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## **Global Forum on Competition**

### **THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS**

#### **Contribution from Kenya**

**-- Session II --**

*This contribution is submitted by Kenya under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.*

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## **RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS: A CASE FOR KENYA**

### **1. Monopolies and Prices Commission: An overview**

1. Monopolies and Prices Commission (MPC) is the Kenya's competition Authority. It deals with economic regulation: regulation of the structure (mergers and takeovers); regulation of conduct (controlling restraints in trade and or dealing with exemptions) and also performance. Another function of the MPC is to advise the government of Kenya in regard to issues germane to competition: domestic, regional and international. MPC, institutionally, is rationalised in such a way that it is a department in the ministry of Finance. This means that it is the Minister who regulates with recommendations from a Department. The basis of this was for MPC to act as a transitory institution that is, from a heavily controlled market economy to a liberalised one. The disadvantage with this regime is that it denies the MPC a chance to establish its reputation. This has arisen when incumbents have ignored or rejected recommendation.

2. As indicated earlier, this institutional arrangement was meant to be a transitional step towards an independent regulator. However, political capture occurred. In order to distort regulatory goals to pursue political ends the previous government did not pursue the goal of setting an independent regime. Economic regulation became a tool of self-interest within government and the ruling elite. It is reasonable to state that MPC suffered a *political risk*: the political leaders failed to support and secure cooperation for policy of economic growth.

3. Nevertheless, this regime has an advantage: it has economised on regulatory resources. This due to the fact that the officers are remunerated as Civil servants and budget allocation is based on Treasury allocation only. However, with the change of Government, there has been a policy shift. Under a document titled *The Economic Recovery strategy* the new Government has committed itself to:

- enacting and enforcing laws supportive of competition;
- harmonising competition law with sectoral regulatory laws;
- according the Commission requisite autonomy in order to separate policy, management and regulatory functions. This will enhance credibility and predictability of the Commission's decisions. This, also, has already been incorporated in the Ministry's of Finance Strategic Plan;
- according the Commission adequate budgetary provision to build the human resource capacity and to enable it to regulate competition in all sectors of the economy.

### **2. Sector Regulators**

4. Whereas MPC's jurisdiction cuts across the whole economy, there exist other sector regulators in the economy who operate independently. Communications Commission of Kenya (CCK), regulates the Communications sector under The Communications Act (No.2 of 1998); Electricity Regulatory Board (ERB), operates under the Electric Power Act, Number 11 of 1997; Capital Markets Authority, promotes, regulates and facilitates the development of an orderly, fair and efficient capital markets under the Capital

Markets Act, Cap.485A. The Central Bank of Kenya, regulates the banking and financial institutions under the Central Bank of Kenya (Amendment) Act, 1996. It is of interest to note that this Act empowers the Minister for Finance to approve mergers and takeovers in the banking sector.

5. There is other legislation with the aim of promoting, regulating and controlling industries. These include laws relating to tariff protection and related matters; Customs and Excise Act, Cap. 472, regulation by taxation; Income Tax Act, Cap.470; Value Added Tax Act, No.7 of 1989 and other laws relating to restrictions on establishment and expansion of Industrial undertakings and Businesses.

6. Sector Regulators in Kenya are created by separate pieces of legislation. Although all of them are not excellent pieces of legislation, the writer can reasonably state that most of them have adopted OECD countries' and US mode of regulation. They are relatively independent regulatory agencies compared to MPC. This regime is quite evident in the telecommunications sector. These agencies are premised on (a) distinguishing formal accountability that is, design of legal framework and legal structures and (b) Informal Accountability that is, regulatory processes and practices; (c) having responsibilities, which are defined and not shared. This arrangement avoids duplication of responsibilities hence minimising regulatory competition and or collusion.

7. They have been accorded autonomy through legislation. This can be manifested by secure source of funds although they have not secured security of tenure for their Executives nor have they set objective appointments procedure for them. These agencies have explicit legal accountability; this is manifested by effective and timely review and appeals procedures they conduct. Transparency has been enhanced through clear and published regulatory processes. Decisions and reasons for such decisions are made public through the media and therefore they establish a benchmark and consistency in future decisions. This has established predictability, which is important, in the market.

### **3. Cooperation between MPC and Sector Regulators**

8. There is neither harmonisation nor synchronisation of the responsibilities of the sector regulators viz those of MPC. Although this arrangement may be an optimal organisational response to the threat of capture, because it reduces the non-benevolent regulator's discretion, there is plausible concern that some regulators have developed a culture of arrogant independence, bordering on vexatious indulgence. This leads to regulatory competition. A recent example is where the Association of Kenya Insurers (AKI) recommended insurance premium rates to Insurance brokers. The indulgence of the MPC in trying to resolve this matter was taken as an infringement of the powers bestowed upon the Insurance industry regulator.

9. Nevertheless, MPC and other sector regulators, in an effort to circumvent the problem created by information asymmetry have continued to share information instead of relying on information provided for by the industry. This has helped to reduce informational rent enjoyed by the industry. Secondly, it has helped reduce the economic costs of regulation: - (1) the costs of directly administering the regulatory system and; (2) the compliance costs of regulation

10. In Kenya, quite often, the laws creating sector regulators contain a portion dealing with competition in the sector with no deliberate harmonisation of the role of MPC and the sector regulators. However, there are some indications that sector regulators, although not obliged, are increasingly consulting with the MPC. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the MPC. The Civil Aviation Board has been liaising with MPC in the area of restrictive trade practices. The Communication Commission of Kenya has also been cooperating with the MPC in the investigation of restrictive trade practices and in the area of mergers and takeovers. The Capital Markets Authority cooperates with the MPC in matters concerning listed companies.