

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS****OECD Global Forum on Competition****CONTRIBUTION FROM KENYA**

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KENYA'S EXPERIENCE OF AND NEEDS FOR CAPACITY BUILDING/TECHNICAL ASSISTANCE IN COMPETITION LAW AND POLICY

1. Introduction

Kenya's change from a controlled economy to a free economy was officially articulated for the first time in the Sessional Paper No. 1 of 1986 on "Economic Management for Renewed Growth", which stated on page 24 paragraph 2.53 that the "Government will establish the market-based incentives and regulatory structures that will channel private activity into areas of greatest benefit for all Kenyans. In doing so, Government will rely less on instruments of direct control and increasingly on competitive elements in the economy". At paragraph 6.31, page 100, the Sessional Paper also noted that, "At present, Kenya has no comprehensive legislation making restrictive practices illegal and "Government will propose legislation prohibiting restrictive trade practices and establishing an administrative mechanism to enforce it". This commitment by the Government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya in 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988 after receiving Presidential Assent on 19th December 1988. Thereafter, the then Minister for Finance signed the necessary Legal Notice on 30th December 1988 appointing 1st February 1989 as the day on which the Act would come into operation.

2. Objectives of Kenya's Competition Law and Policy

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 institutional framework is made up of the Legislature (Parliament), Office of the minister in-charge of Finance (MOF), the Office of the Commissioner for Monopolies & Prices (MPC), the Restrictive Trade Practices Tribunal (RTPT) and the High Court of Kenya.

3. Enforcement of Competition Law

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 analysis, lawyers and other necessary 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 research into markets where competition problems are thought or alleged to be present.

The Commissioner for Monopolies and Prices is appointed in 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 Department of the Treasury 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:

- empowering consumers through information and redress.
- Protecting them by preventing abuse.
- 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.

Notwithstanding the above, the efficacy of Kenya's Competition Law has been veritably constrained and it requires to be reviewed or even overhauled for the following reasons:-

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 authority 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 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.

4. Experiences in Technical Assistance

Kenya has not received any multi-year programme assistance in the field of Competition Law and Policy upto date. In the recent past, UNCTAD has been the most useful agency in the provision of technical assistance to Kenya's competition agency. In this regard UNCTAD provided trainers for two regional training workshops hosted by Kenya in February 1998 and March 2001. UNCTAD has also assisted Kenya with sponsorship for Kenya's competition officials to attend seminars and conferences and two week's attachment for two officials at the Federal Trade Commission of U.S.A.

Other technical assistance providers to MPC have been:

1. Japanese International Co-operation Agency sponsorship for the attendance at the Anti-monopoly course in Japan.
2. OECD sponsorship to attend OECD Global Competition Forum in 2001 and 2002.
3. WTO/DFID sponsorship to attend Africa Regional Seminar, Cape Town, South Africa, February 2001.

5. Technical Assistance Needs

To redress the shortcomings demonstrated above, and in order to manage the dynamic process of globalisation, trade liberalisation, de-regulation and protection of consumer welfare, requisite capacity needs to be developed. The economies of the countries which form the East and Southern African region, have in the recent past, been reeling from the effects of poor economic performance attributable to diverse factors. These range, inter alia, from drought and other vagaries of the weather, collapse of commodity prices in world markets vis-à-vis prices of imported manufactured goods, Civil wars to unfair competition in the world market.

In most of the countries of the region, the sustenance of the national budgets invariably requires the support of donor aid. In any case, national priorities gravitate towards more veritably mundane sectors such as health, poverty alleviation and education. The region is, therefore, financially and technically

constrained in matters relating to institutional Capacity Building. Apriori, Competition Authorities in the region are not spared the vicissitudes and the resultant effects of these constraints.

Assistance in capacity building and technical matters for Kenya should take into account the level of development in Competition Law and Policy. Kenya has had a Competition Law and a Department in charge of Competition Law and Policy for the last twelve (12) years. However, the department has been constrained by lack of resources in its efforts to create a culture of competition in the economy. The department therefore needs assistance to enable it implement the following programmes/activities:-

Train competition officials for investigations and enforcement.

1. Draft a suitable law.
2. Procure office equipment for market research, case analysis, exchange of information and sharing of experiences with peers regionally and internationally.
3. Competition advocacy and education.
4. Consultancy Services.
5. Establishment of a data bank.

ANNEX B.

A BRIEF COMMENTARY ON KENYA'S EXPERIENCE IN INTERNATIONAL CO-OPERATION IN CARTEL AND / OR MERGER CASES

As a department of the Ministry of Finance & Planning, Kenya's Competition Agency is only competent to enter into binding agreements through the parent Ministry. The Permanent Secretary, Ministry of Finance & Planning and the Attorney-General are the only authorised officials who may commit the department through an agreement.

Notwithstanding the fact that the Monopolies and Prices Commission of Kenya has no formal Cooperation agreement with any other Competition agency, the Commission has Cooperated with the Competition Commission of Zambia in the handling of the merger of two beer making companies in 1999 and the Zimbabwe Trade and Industry Competition Commission in the investigation of interest rates setting by banks in January 2001. In these two cases, formal and informal exchange of information took place between the heads of respective competition agencies.