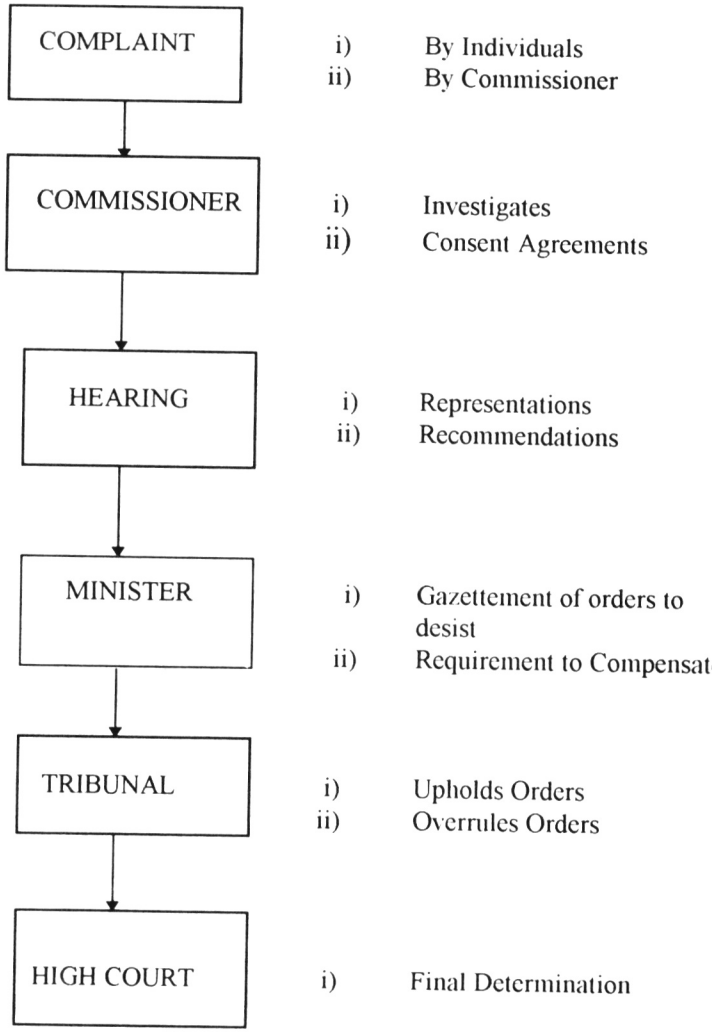
Annex II

Divisions, Divisional Heads and Divisional Functions

	Division	Head/Designation	Functions
1.	Administration	Mr. D. J. Mwasaga Deputy Secretary	Finance and General Administration
2.	Planning and Evaluation	Mrs. Alice Mwololo Senior Economist	Merger Analysis and International Co-operation
3.	Enforcement	Mrs. Lilian Mukoronia MPO I	Ensuring compliance with competition Principles and Rules.

Annex III

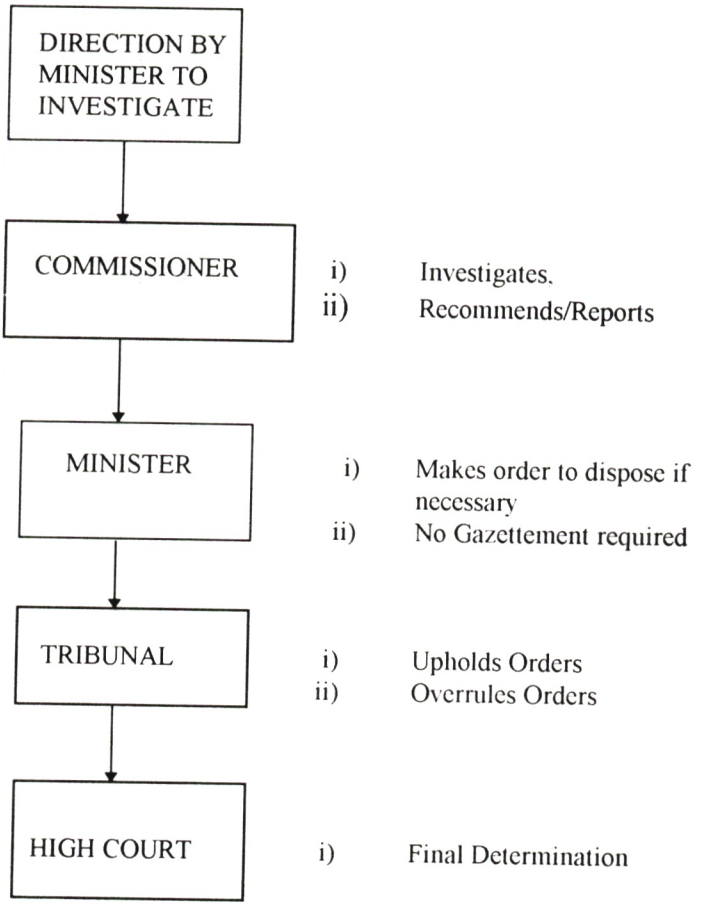
Restrictive Trade Practices



Note: The Minister is required to Gazette Order.

Annex IV

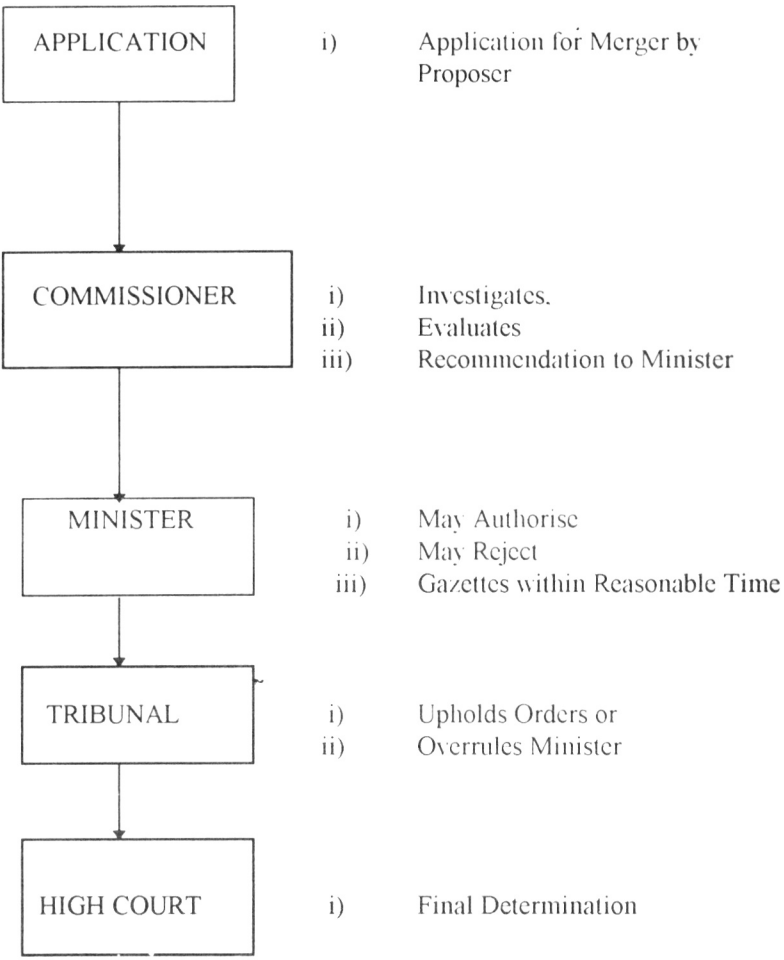
Monopolies/Dominant Positions



Note: The Minister is not required to Gazette Order.

Annex V

Mergers/Takeovers



Note: Unauthorized Mergers are illegal *ab initio;* Agreements unenforceable. The Minister is only required to Gazette Order within reasonable time.

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