

Unclassified

CCNM/GF/COMP/WD(2004)8



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

07-Jan-2004

English text only

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2004)8
Unclassified

OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Kenya

-- Session II --

This contribution is submitted by Kenya under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

JT00156386

Document complet disponible sur OLIS dans son format d'origine
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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT
THROUGH THE PROMOTION OF COMPETITION - THE KENYAN EXPERIENCE**

*by Peter Muchoki Njoroge
(Monopolies and Prices Commission)*

1. Kenya operationalised its competition law on 1st February 1989. The law has six principal parts as follows:

- Part I - This part deals with interpretation and establishes the Monopolies and Prices Commission.
- Part II - This part contains provisions germane to Restrictive Trade Practices.
- Part III - This part contains provisions apposite to Control of Monopolies and Concentrations of Economic Power.
- Part IV - This part has provisions relating to the Control and Display of Prices. It has been of no practical value for many years as Kenya consigned price controls to the dustbin in 1994.
- Part V - This part establishes the Restrictive Trade Practices Tribunal.
- Part VI - This part contains miscellaneous provisions. Nothing more will be said regarding this part.

1. Restrictive Trade Practices

2. The Kenya law on restrictive trade practices is intended to cover a very wide area. It covers acts intended to reduce or eliminate the participation of legal and natural persons in economic activities. Offended persons can complain to the Commission or the Commission may initiate an investigation *ex proprio motu*. The Commission has wide powers including powers to require the offending persons to cease and desist. This is done through Consent Agreements which the Commissioner is required to Gazette. Where there are no Consent Agreements, a hearing is held after which the Minister makes requisite orders. The orders to desist may require the offender to take positive steps to assist existing or potential suppliers, competitors or customers, in order to compensate for the past effects of the offending practices. There are rights of Appeal to the Tribunal and to the High Court.

3. The Kenya experience has been that many people against whom complaints are made tend to reach some sort of an agreement with the complainants. At that point most complainants just vanish into thin air. They thus make the investigation process very difficult. We should however not be surprised. Businesses by nature are selfish and will see no point in wasting more money and time when the desired result has been achieved. To the extent that the suspected offenders desist from continuing to break the law, we can opine that the mere existence of a competition Authority, to which complaints are made, is

beneficial to the economy. Even without completing investigations, the Competition Authority, through fortuitous defaults brought about by recalcitrant Complainants, has been performing an important role in prohibiting Restrictive Trade Practices.

4. Regarding investigations initiated *ex proprio motu* by the Commission, the Kenyan experience is that even where the suspected offenders deny wrong-doing, the offensive practices cease. The surveillance function of the Competition Authority is, thus, beneficial to the national economy.

5. It may be important to point out that developing countries have substantial informal sectors. This has the effect that the capture of restrictive trade practices in these sectors is made very difficult.

2. Control of Monopolies and Concentrations of Economic Power

(a) *Mergers and Takeovers*

6. Horizontal mergers and takeovers between two or more independent enterprises are prohibited *per se* unless they are authorised in accordance with the law. This compulsory notification and authorisation procedure has, of necessity, ensured that the Commission is very active in the mergers/takeovers area.

7. The Commission is of the view that some sort of a threshold should be introduced. Otherwise the Commission is quite effective in this area.

8. It should be pointed out that when the merger or takeover is being approved, a condition may be imposed that certain steps be taken to reduce the negative effects of the merger or takeover on competition.

(b) *Control of unwarranted concentrations of economic power*

9. The competition law requires the Minister to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution.

10. The Competition Authority undertakes sectoral studies in a bid to consummate this legal mandate. Where necessary the Minister may make an order directing any person whom he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or the supply of services as the exigency of the situation may deem necessary to remove the unwarranted concentration.

11. In developing countries, cognisance should be taken of the reality that there is a general dearth of investable capital due to a general lack of capacity to make adequate savings. This means that enterprises against which divestiture orders are made may be unable to find investors willing or able to purchase their holdings. With such eventualities, Competition Authorities will find it difficult to enforce the law. A situation in which the law cannot be enforced is no better than a situation in which there is no law at all and should be avoided at all costs.

12. It is also possible for enterprises being subjected to divestiture orders to collude with potential investors so that subject properties are not bought at all. Divestiture Orders, also, have the possibilities of being subjected to constitutional challenges in courts of law as they pose dangers to the sanctity of private property.

3. Control and Display of Prices

13. The existence of this part is veritably superfluous. Kenya has abolished price controls since October, 1994. It is hoped that the whole part will be repealed soon.

4. The Restrictive Trade Practices Tribunal

14. The Restrictive Trade Practices Tribunal consists of a Chairman, who must be an advocate of the High Court of Kenya qualified to be appointed a High Court Judge, and four other members appointed by the Minister.

15. The Tribunal has not been very busy. It is, however, known that Kenyans are averse to litigation of whatever nature. The majority of the people view situations where they may end up in courts of law with trepidation. Some people have argued that our courts system is user unfriendly and egregiously slow. As businesses abhor situations which may lead to uncertainty regarding not only the time taken in resolving disputes but also what the decisions will be eventually, they tend to eschew the litigation system. In any case, time and some degree of certainty are of essence to business.

5. Other Apposite Issues in the Enforcement of Competition Law and Policy

(i) Lack of a competition culture

- (i) Competition is a fairly new phenomenon in developing countries. As long as there are competing manufacturers, wholesalers, retailers etc., many people will think that there is adequate competition. As a new phenomenon, competition has not been understood well. For example, when the Kenyan Law was being debated in Parliament some members of Parliament thought that competition law and policy should be applied to curtail the preponderance in business by a certain group of Kenyans vis-à-vis those deemed to be indigenous¹. Yet another member of Parliament felt that competition law should be applied to prohibit the practice of requiring new entrepreneurs to pay goodwill².

If law makers did not understand the law they were promulgating, then the common citizenry is obviously less informed.

- (ii) Lack of support by the policy makers, public and the business community

Policy makers do not accord Competition Authorities required support. This may be because competition is a new phenomenon. Recently, in Kenya, two members of Parliament wanted to reintroduce price controls in the areas of Banking and Petroleum. The amount of support they got from Parliament, the public and the unaffected sectors of the business community was phenomenal.

At a recent meeting³ of competition practitioners, it was decried that although competition was one of the new issues being discussed in Doha in November, 2002, most

1. Kenya National Assembly, 3rd November, 1988.

2. Ibid.

3. The meeting was held in Pretoria, South Africa, to launch the Southern and Eastern Africa Competition Forum on 16th November, 2002. During the Cancun meeting [2003], Kenyan, Zambian & South African competition authorities were represented.

of the competition authorities were excluded from government delegations. This cogently demonstrates that full acceptance of competition by national authorities is yet to be attained.

Businesses only support the idea of competition when they are affected negatively. In many developing countries, policy makers are often the owners of key businesses. This reality poses veritable challenges to the enforcement of competition policy and law. Quite often the law makers promulgating competition law own the businesses which may require regulation. Possibilities of conflicts of interests are legion.

(iii) The judiciary

The judicial systems in developing countries are not very active in the area of competition. It is necessary that the judiciary is brought on board through requisite education and advocacy programmes.

(iv) Lack of adequate financial resources

In developing countries such as Kenya, Competition Authorities are not accorded adequate financial resources. This may be understood when we juxtapose the requirements of competition authorities with more mundane needs such as clean water, health, roads, education etc. Even these supposedly more immediate needs do not receive adequate funds as the funds are not there in the first place.

(v) Lack of adequate human resources

Almost all competition authorities in the developing countries lack adequate human power. To a politician, it does not make sense to train one highly qualified competition expert abroad when the same resources could be expended in training many health workers etc. There is need to sensitise policy makers on the need to have qualified practitioners.

The private sector has contributed a lot to lack of qualified personnel. In many instances, the private sector has poached from the competition authorities employees who have been highly trained. This is because the private sector offers better salaries.

(vi) Lack of legal and financial ability to delve into the areas of education and advocacy.

For Kenya, although the Commission has an independent legal mandate to police competition issues, in other areas it is merely a department of the Treasury. As a result, education and advocacy issues have to be handled by another Treasury unit. Since competition matters are a fairly new phenomenon, there is need for the law to be reviewed so that the competition authority gets autonomy. This will allow the authority to handle education and advocacy matters. This area is currently being addressed.

Regarding inadequacy of financial resources, it is hoped that effective advocacy will facilitate the increase of the competition authority's budget. Autonomy will also have a positive effect in this area as the competition authority can impose fees to cover costs of its services in areas such as mergers and takeovers.

(vii) Exemptions

Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act exempts from the provisions of the law some trade practices. This is not a desirable situation. These exemptions have the ability to lessen competition in the economy. The exemptions will cover some statutory authorities and also embrace the licensing of members of professional societies such as the Law Society, Medical Doctors, Engineers, Architects, Accountants etc.

(viii) Sector regulators

Sector regulators in Kenya are created by separate pieces of legislation. Quite often, the law creating a sector regulator contains a portion dealing with competition in the sector. There should be deliberate harmonisation of sectoral laws with the competition law. If found expedient, the competition authority should have concurrent jurisdiction with sector regulators in all matters spawning competition issues.

Recent experience has shown that sector regulators are increasingly consulting with Kenya's competition authority. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the Monopolies and Prices Commission. The Civil Aviation Board has been liaising with us in the area of restrictive trade practices. The Communications Commission of Kenya has also been cooperating with the competition authority in the investigation of restrictive trade practices and in the area of mergers and takeovers.

(ix) Prosecution of offenders

The Restrictive Trade Practices, Monopolies and Price Control Act has provided for offences and penalties under Sections 21 (Restrictive Trade Practices) and 26 (control of monopolies and concentrations of economic power). The prosecution of the offenders is, however, not done by the competition authority. This has to be executed by the national police force and/or the Attorney General's office. Requisite autonomy will improve the Competition Authority's role in this area.

(x) Difficult economic realities

In the area of mergers and takeovers, developing countries sometimes find themselves between the rock and the hard place. For example, a company will be placed under receivership. Eventually a proposal will be forwarded to the competition authority for its takeover by a competitor. The Competition Authority may find that no other competitor was interested in the failed firm due to a dearth of investable capital. This will also apply in the takeover of businesses and assets of foreign companies divesting from developing countries.

(xi) Access to redress by members of the public

Interested members of the public and not just litigants should be accorded opportunities to seek legal address in appropriate cases.