OECD Global Forum on Competition

CONTRIBUTION FROM KENYA

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COMPETITION POLICY AND LAW IN KENYA

1. INTRODUCTION

Prior to Kenya’s attainment of Self-Rule in June 1963 and full Independence on 12th December 1963, the degree of industrialisation and monetisation of the economy was rudimentary (very low). Most of consumer items such as sugar, fats, razor blades, pangas, jembes, etc which were needed by the settler community were imported from United Kingdom. In Kenya itself, the interests of the consuming settlers were protected through a Price Controller Regime which ensured that consumers of essential goods and services were not exploited by traders through the Price Control Act of 16th October 1956.

Kenya embarked on a process of rapid industrialisation and indigenisation of the economy on the attainment of independence on 12th December 1963 through the setting up of import substitution industries to meet Kenyan and East African Community requirements and the transfer of non-citizen firms to Kenyans. To this end, the independent Administration of Kenya enacted the trade Licensing Act, Cap. 497 of the Laws of Kenya which legalised the take-over of non-citizen firms by citizens of Kenya through denial of Trade Licenses to certain Trades and Businesses. The Administration also legalised the control of the importation and exportation of goods of any description and the control of supplies essential to the life or well-being of the community through legal Notice No. 303 of 1964 under the Imports, Exports and Essential Supplies Act, Cap. 502 of the Laws of Kenya.

Briefly therefore, the commercial activities of Kenya were regulated mainly through instruments provided under the Price Control Act, Trade Licensing Act and Imports, Exports and Essential Supplies Act which included among others the following instruments:-

I. Fixing of prices of certain goods and services.
II. Transfer of certain businesses from non-citizens to citizens of Kenya
III. Establishment of imports substitution industries
IV. Imports and Exports licensing.
V. Establishment of import quotas for certain goods.
VI. Complete banning of imports of certain goods.
VII. Letters of No Objection.
VIII. Allocation of Foreign Exchange.
IX. Fixed Exchange Rate.

Kenya’s industrialisation programme through imports substitution strategy reached saturation point in mid 1970s and the programme was hard hit by the collapse of the E.A. Community which resulted in Tanzania and Uganda opening their markets to imports from China, Taiwan, Korea, India, etc. With the loss of the larger captive East African market, Kenya’s domestic industries found themselves with a very small domestic market and products which could not compete in the export markets because of their high prices, low quality, poor packaging, poor design etc. This was followed by falling (decreasing) employment opportunities and falling standard of living for Kenyans.

To reverse the trend of economic decline, it became abundantly clear that Kenyan industries must produce not only for domestic market but also for the export market. The Government therefore decided in the mid 1970s to expose them to competition first in the domestic market by allowing some imports so as to prepare them for export market competition. Competing imports were selectively allowed into the Kenyan market; banned items were progressively removed from the list of banned items and price controlled items removed from price control lists progressively. In addition, additional industries were licensed to boost domestic competition, lower consumer prices, increase employment opportunities, improve the efficiency in the use and allocation of scarce resources to competing needs.
The policy was aimed at the improvement of the marketability (competitiveness) of Kenyan products in the export market, increase job opportunities, lower the cost of living and raise the standard of living for the Kenyans throughout the Republic.

2.0 Evolution of Competition Policy and Law

The proposal for the Development of a Competition Policy and the enactment of a law to support the implementation of such a policy in Kenya was advanced in 1982 by the Working Party on Government Expenditure (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 firm 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 Department of The Treasury. The Commission should be empowered to collect annually standardised 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».

Paragraph 91 touched on the manning of the institution that the economy would expect to be able to regulate the conduct and the structure of the market so as to obtain the desired performance in the market place and noted that «The Commission will require a staff of economists and financial analysts to report on market conditions, paying particular attention to movements in prices and costs at all levels of production and distribution and their effects on both supply and demand. Apart from its regulatory function it should contribute to Government policy formulation in matters affecting trade, production and prices.»

The WPGE principal objective in its recommendations for a competition policy legislation and establishment of suitable institutions for the administration and enforcement of the Policy and Law, was to provide Kenya with an instrument for influencing resource allocation in constructive directions while helping to curb the abuses associated with unbridled private enterprise.

The WPGE recommendations of 1982 gave advocates of a liberalised economy both in Government and private sector food for thought and studies were undertaken between 1983 and 1985. Towards the end of 1985, a comprehensive cabinet memorandum was prepared and submitted to the Cabinet proposing the enactment of a law prohibiting Restrictive Trade Practices and the establishment of a Monopolies and Prices Commission in Kenya. The Cabinet approved the proposal and mandated the then Ministry of Finance and Economic Planning to consult widely with other relevant Government Ministries and Departments so as to be able to draft a suitable bill for debate and enactment by the Parliament.

Kenya’s momentum for change from a controlled economy to a Market Economy was amplified by Sessional Paper No. 1 of 1986 on «Economic Management for Renewed Growth», which noted 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 compressive legislation making restrictive practices illegal and no administrative or legal mechanism to prevent them”. Therefore the “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 December 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988 after receiving the 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.

3.0 **Objectives of Kenya’s Competition Law**

The principal objective of Kenya’s Competition Law is to encourage competition in the domestic market by prohibiting restrictive trade practices, controlling monopolies, regulating concentrations of unwarranted economic power and prices.

The second objective of the Law is to set up the necessary institutional framework for administration and enforcement of Kenya’s Competition Law and Policy.

4.0 **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.

4.1 **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. My 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.

4.2 **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 analysts, 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 informal research into markets where competition problems are thought or alleged to be present.

4.3 **The Office of the Commissioner of Monopolies and Prices**

The Commissioner for Monopolies and Prices is appointed in pursuance 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 Price Commission Department of the Treasury and has responsibilities for efficient administration and enforcement of the Competition Law. He has also responsibilities in the consumer protection field. He seeks to maximise consumer welfare in the long term, and protect the interests of vulnerable consumer 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.

4.4 **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 Restrictive Trade Practices Tribunal, was established on 8th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya and 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 re-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 functions 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.
4.5 The High Court of Kenya

All appellants to the RTPT in pursuant to the provisions of Sections 20(1), 25(1) and 31(1) in respect to ministerial orders made in pursuant to the provisions of Sections 18(1), 24(1) and 31(1) respectively who are dissatisfied with the decisions of the RTPT may appeal to the High Court of Kenya against those decisions within thirty days after the date on which a notice of those decisions was served on him 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 order is laid before it that the order be annulled, it shall henceforth be void, but without prejudice to the validity of anything done thereunder, or to the making of any new order.

5.0 Enforcing the Law

Whether through ignorance of the law, or deliberately, any person or business which fails to comply with ministerial orders on restrictive trade practices, abuse of market power or mergers and take-overs, is guilty of an offence under the Act and is liable on conviction to fines and imprisonment with or without corporal punishment or both fine and imprisonment.

The fines may include five times of the overcharge in the case of prices, twice the cost incurred by the aggrieved competitors and Kshs. 100,000.00 for the offence of the abuse of market powers. The imprisonment may range from one year to five years. Penalties may also be a combination of several fines and terms of imprisonment.

Kenya’s Competition Policy is heavily over-loaded with objectives which quite often are in conflict with one another, and which would be better served if specifically addressed through separate policy and legal instruments. For instance, protection and promotion of consumer welfare may in the short and medium terms be in conflict with competition objectives and similarly public welfare may be in conflict with private commercial interests in the field of the exploitation of competitive advantage in the market place. Equally, the legislation is complex and distressing to the minds of the administrators and businessmen in the process of its interpretation and implementation.

In this regard, my submission is that there is an urgent need for Kenya to formulate separate policies to address the overlapping policies which are currently addressed by the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya. To start with, the following separate policies and laws may be considered for formulation and enactment :-

a. Fair Trading Policy and Act to address consumerisation and public welfare interests in the economy.

b. Competition Policy and Act to address Economic efficiency issues in the allocation of scarce resources.

c. Monopolies and mergers policy and Act to address gigantism in the market place and the control of the abuse of market power.
d. Restrictive Trade Agreements and practices policy and Act to address formal and informal commercial agreements and arrangements which restrict competition in the market-place.

e. Streamline sectoral policies and Acts which must be subservient to the Fair Trading and Competition Acts.

6.0 Critique of the Law

This Act is basically divided into the following major parts:

1. Provisions relating to restrictive trade practices-these include predatory trade practices, refusal to sell, price discrimination, cartels, collusive tendering and bidding, misuse of IPRs etc.

2. Control of monopolies and concentrations of economic power- this part subsumes mergers and take-overs. Specifically, the Minister is mandated by the law to keep the structure of production and distribution of goods and services under constant review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages.

3. The establishment and assignation of competition law and policy surveillance and enforcement institutions - the Act establishes the following institutions; [a] The office of Commissioner for Monopolies and Prices, and [b] the Restrictive Trade Practices Tribunal. The Act also assigns statutory functions to the following institutions; [a] the Office of the Minister for Finance as the general overseer of the implementation and enforcement of competition policy and law, and [b] the High Court as the final appellate institution in all matters germane to competition disputes.

The Kenyan Law was transitory in its conceptual underpinnings and was meant to progressively move the country from a Controlled Regime to a liberalised market. Perhaps because it was enacted when liberalisation was not fully embraced, it has many whimsical and anachronistic manifestations which invariably render its enforcement not only indefinitive but also cumbersome. There is also in existence a wide array of other Acts of parliament whose effect, in totality, is to brazenly detract the country from the path of universally accepted competition principles and rules. Like a veritable colossus, they bestride the entire gamut of the nation’s economic sectors. These are Sectoral Acts such as the Industrial Property Act, the Trade Licensing Act, the Seeds and Plant Varieties Act which render the enforcement of the law quite difficult. The Monopolies and Prices Commission has in the recent past proposed a review of the law skewed towards the amelioration of these anomalies and to strengthen, harmonise, broaden and rationalise the various activities putatively and actually within the remit of the national competition regime. More specifically, it is intended that the Monopolies and Prices Commission as a Macro-Regulator should be accorded a legal mechanism to enable it relate effectively with sector regulators in all matters spawning competition concerns.

7.0 Handling of cases

Kenya’s Monopolies and Prices Commission takes into consideration the following realities of the market–places when interpreting, enforcing and complying with the provisions of the country’s Competition Law:

(i) The need to support the good work being undertaken by the Inter-Governmental Group of Experts [IGE] and the Working Group on Interaction Between Trade and Competition Policy [The Working Group].

(ii) The conduct of TNCs, Hard-core Cartels and Cross-Border Mega Mergers.
(iii) The need for Kenya’s enterprises to be afforded time and resources to create critical masses which will allow them to Marshall some muscle in the world competition arena.

(iv) Takes into account the diversity of member states both developing and developed, in levels of development, institutional capacities and structures.

(v) Expects future multilateral arrangements in Competition should subsume, and be predicated upon, the principles of diversity, progressivity and flexibility and should not be employed as a way of “clipping the wings” of comparatively stronger firms in the developing countries by well established firms of the developed world.

(vi) Is of the view that in order to come up with appropriate and harmonised policies on both Trade and Competition, there is need for improvement of co-operation at three levels. One, among national competition authorities particularly on information exchange. Two, among governments. Three, between competition agencies and enterprises. This co-operation will promote a harmonised approach to issues such as cross-border mergers, hard-core cartels, dumping, subsidies, differential tariffs etc., Requisite consultations should be encouraged and a dispute resolution mechanism should be embraced. This co-operation will assure equal treatment for member states.

(vii) Ensures that competition policy considerations are taken into account in the formulation and implementation of trade and other related policies.

By the end of year 2000, the Monopolies & Prices Commission had handled 257 Competition cases. A sample of cases with international dimension handled in 2000 is summarised hereunder:

I. Acquisition of M/S Agip Kenya Ltd by M/S Shell Kenya Ltd and M/S British Petroleum Kenya Ltd (Shell / BP).

1.0 Introduction

On 2nd June 2000, M/s Shell/BP and Agip submitted a joint application to the Minister for Finance through the Commissioner for Monopolies and Prices in accordance with the provisions of sections 22, 27 and 28 of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya seeking ministerial authorisation for the acquisition of all business operations of M/s Agip Kenya Ltd. by M/s Shell/BP. The transaction in Kenya had been triggered off by the Sale/Purchase Agreement between the parent companies, M/s Agip Petroli International B.V of Rome, Italy and Shell International Petroleum Company Ltd. of London, United Kingdom (acting on its own behalf and on behalf of M/s British Petroleum AMOCO Plc) of 10th January 2000. In this Agreement, the seller (Agip), contracted with the purchasers (Shell/BP) to sell to the purchasers all equity in its subsidiary companies in five (5) African countries, namely; Kenya, Uganda, Eritrea, Ethiopia and Cote de Voire as a single package.

Under the Kenyan Competition law, mergers and take-overs between two or more independent enterprises engaged in manufacturing or marketing similar goods or services are subject to approval by the minister in charge of Finance in the Government of Kenya.

The transaction between Agip and Shell/BP required the minister’s approval for it to have any legal effect.

For the purpose of evaluating the competitive impact of the acquisition in order to be able to formulate a suitable recommendation to the minister, the Commissioner instituted investigations which ended on 4th October 2000 with the publication in the gazette of the minister’s conditional approval of the acquisition.
The following is the overview of the investigative activities after the receipt of the application:-

The participating parties were requested to supply copies of the Agreement on the transaction on 2nd June 2000.

The Commissioner formally acknowledged the receipt of the application on 6th June 2000.

The Commission carried out a preliminary desk research to determine whether an in-depth investigation was needed or not, the relevant market, the main trading activities in the petroleum oil industry and the main operators. This report was submitted to the Commissioner and discussed with the case officers on 15th June 2000. It was decided that an in-depth investigation would be carried out.

The participating parties submitted copies of the Letter of Intent on 20th June 2000.

Between 20th and 28th June 2000, the Commission contacted stakeholders in the Petroleum Oil Industry to make appointment for interviews and to request for written presentations regarding the proposed acquisition of Agip by Shell/BP. Those contacted included:- Ministry of Energy, East African Petroleum Institute, Kenya Oil Refineries Ltd, Kenya Pipeline Company Ltd., Association of Independent Petroleum Dealers, five non-participating multinational oil companies (Caltex, Kobil, Kenol, Mobil and Total) and the Kenya National Oil Corporation.

On 21st July 2000, the Commission formally informed the participating parties that interim findings of our investigations had shown that the proposed acquisition of Agip by Shell/BP would result in substantial injury to competition process in the production and supply of liquefied petroleum gas (LPG) and the use of track loading arms for white oils in Mombasa and Nairobi. The Parties were therefore requested to submit proposals on how the Agip LPG and track loading facilities in Nairobi and Mombasa could be restructured after the acquisition so as to minimise the anti-competitive effects of the proposed acquisition in order to safeguard the interests of other market operators and consumers. The parties were also requested to submit a schedule of all durable assets and their market values which were the subject of the proposed acquisition.

Between 21st June and 17th August 2000, case officers travelled throughout Kenya to collect and compile information through interviews with stakeholders in Kenya’s Petroleum Oil Industry and formal and informal presentations from interested groups. Case officers also held several meetings in Monopolies and Prices Commission offices with stakeholders.

Between 18th and 21st August 2000, the case officers wrote their report and submitted the same to the Commissioner on 21st August 2000.

On 29th August 2000, the Commissioner submitted his recommendations to the minister for Finance who after considering the Commissioner’s recommendations approved the acquisition on 20th September 2000 subject to disposal of LPG and loading arms facilities within one year following the acquisition. The ministerial authorisation was published in the gazette on 4th October 2000.

It should be noted that Shell/BP appealed to the minister to authorised the acquisition unconditionally but their appeal was rejected by the minister.
II . Take-over of Eight(8) Coca Cola Plants by M/s Coca Cola South Africa Bottling Company Pty (Coca Cola SABCO)

1.0 Introduction

Kenya had in year 2000 ten(10) Carbonated Soft Drinks bottling plants. Eight(8) of the plants bottle Coca Cola branded soft drinks; one(1) bottles Softa and the tenth bottles Schweppes branded soft drinks.

Prior 1995, Coca Cola, Pepsi Cola and Schweppes competed for a share of the Kenyan carbonated soft drinks market. By the end of 1995, the dominant Coca Cola branded carbonated soft drinks which controlled about 95% of the national market locked out all competition with the closure of Schweppes and Pepsi Cola plants. To strengthen and sustain its dominance in the market, it appears that Coca International decided to take-over all the eight Coca Cola bottling plants in Kenya through its subsidiary company, Coca Cola SABCO in 1995 in order to take direct control of production, marketing and supply of inputs in all the eight Coca Cola plants in Kenya. This was planned to be done systematically by the acquisition of one by one of all the eight plants by Coca Cola SABCO.

2.0 Investigations

Towards the end of September 1997, M/s Coca Cola SABCO with the support of M/s Coca Cola Africa submitted an application for the acquisition of M/s Flamingo Bottlers of Nakuru. Investigations revealed that M/s Coca Cola SABCO had already acquired Nairobi Bottlers (the most important Coca Cola plant in the country) in suspicious circumstances in 1995. The acquisition had been effected without the approval of the minister for Finance.

To deal with the application for the acquisition of Flamingo Bottlers, a large number of stakeholders in the soft drinks sector including Government agencies, consumers, traders, potential competitors, trade associations and the applicants were interviewed by Competition Policy officials in October and November 1997. At the end of the investigations, the minister approved the application subject to certain conditions on 3rd December 1997.

Investigations into the structure, conduct and performance of Kenya’s carbonated soft drinks sector have been and still are on going in response to appeals from Coca Cola SABCO for the Commission to reconsider the conditionalities imposed on the company in 1997. The last appeal was received in 2000 at a time when the Commission was investigating several complaints against the practices and conduct of M/s Coca Cola SABCO and the appeal was rejected.

III . The sale of National Social Security Fund (N.S.S.F) shares in East African Portland Cement Company Ltd. (E.A.P.C.C) and Athi River Mining Company Ltd. (A.R.M) to Blue Circle Industries Pte (B.C.I) of United Kingdom.

1.0 Introduction

Kenya has three cement manufacturing companies which are all quoted in the Nairobi Stock Exchange (NSE). M/s Bamburi Cement Ltd. has a capacity of 1.2 million tonnes annually and sells about 600,000 tonnes in Kenya annually (50% of the annual domestic consumption). M/s E.A.P.C.C has a production capacity of 800,000 tones annually and sells about 500,000 tones annually (about 40% of the annual consumption). M/s ARM has a production capacity of 100,000 tonnes annually and caters for about 10% of the annual domestic consumption.
2.0 Application

In June 2000, M/s Blue Circle Industries Plc (B.C.I) applied for authorisation to acquire 9,300,000 and 870,000 N.S.S.F shares in E.A.P.C.C and A.R.M respectively. N.S.S.F which is a public pension fund had agreed to sell the stock and B.C.I had agreed to purchase the same.

3.0 Investigations

Investigations revealed that M/s B.C.I of United Kingdom and M/s La Farge of France owned directly and indirectly through their International Holding Company, M/s Bamcem, 73%, 42% and 19% of the shareholding in Bamburi Cement Ltd, E.A.P.C.C and A.R.M respectively. The proposed transaction would result in M/s Bamcem, which is owned by M/s B.C.I, La Farge and Costal of Switzerland 40%, 40% and 20% respectively and its principals owning 72%, 52% 21% in Bamburi Cement Ltd, E.A.P.C.C and ARM respectively. The implication is that M/s Bamcem and its principals, B.C.I and La Farge would have substantial influence in decision making and corporate policies of all three cement manufacturing companies in Kenya if B.C.I were authorised to acquire 9,300,000 and 870,000 shares in E.A.P.C.C and ARM respectively.

4.0 Decision

As the proposed transaction would enhance the dominance of M/s B.C.I in the production and marketing of cement in Kenya with potential injury to potential competitors and consumers of cement, it was decided that the transaction would reduce competitive benefits in the production and supply of cement. The application was therefore rejected by the minister for Finance.