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ACRONYMS

Act	:	The Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya
Commission	:	Monopolies and Prices Commission
CCK	:	Communications Commission of Kenya
COMESA	:	Common Market for Eastern and Southern Africa
EAC	:	East African Community
OECD	:	Organisation for Economic Co-operation and Development
UNCTAD	:	United Nations Conference on Trade and Development
WTO	:	World Trade Organization

INTRODUCTION

This report was prepared by George K Lipimile, Executive Director, Zambia Competition Commission, and Edward Whitehorn, a Consultant on International Competition Policy, at the request of UNCTAD. The report is intended to provide a peer review assessment of the work of the Kenyan Monopolies and Prices Commission for presentation at the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices to be held in November 2005.

The authors have benefited from discussions with the Commissioner and staff of the Kenyan Monopolies and Prices Commission and with a wide range of stakeholders in Kenya. The report draws on reports prepared for UNCTAD, the World Bank and the OECD, as well as existing literature on Kenyan competition policy.

EXECUTIVE SUMMARY

In the 1980s the Kenyan economy started to move away from a price control regime with significant state intervention towards a market economy. The Government recognized the need to introduce a competition law and the Restrictive Trade Practices, Monopolies and Price Control Act came into force in 1989. It was intended to be a transitional measure and has now become outdated.

The Act provides for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and for the control of mergers and takeovers (as well as price control measures which are no longer used). However, there is no reference to abuse of a dominant position. There is a wide-ranging exemption which excludes regulated sectors of the economy from the scope of the competition law. The investigation of possible contraventions of the Act is the responsibility of the Monopolies and Prices Commission which forms part of the Ministry of Finance. Decisions on particular cases are taken by the Minister. His decisions can be appealed to the Restrictive Trade Practices Tribunal and from there to the High Court.

The Commission has 33 staff, 22 of whom are in professional grades. The professional staff are well qualified, many holding Master's degrees in law or economics. The caseload of the Commission has been relatively light since its inception, with 15 restrictive trade practices cases and 22 merger cases handled in 2004. Most restrictive trade practices cases are terminated without a formal published decision and consequently very few consent agreements or orders have been made since the Act came into force. The Commission needs further capacity building, particularly in the area of enforcement and case handling.

There are many sector-specific regulators in Kenya, some of whom have responsibility for competition issues. However, it is not clear how technical regulation of these sectors relates to competition issues which arise in the sector.

Kenya does not have a consumer protection law in place, and consideration should now be given to including such measures in a new competition law. There are advantages in combining consumer protection work with competition policy enforcement, not least because it allows the competition authority to achieve visible results and to raise its profile in the community.

The Commission's advocacy activities have been limited in scope. This is a serious disadvantage given the importance of competition advocacy work, particularly in a developing country context, and the lack of a competition culture in Kenya. The Commission should promote the link between competition policy and poverty reduction.

The report concludes with policy options for consideration. These include replacing the current Act with a modern competition law and transforming the Commission into an autonomous competition authority. The Commission should also be given a formal competition advocacy role. The regulation of specific sectors should be brought within the scope of the competition regime and the relationship between the sector-specific regulators and the Commission should be clarified. Thresholds for merger control should be introduced together with timeframes for the review process. Consideration should also be given to incorporating consumer protection provisions in the new competition law.

1: CONTEXT AND HISTORY

1.1 Colonial rule in Kenya

Kenya's colonial experience – short as it was – transformed the country in a fundamental manner. From a backward region with a very good climate but few other natural advantages, Kenya underwent a greater change than most African countries.

The pre-independence history of Kenya's economy can be divided into three phases: pre-colonial subsistence farming, the period of consolidation of the extraction of labour and the penetration of settler farming, and the establishment of indigenous entrepreneurs. The first phase was marked by stagnation, the second by the steady dislocation of African agriculture and traditional social structures, and the third by the rapid re-organization of the economy. The dominance of agriculture in the economy, and the presence of a small but assertive settler community led to the emergence of European and capitalist domination with the political, economic and social characteristics of an underdeveloped colonial settler society.[1] Agriculture was at the centre of the colonial capitalist system.

Colonialism moulded the developing Kenyan economy in distinctive ways. Although most of the country continued to be occupied by African peasant farmers, land was also alienated to settlers. Alienation led both to agricultural production being dominated by settler farmers and to serious land shortages among the African tribes. Agricultural enclaves were developed at the expense of the rural African populations and their mode of production.[2] The link between the settlers and the African population lay in the need for cheap labour which could only be obtained by extruding migrant workers from what was at first a moderately self-sufficient subsistence economy. The consequence of this process was that the rural societies became underdeveloped.

European and Asian minorities came to settle in Kenya during colonial rule. While the former monopolized managerial, professional and skilled artisan occupations, the latter controlled much of the country's middle-range retail commerce. Both groups were deeply committed to a private enterprise economy, although at the same time few of them were prepared in 1963 to take out Kenyan citizenship or to invest in long-term projects essential to the development of the economy.

This process could only be set in motion and sustained by the establishment of political control and this was achieved by direct colonial administration. An institutional framework was created which ensured that the needs and interests of the settler community were met and safeguarded under the colonial rule.

The colonial administration set up the mechanisms for the imposition of taxes and the need for cash incomes, the restriction on land use and limits on the scope for earning cash outside of wage employment. The growth of cash economy opportunities for commerce were largely reserved for European settlers. Colonial class relations were established in this manner. There was a steady enlargement of a European settler community with ownership of the means of production in mostly agricultural, in administration and in trading. The majority of Africans were peasants or wage earners. The characteristics of the pre-independence economy were as follows:

1. As agriculture dominated the economy, the whole system was subordinated to its requirements. Being an export industry which required only labour and capital to operate there was no intrinsic reason for agriculture to become an engine for growth for the economy as a whole.
2. Although capital investment was considerably high and supported mostly by British commercial and

merchant banks established in the country, foreign ownership and the backwardness of the economy meant that financial benefit did not accrue to the country. There was very little productive re-investment within Kenya during the colonial period.

3. The agricultural sector was a substantially self-contained enclave with few linkages with the rest of the economy. Basic supplies of implements and manufactured goods were especially from United Kingdom. There was no necessary spill over of productive activity to the rest of the country, as might have been the case with a manufacturing industry.

4. Not only did profits leave the country but also much of the savings and salaries of the expatriate community. As a result there was only a small internal market for manufactured goods and higher priced foods. At independence, manufacturing constituted only 7 per cent of GDP. The external orientation of consumption by short-term contract settler administration staff created a pattern for the settler population, and it was an important function of the colonial administration to facilitate the importation of goods and externalizing of financial assets.

5. African workers, unlike workers in industrialized manufacturing countries, were not consumers of the goods they produced. The realization of production did not depend on internal consuming power. Hence, the labour power of the workers could be exploited more, the only limit being the replacement of labour by the extrusion of new workers from the indigenous economy. Thus, the maximum extraction of surplus value was possible as long as the colonial social and political conditions remained.

The colonial regime further supported the creation of institutions specifically designed to safeguard and deliver benefits to the settler community. These included state agencies to control (and sometimes subsidize) national economic activities, such as the Maize Board, Wheat Board, Dairy Board, Tea Board, Meat Commission, Pyrethrum Board, etc., as well as producers' organizations established to interact with the government in the interest of their constituents, such as the Kenya Farmers' Association and the Kenya Cooperative Creameries. Even after independence, these public institutions were maintained and private associations or cooperatives which were mostly dominated at the time by the white settlers, were converted into quasi-public bodies. This phenomenon was carried over to the early post-independence era where the government also expanded its involvement in productive activities through the establishment of new state owned enterprises and joint/private ventures in manufacturing and commerce.

1.2 State intervention after independence: the issues

The character of the post-colonial state in Kenya can only be understood in relation to the country's colonial history. Although colonialisation was of a relatively short duration the effect of that experience was overwhelming, especially on the economy. The dominance of foreign capital and the settlers came to set the terms on which the country's resources would be used thereafter even, to a considerable extent, after independence.

Kenya attained its independence from Great Britain in 1963. Unlike other independent African countries in the region, Kenya did not follow the strict path of 'African socialism' in the same way as its neighbour, Tanzania. The new Kenyan Government agreed with the African nationalist economic policies, but opted for a mixed economy that was market based, supportive of the already existing private sector (European settlers), and open to foreign investment.

Kenya like other independent states in the region found that its political capacity was not matched by economic power and that it was indeed firmly in the grip of neo-colonialism. The need for a strong control authority was not only politically convenient but a natural consequence of the economic policies of the colonial government, which ruled the country prior to independence. The nature of the challenge from a foreign-owned economy was governed by the monopoly character of colonial capitalism which gave exclusive powers to branches of large transnational corporations in various sectors of the economy.

At independence, the government began to strengthen its own powers, particularly those of the President, the ruling party, cabinet and the state apparatus as a whole. In the early post-independence years economic policy making was managed by the Cabinet Economic Sub-Committee. The state, as a result, became a considerable force and, until not too long ago, was no mere theoretical construct, nor a mere 'relation', but had a concrete reality at every level, political, administrative and managerial.

The government had since realized that apart from political independence, there was need to achieve economic power or economic sovereignty. Nationalism was not yet a spent force and the government set about resorting to state interventions of all kinds to increase its hold over the national economy. This involved the enhancement of the participation of the Kenyans in economic life and economic benefits while reducing the role of the former colonialists, resident Asians and multinational corporations. The nature of state intervention was generally governed by three factors: Firstly, it was a 'national' response to what was termed as the foreign exploitation of multinational corporations and expatriate owners generally. Secondly, in the virtual absence of indigenous entrepreneurs, the 'national' initiative was taken by local Kenyans whose only instrument was the state. Finally, the government had to act in order to be seen to be fulfilling the independence expectation of the middle class, organized labour, the peasantry and the masses generally.

Soon after independence the Kenyan Government began a large-scale programme of state intervention seeing this as an extension of the independence struggle. In the first ten years, the large injection of investment capital aimed at diversification, coupled with the deliberate generation of demand to stimulate the economy reform, brought in another dimension in the creation of a large public sector which the Government claimed as one of its major achievements. As a result of these measures non-Kenyans were displaced from the commanding heights of the economy and opportunities were opened up for individual Kenyan businessmen by restricting certain sectors to nationals. The government claimed that its moderate policies in the early years were meant to placate the expatriate community and foreign corporations.

While the interventions of the state in the economy were meant to advance the interests of Kenyans individually and as a nation, the form of that intervention had some relevance to the outcome. The state intervention took a form which opened the way to the displacement of foreign capital and personnel by largely state controlled and manned companies with a residual area for Kenyan private business. The measures led to the emergence of a kind of mixed economy with a large state sector consisting of the major industrial enterprises. Proportionally, the state gained command of massive resources which seemed to be capable of becoming the engine for industrial growth and all-round development.

At each step, the government interventions gave expression to the desire to overcome the frustrations of a government intent on pressing ahead with expanding the economy through industrialization but limited and constrained by the fact that foreign ownership of the major means of production led in an entirely different direction. Measures were introduced to address the central issue of how the state bureaucracy was to establish state control over the main industrial corporations which dominated the economy and turn them into quasi-government bodies, or parastatals. Thus the measures of state intervention were partly designed to displace foreign interest thereby strengthening its own base in the economy.

Another most prominent form of state intervention in the Kenyan economy was price control and other related consumer subsidies. The use of price controls and consumer subsidies was seen as a form of social wage and as a mechanism of redistribution. It was seen as an expression of 'welfare economics', whereby the government sought to respond to demands from the mass of the people for better living conditions. The policy of price control was entrenched into the economic system of Kenya by the enactment of the Price Control Ordinance of 1956 renamed the Price Control Act of 1956 and revised in 1972.

The other economic policy option which was embraced by Kenya during the post-independence era was that of 'import substitution'. In the same manner as other developing countries in 1970s Kenya adopted an industrialization strategy that was based on import substitution. This entailed policy measures that offered trade protection for domestic 'infant industries' that were set up to produce substitutes for previously imported consumer goods. At the time there was a very strong view that developing countries should follow an industrial development policy based on import substitution rather than export promotion because their prospects for breaking into global markets for manufactured products were very remote, if non-existent.

State intervention steadily grew in the 1970s, this was partly because private business did not fulfil government expectations. The state sector became increasingly seen as a nationalistic and pragmatic response to the behaviour of private capital. However, the government was also anxious that there should be no drastic rupture with foreign interests in Kenya, and the state enterprises form was a means for allowing a substantial foreign minority interest to remain in the affected companies.

Government control over the economy was also strengthened through the regulatory framework and the steady expansion of controls on domestic prices, interest rates, foreign exchange controls, imports and exports. Some of these controls were introduced in response to a rapid succession of economic shocks that adversely affected Kenya's economic situation and prospects, including the capital flight witnessed by the country and the industrialization strategy adopted by the country in the 1970s. The other severe shocks which adversely affected Kenya's economic situation and prospects include the boom-and-bust cycle in coffee and tea prices in 1976-1979, and the break-up of the East African Community (EAC) in 1977.

1.3 Economic reforms

The era of economic policy reforms which was characterized by the now famous concept of 'structural adjustment', was introduced in 1979. The basic objectives of the structural adjustment programmes (SAPs) as initially conceived were to restore the country to macro-economic stability following the disruptions of the economic shocks of the 1970s. A common aspiration underlying these reforms has been that the reduction of government's direct involvement or intervention in economic activities would revive economic growth through increased resource mobilization and more efficient utilization of resources.

This meant, among other policy options, 'getting the prices right' such as, eliminating market distortions and increasing competition in the domestic economy. The major economic policy adopted by government consisted of 'deregulation of the market'. This required phasing out public sector monopoly control in markets for foreign exchange, credit, and agricultural commodities; and privatisation of commercial state enterprises. SAPs were also adopted that included market-oriented reforms, notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, as well as liberalization of trade policy and investment regimes. The reforms also emphasized the importance of opening up markets which were traditionally heavily regulated or operated by a single, often state-owned business. Sectors subject to this initiative include telecommunication, air transport, postal service and energy sectors.

Trade policy has been a central aspect of structural adjustment reforms in Kenya since the 1980s. While progress in liberalization of the trade regime has been sporadic, with periods of significant progress followed by slower movement and even reversals, the final position achieved following the major reforms of 1993-1994 has brought Kenya firmly into the group of developing countries with the most liberal trade and foreign exchange regimes. In contrast to the pervasive controls maintained through the 1970s and 1980s, and the inefficiencies and rent-seeking that the control system perpetuated, the current economic situation in Kenya can be regarded as a revolutionary change.

The contradictions in Kenya's economic policies were noted soon after the reforms. By the 1980s there was growing sentiment within government and business to pursue economic policies that affect competition within the Kenyan economy. Two major criticisms were offered at the time. There was firstly, the realisation that the establishment of big state corporations did not lead to a more rational deployment of economic resources, Secondly, the advocates of the market economy were calling for competitiveness among enterprises and that the public companies were state protected monopolies cushioned against the consequences of inefficiency. As a result of irregular and uncertain profitability by the state corporations, there were frequent calls for greater autonomy for enterprises on the grounds that this would restore some elements of a competitive system free of state 'interference'.

The government had to react to the mounting pressure to change the economic policy. It responded by saying that state corporations will have their monopoly status removed and central controls relaxed.

In 1982, a Working Party on Government Expenditure (WPGE) was appointed by the government to advise on the progressive approach to competition. The committee made several recommendations to the government and noted that, as government intervention in the domestic economy via state-owned commercial enterprises was incrementally being reduced, the country would need to rely on market options through policies that encourage private sector involvement in the economy. The committee further warned government that "as private sector activities and community effort increase in scope and magnitude, opportunities for abuses, favouritism and exploitation may also increase".

In paragraphs 89 to 91 of that report, the WPGE proposed the character of the institutions that were necessary to facilitate the motion from a largely controlled economy to a market oriented economy. Paragraph 90 specifically 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. Essentially therefore, the WPGE proposed the establishment of a competition authority to specifically administer the competition policy. It called for the transformation of the Price Control department into a competition authority. The competition function as an added responsibility to the price control function.

The recommendations on market oriented reform were supported by Sessional Paper No. 1 of 1986 on "Economic Management for

Renewed Growth", which articulated the need for a market-driven economy. On the question of competition policy, the Sessional Paper noted that, "at present, Kenya has no comprehensive legislation making restrictive practices illegal and no administrative or legal mechanism to prevent them".

Sentiments within government and business towards the decline of the economy continued to grow. For example, pervasive price controls had become an important part of Kenyan economic life in the 1970s and early 1980s. The prices of almost all goods were controlled under the General or the Specific Price Control Orders (GPCO and SPCO) established under regulations dating as far back as 1956, and amended in the Price Control Act of 1972.

Although the WPGE Report of 1982 Working Party did not explicitly mention price decontrol, and Sessional Paper No. 1 of 1986 argued that some price controls should be maintained, only suggesting that they be 'streamlined', the publication of Sessional Paper No. 1 resulted in a reduction of the number of goods controlled under both general and specific orders. This was done by listing the goods to be decontrolled in the Finance Minister's annual budget speech. Pursuant to the proposals of the WPGE, a bill was drafted and subsequently presented to the legislature in 1988. This commitment by the government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya of 1988. The legislation assigned the Monopolies and Prices Commission as the primary enforcement body of the competition policy. By 1994 all price controls had been eliminated.

The Public Enterprise Reforms of 2003-2007 have continued with the process of disengaging government from commercial activities that can be performed more efficiently and effectively by the private sector. This has included the acceleration on the ongoing privatisation programme. For example, plans are being carried out to liberalize the telecommunication sector, this may involve the privatization of Telkom Kenya. Other natural monopoly companies earmarked for reform include, among others, the Kenya Railways Corporation, Kenya Ports Authority, and Kenya Power and Lighting Company.

Box 1
Chronology of economic developments in Kenya

Period	*Description*
12 December 1963	Kenya's independence from the United Kingdom.
1965	Sessional Paper (SP) no. 10 of 1965, "African Socialism and Its Application to Planning in Kenya."
1966	Central Bank of Kenya established.
October 1973	First oil crisis.
1976 – 1977	Coffee boom results in erosion of fiscal discipline; subsequent decline in coffee prices worsens balance of payment deficits.
August 1977	Break-up of East African Community and common currency area linking Kenya, Tanzania, and Uganda.
1979	Second oil crisis
1980 – 1983	Loss of fiscal discipline followed by successful, but possibly too abrupt, macro/fiscal stabilization; fiscal control restored by FY 1983; start of flexible monetary and exchange rate policy; beginning attempts at trade liberalization but limited success due to lack of coordination with macroeconomic policies; little progress in cereals market liberalization.
January 1980	Launch of structural adjustment program; first Structural Adjustment Credit from World Bank.
1984 – 1985	Hiatus in reform efforts and in donor balance of payments support.
1984	Severe drought due to failure of rains, requiring massive food grain imports.
1986 – 1991	Sessional Paper n. 1 of 1986, "Economic Management for Renewed Growth." This paper defines policy objectives. Periods of sectoral adjustment programs in agriculture, industry, trade and finance, with renewed donor support. Slow but steady progress in domestic price decontrol and trade liberalization (further elimination of QRs, tariff reform, more active exchange rate management, liberalization of interest rates, improvements in management of financial sector, some initial steps in cereals market liberalization); but decay in fiscal discipline.
1986 – 1987	Coffee boom, of lesser impact than 1976–1977.
25-26 November 1991	Consultative Group meeting in Paris at which donors decide to suspend balance of payments aid.
1991 – 1993	Slowing of reform effort. Reversals of cereals market liberalization but continued progress in domestic price decontrol; tariff rationalization plus introduction of ad hoc measures for limited liberalization of foreign exchange market. But weak overall reform effort, growing political problems, and donor concerns over governance and corruption lead to suspension of balance of payments support from November 1991 to mid-1993.
1993 – 1995	Resumption of reform effort, particularly trade and exchange rate policy. Complete liberalisation of foreign exchange market, end to import licensing, further tariff reform; completion of domestic price decontrol; only limited progress in reform/privatisation of state-owned enterprises, civil service reform. Resumption of donor balance of payments support from mid-1993.
December 1995	Repeal of Exchange Control Act to complete liberalization of trade regime.
1996 – 1998	Again, slowing of reform effort. Government maintains liberalized trade and exchange regime, interest rates, decontrol of domestic prices. Fiscal and monetary policy are reasonably well managed, but structural problems in budget, state enterprise sector, civil service, and agricultural sector institutions are not adequately dealt with. Result is suspension of new IMF ESAF in July 1997, cancellation of World Bank SAC in June 1998.

2: SUBSTANTIVE ISSUES: CONTENT OF THE COMPETITION LAW

Kenya's competition law is contained in the Restrictive Trade Practices Monopolies and Price Control Act (Chapter 504 of the Laws of Kenya) which came into force on 1 February 1989. The Act replaced the Price Control Act which was repealed, but the previous price control provisions were incorporated into the new law which was intended to be a transitional measure to allow Kenya to move from a price control regime to a competitive market economy. The intention was that the "government will rely less on instruments of direct control and increasingly on competitive elements in the economy".[3]

Part IV of the Act relating to the control and display of prices has not been used since 1994 when petroleum products were the last item to be removed from the price control regime. This part of the Act will not be considered further in this report.

The Act provides for the control of restrictive business practices which cover both unilateral conduct and agreements. However, there are no provisions relating to dominance in this part of the Act and in relation to conduct, there is no distinction between dominant and non-dominant companies. Complaints about anti-competitive conduct are made to the Minister through the Commissioner.

Where more than one third of a market is controlled by a single entity or there is vertical integration between manufacturing, wholesaling and retailing, the unusual provisions relating to unwarranted concentrations of economic power become applicable. Such concentrations can be investigated at the request of the Minister.

There are merger control provisions which apply to certain mergers which involve companies dealing in similar commodities or services. There are no turnover thresholds. Mergers falling within the ambit of the Act require an order from the Minister authorizing the transaction. Applications for an order are investigated by the Commissioner who is required to take wide public interest criteria into account and then makes a recommendation to the Minister.

2.1 Restrictive trade practices

The provisions relating to restrictive trade practices are contained in Part II of the Act. In section 3 a restrictive trade practice is defined as "an act performed by one or more persons" which eliminates opportunities to participate in the market or to acquire goods and services. It therefore encompasses both unilateral conduct and agreements. The elimination of opportunities is to be measured with reference to the situation that would have obtained in the absence of the practices in question. This is an unusual definition of anti-competitive conduct, although it is elaborated by a list of categories of conduct which are declared to be restrictive trade practices.

There is also a wide-ranging exemption in section 5. Under this section, trade practices are exempted from the provisions of the Act if they are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred by an Act of Parliament or by an agency of the Government acting under an Act of Parliament. Also exempted are trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting under an Act of Parliament.

The exemption has the effect of removing the public sector from the scope of the Act. The utility sectors, for example, come within this exemption and are therefore not subject to the general competition law. It goes wider than the public sector to exempt trade practices which relate to the licensing of participants in certain trades and professions.

[3] Sessional Paper No. 1 of 1986 on "Economic Management for Renewed Growth", paragraph 2.53.

The enumeration of restrictive trade practices (in section 6) includes nine categories of agreements. The list includes many of the types of agreements which are often the concern of a competition law. They include cartels, resale price maintenance, quantity rebates, discrimination and market sharing.

Cartels relating to prices or the terms on which business is transacted are mentioned specifically and the parties to the agreements can be manufacturers, wholesalers, retailers or contractors. Resale price maintenance (or the imposition of conditions of sale) is deemed to be a restrictive trade practice when engaged in by manufacturers or wholesalers.

Discrimination constitutes a restrictive trade practice when sellers agree not to sell particular goods to buyers or any class of buyers, or when resellers agree not to buy particular goods from sellers or any class of sellers. Furthermore there cannot be an agreement to employ or to restrict or favour the employment of any method, machinery, process, labour, land or other resources.

Finally, market sharing is deemed to be a restrictive trade practice, as is any agreement to limit or restrict the output or supply of any goods, or to withhold or destroy supplies of goods.

Any agreement or arrangement falling within any of the above categories is not enforceable in legal proceedings. However, these provisions do not apply to an agreement or arrangement between consumers relating to goods which are bought by them for consumption and not for resale.

Where an agreement is made by a trade association, the agreement is deemed to have been made by the association and by all its members (section 6(4)). There follows, in section 7, a list of practices which, when conducted by a trade association, are declared to be restrictive trade practices. The practices include the unjustifiable exclusion of any person, and making direct or indirect recommendations to association members relating to prices or terms of sale. The provisions apply regardless of whether the association members are free to follow the recommendation or not, as they choose. However, if a member expressly notifies the association in writing that he or she disassociates himself or herself entirely from an agreement or recommendation, that member will not be deemed to be a party to the restrictive trade practice.

The Commission succeeded in ending a price fixing scheme in the insurance industry (see box 2). Following an investigation, the Commission established that the Association of Kenya Insurers (AKI) was making recommendations to its members concerning premiums rates to be charged. A consent order was agreed in April 2003 whereby the AKI agreed to withdraw its recommendations and not to issue any further rate recommendations.

Box 2

Price fixing

Following complaints about high insurance premiums, particularly in the transport sector, the Commission initiated an investigation. The Association of Kenya Insurers (AKI) is one of the strongest industry associations in Kenya in terms of financial resources and has all of the major actors of the country's insurance industry as members.

The Commission made a breakthrough and obtained a copy of the AKI Motor Rating Schedule dated 4 June 2002 which set rates, terms and benefits to apply to all motor policies issued after 1 July 2002. The Commission also obtained a copy of AKI Resolution 07/2002 wherein it was resolved and agreed that other supplementary rates would apply with effect from 1 January 2003.

The AKI was therefore asked to answer allegations that it had been making, directly or indirectly, recommendations to its members which relate to the prices charged or to be charged by its members.

The AKI responded by claiming that it was exempt from the provisions of the competition law by virtue of section 5, and furthermore pointed out that the industry was regulated by the Insurance Commissioner who had requested rating guidelines on all classes of general insurance business.

However, the AKI negotiated a consent order with the Commission, under section 15(3) of the Act, and on 23rd April 2003 it was agreed that:

1. The Association of Kenya Insurers undertakes to withdraw, with immediate effect, all its present and past decisions on premium rates which purport to recommend prices chargeable for insurance services by its members. The Association of Kenya Insurers also undertakes to desist from making such decisions and from issuing such premium rates recommendations in future.

2. The Association of Kenya Insurers undertakes to observe, with effect from the date of this consent agreement, all the provisions of the Restrictive Trade Practices, Monopolies and Price Control Act.

3. The Association of Kenya Insurers will diligently and strictly observe the terms of this Consent Agreement in order to compensate for the past effects of the said past decisions.

These restrictive trade practices are essentially agreements between two or more parties. The next three sections of the Act deal with unilateral conduct, but the scope of the sections is not confined to parties with a dominant position on the market. Refusal or discrimination in supply is treated as a restrictive trade practice in sections 8 and 9 of the Act. Discrimination is defined in terms of providing less favourable conditions than are available to third parties. The conditions of sale or supply which are deemed to be less favourable are specified and include delays in making goods or services available, supplying at higher prices, or on less favourable credit terms. In a situation of shortage (for example, because of import restrictions), discrimination also includes supplying less than a normal proportionate share of the goods or services. Refusal to sell or supply, or to continue to sell or supply, by a manufacturer, wholesaler, retailer or supplier of services, is deemed to be a restrictive trade practice.

Section 9 sets out specific instances of refusal or discrimination in supply which are deemed to be restrictive trade practices. The conduct includes refusing to sell or supply intermediate products to downstream processors, forcing purchasers to buy other goods or services as a condition of supplying, selling goods or supplying services on condition that the purchaser sells or arranges the sale of second-hand goods to the seller or a person nominated by him, or imposing resale price maintenance as a condition of supply.

Predatory pricing and related conduct is dealt with in section 10 of the Act. Predatory trade practices are defined in relation to an intention to drive a competitor out of business or to deter a person from establishing a business, or to induce a competitor to dispose of a business or shut down any facility, or to induce a person to desist from producing or trading. It is further provided that a predatory trade practice is deemed to have been committed with the requisite intention if any outcome described above occurs subsequent to the occurrence of the practice, or if it may be inferred that successful execution of the practice would be followed by that outcome.

The section then lists the five types of conduct which are included in the definition of predatory trade practices, namely: selling at prices below average variable cost; offering a discount on condition that the purchaser does not purchase goods or services from some other person; threatening an existing or potential competitor if that competitor carries out a lawful trade practice or purchases good or services from a third person; or offering inducements to, or threatening, suppliers to withhold supplies or to furnish them on terms and conditions that discriminate against a competitor.

2.2 Collusive tendering

Collusive tendering is prohibited by section 11 that makes it an offence which is punishable by a fine or imprisonment, or both. The offence is committed when two or more persons, being either manufacturers, wholesalers, retailers, contractors or suppliers of services, agree the terms of their bids or agree to abstain from bidding. It is also an offence to collude when bidding at an auction (section 12).

2.3 Monopolies and concentrations of economic power

Part III of the Act deals with concentrations of economic power and mergers and takeovers. The Minister of Finance is required (by section 23) to keep the structure of production and distribution of goods and services in Kenya under review to determine where unwarranted concentrations of economic power exist. Such concentrations are those whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution.

The Minister is directed to pay particular attention to various factors. These include situations where a person controls a chain of distributing units the value of whose sales exceed one third of the relevant market for those goods, which can be a national or regional or urban market. A second scenario involves a situation in which a person who controls two or more physically distinct units which manufacture substantially similar products, supplies more than one third of the domestic market. Thirdly, where a person has a beneficial interest, exceeding 20 per cent, in a manufacturing enterprise, and simultaneously has any beneficial interest in one or more wholesale or retail enterprises which distribute products of the manufacturing enterprise. Fourthly, where a person has a beneficial interest, exceeding 20 per cent, in a wholesale distributing enterprise, and simultaneously has any beneficial interest in one or more retail enterprises which distribute goods of that wholesale enterprise.

The Minister may direct the Commissioner to investigate any economic sector which he has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power.

An unwarranted concentration of economic power is deemed to be prejudicial to the public interest if it: (a) unreasonably increases the cost of production, supply or distribution of goods or the provision of any service; (b) unreasonably increases the price at which goods are sold or the profits derived from the production, supply or distribution of goods or services; (c) reduces or limits competition in the production, supply or distribution of any goods or services; and (d) results in a deterioration in the quality of any goods, or in the performance of any service.

After receiving a report from the Commissioner, the Minister may make an order directing any person whom he considers to hold an unwarranted concentration of economic power to dispose of such portion of his interests as the Minister deems necessary to remove the unwarranted concentration. A disposal of interests under such an order may involve the sale of all or part of a person’s beneficial interest in an enterprise or the sale of one or more units controlled by the person. A person against whom an order is made, may appeal to the Restrictive Trade Practices Tribunal and from there to the High Court. No such orders have been made since the Act came into force.

2.4 Control of mergers and takeovers

Mergers and takeovers which involve two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or supplying substantially similar services, are subject to control under section 27 of the Act. All such mergers and takeovers require an authorizing order issued by the Minister. Failure to obtain such an order means that the merger or takeover has no legal effect and is an offence punishable by a fine or imprisonment, or both.

Application for an order authorizing a merger or takeover is made to the Minister through the Commissioner who then investigates the application and makes a recommendation to the Minister. In evaluating the application for the purpose of formulating a recommendation, the Commissioner must have due regard to the criteria set out in section 30.

There are three broad evaluation criteria. They are in the nature of public interest criteria which extend beyond competition concerns. The first criterion is that a merger or takeover will be advantageous to Kenya to the extent that it will result in a substantially more efficient unit with lower production costs and greater marketing thrust, thus enabling it to compete more effectively with imports, and expand Kenya’s exports and therefore increase employment. The second is that the transaction will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices due to oligopolistic interdependence. The third is that the transaction will be disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labour-intensive technology.

The *Premier Food Industries* case (see Box 3) demonstrates how the Commission was concerned about the employment effects of a proposed merger, even in the absence of competition concerns. The Commission recommended that the merger be approved on condition that the acquirer retained the existing workforce of the two target companies.

Box 3

Merger Control

Premier Food Industries Limited applied to the Monopolies and Prices Commission on 21 November 2002 seeking approval to acquire the assets of Trufoods Limited and Kabazi Canners Limited. Its business operations involve manufacturing, processing and selling of processed fruits, vegetable products and beverages. Trufoods Limited is a local private company manufacturing food products. Kabazi Canners Limited is also a limited local private company and also manufactures food products.

Trufoods Ltd and Kabazi Canners had interlocking directorships and shareholders and the directors and shareholders were the same for both companies.

The three firms had a very wide distribution network which involved over 200 distributors spread across the country. The companies also had numerous competitors in the same market. More competition was posed by importers. Numerous jua kali sector [informal sector] players were also involved in this business.

Over 30 companies were operating in this sub-sector and none had any appreciable control of the market in any particular product. Therefore, the takeover was unlikely to lead to any dominance by Premier Foods Limited. Premier's estimated market share of about 10 per cent did not pose any competition concerns.

The proposed new entity would safeguard employment. At the time the takeover application was considered, Premier employed 223 people (of these 90 were casual labourers and 133 were permanent members of staff), Trufoods had 192 (113 casual/contract workers, 86 permanent workers), Kabazi 159 casual/contract workers and 69 permanent workers. The two target firms were experiencing difficulties because of their outdated technology which was on the verge of becoming redundant and this meant that they faced the danger of closing down. The takeover looked likely to salvage this situation and thus ensure that those persons already in employment would retain their jobs. The services of the staff of the two target firms, it was agreed, would be transferred to Premier Foods Limited.

It was, therefore, recommended that the takeover be approved on the following conditions:

1. Trufoods Limited and Kabazi Canners Limited would pay all their pre-takeover employees their full employment benefits in accordance with the contractual arrangements governing their employment.
2. Premier Food Industries Limited would introduce new employment contracts for the employees of the two other companies who wish to become its employees.

An order made by the Minister may approve or reject the application or it may approve the application on condition that certain steps are taken to reduce the negative effects of the merger or takeover on competition. The order is published in the Gazette and an appeal can be made to the Restrictive Trade Practices Tribunal and from there to the High Court.

3: INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

3.1 Competition policy institutions

During the enactment of the law, the government concluded that competition law, of which the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 is the principal legislative centre piece, was a piece of economic legislation and should fall under the responsibility of the Ministry of Finance.

This form of institutional arrangement has attracted substantial comments from stakeholders with respect to the need to have an independent competition authority. The major theme of this debate is whether the decisions of the competition authority should be binding or remain recommendations subject to the approval of another authority, in this case the Minister outside the competition authority. Are the decisions of the authority based on sound competition principles without political or government interference, given the current decision-making process? To what degree should the government be given the power to intervene in the functions of the Commission?

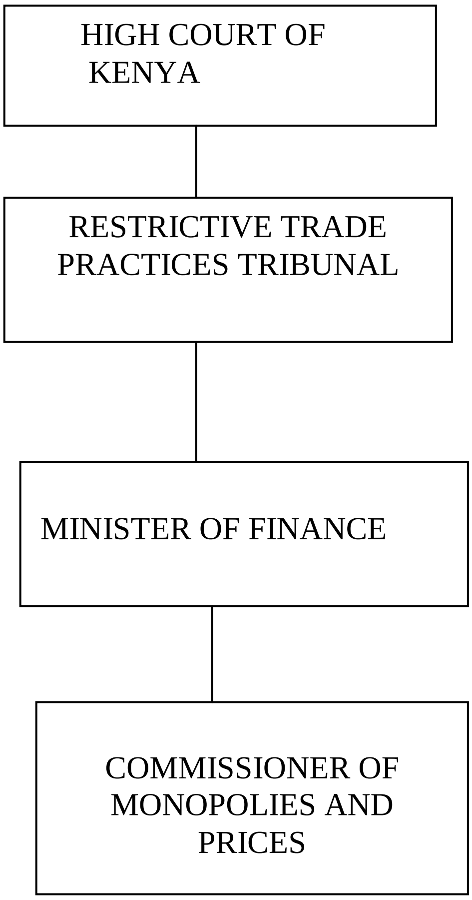
Institutional autonomy, freedom from political interference in the Commission's activities and the ability to exert influence on the Commission's decisions are sometimes seen as interrelated. Thus, a highly autonomous competition authority is assumed to stand free from political influence on decisions and initiatives. On the other hand, a competition authority close to the government, and perhaps involved in the political agenda, might be positioned to have a stronger influence and input in government programmes which may be to the benefit of competition.

The situation in Kenya is quite elaborate. The institutions for competition law enforcement are closely linked to the central government through the Ministry of Finance.

The Act provides for four enforcement institutions namely: the Office of the Minister of Finance, the Office of the Commissioner for Monopolies and Prices; the Restrictive Trade Practices Tribunal; and the High Court of Kenya.

Box 4

COMPETITION ENFORCEMENT INSTITUTIONS



3.2 Office of the Minister of Finance

The Act gives the overall powers to administer and enforce competition law and policy to the Minister of Finance. Section 3(2) of the Act subjects the Commissioner for Monopolies and Prices to the absolute control of the Minister. The Office of the Minister of Finance is the supreme organ in the administration of competition law. The Minister possesses absolute power to make orders in all aspects of restrictive trade practices, control of concentrations of economic power, as well as orders relating to mergers and takeovers.

Although the Minister is expected to seek technical advice of the Commissioner in enforcing competition law, this has in certain circumstances created regulatory uncertainty. For instance, the Minister has on certain occasions disregarded the advice or not consulted the Commissioner. The Act does not make it mandatory for the Minister to seek the advice of the Commissioner.

Box: 5 - THE FINANCIAL STANDARD Tuesday 4 September 2001

Okemo, Kijirah in dilemma
Presidential order has put the duo on the spot
By Mutahi Mureithi

The saga surrounding the acquisition of Machakos-based East Kenya Bottlers by a South African company, Coca-Cola Sabco took a new turn last week following an order by President Moi that foreigners should not be left to control local companies.

On the spotlight is Finance Minister Chris Okemo and the Commissioner of Monopolies, Justus Kijirah, who gave the go-ahead for the takeover, despite loud protestations from indigenous bottlers.

The South African company was also said to be making plans to acquire two other bottlers, which would give it a 70 per cent stake in the entire carbonated soft drinks market. This would be contrary to the monopoly laws that guard against such a stranglehold on a market, by one firm, while there are other equally competent, and cash rich firms, trying to get a foothold.

It is now emerging that when Sabco acquired total share-holding in Flamingo Bottlers in 1997, there was an express proviso, by the Commissioner of Monopolies, that it would not acquire any other plant at any time so as not to have too tight a hold on the market.

Kijirah, at the time said that "future applications (by Sabco) for consummation of takeovers/mergers of existing bottling firms in Kenya by M/S Coca-Cola Sabco or its subsidiary firms will not be entertained."

In fact, as late as last year, the then Permanent Secretary in the Ministry of Finance, Martin Odour Otieno, also wrote to the chairman of East Kenya Bottlers, Muriuki Mugwandia, asserting that the status quo (that Sabco would not be allowed to acquire any other plant) prevailed. "This condition had not been lifted and as such, sales of existing Coca-Cola bottling plants in the country to M/S Coca-Cola Sabco cannot therefore be considered," said Otieno. He advised the chairman to either float the company or identify another buyer "if the shareholders have decided that they must divest from carbonated soft drinks manufacturing."

Although investors of East Kenya Bottlers, the firm at the centre of the row, may have wanted out, there are indications that the local independent bottling plants wanted to buy the plant, and had even made budgetary allocations for the buyout.

Early last month, the independent bottlers delivered a memorandum to the Finance Minister, in which they expressed their fears and apprehensions about the Sabco/East Kenya deal.

The bottlers told Okemo they did not understand how he could have given the go-ahead to the deal, especially in light of the fact that the bids had been rejected twice in the last three years. The feeling was that the investors were being let down by the Government in their hour of need. The bottlers now say that the gazetting of the deal has place Sabco in a much stronger position – contrary to an earlier position where the firm had indicated it would not control over 59 per cent of the market if a consolidation plan mooted by it was affected.

There are specific provisions in the Act which bestow certain powers on the Minister. Under section 17 of the Act, the Commissioner is required to submit his recommendations to the Minister after his investigation in an allegation of a restrictive trade practice. Such a recommendation shall also include the record of the hearing. The Minister upon receipt of such a recommendation may under section 18 make an order through a notice in the Gazette, prohibiting a restrictive trade practice or order certain steps to be taken to address the competition concerns.

Further, the Minister under section 23 of the Act is required to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exists whose detrimental impact on the economy outweighs the efficiency advantages. In carrying out this function, the Minister may under section 24(1) of the Act 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 he deems necessary to remove the unwarranted concentration.

The Minister has also been given powers to approve mergers and takeovers. Section 27 of the Act requires prior merger notification to the Minister for any intended merger or takeover. The Commissioner is required under section 30 of the Act to evaluate an application of a merger and submit the same and his recommendation to the Minister for approval, pursuant to section 28 of the Act.

The elaborate powers given by the Act to the Minister have raised concerns to many stakeholders. It has been felt that this has weakened the effectiveness of the law and had led to wrong perceptions. The current debate is as to whether the Commission should be independent or autonomous.

It is accepted that the design of a competition authority is linked to the traditions and institutional structure of the country, and could not, or only with difficulty, be set up in a different way than is customary for comparable public administrative bodies in the country. Building this institutional apparatus will require that the competition authority's position within the government be re-established. First of all, the competition authority would have to be delegated the power to implement competition policies at the national level. The competition authority would need institutional support to implement and enforce competition policy effectively. Secondly, those government policies that have the potential to maximise competition policy effects when combined, such as consumer protection, should be integrated with competition policy. Thirdly, the relationship between the competition authority and regulatory bodies in the various sectors should be redefined.

It is important that the competition authority is functionally and operationally independent from government. If this independence is not achieved, both in fact and in the perception of the community, the competition authority will be, or be seen to be, influenced by the politics of the government of the day, and therefore subject to other political agendas. Such a situation need not necessarily be in the interest of competition and achieving competitive market outcomes. Without independence, the agency may lack credibility and the community will not have the requisite degree of faith that their complaint or problem will be dealt with in a fair and reasonable manner. Without this element of trust, the result may be a sceptical public and an ineffective regulator.

Box 6
Best practice features of a competition authority

- Independent, insulated from political interference.
- Transparent, well-designed administrative mechanisms, regulations and procedures.
- Separate investigation, prosecution and adjudication functions.
- Checks and balances with rights of appeal, reviews of decisions, and access to information on legal and economic interpretations.
- Expeditious and transparent proceedings which safeguard sensitive business information.
- Provisions for imposing significant penalties.

3.3 Office of the Commissioner of Monopolies and Prices

Section 3 of the Act establishes the Office of the Commissioner of Monopolies and Prices. The Commissioner, subject to the control of the Minister, is responsible for the control and management of the competition authority. The Commission is the regulatory authority with primary responsibility for enforcing the provisions of the Act. Its broad authority includes oversight of both the competition and price control provisions of the legislation (the price control function is now discarded).

The Act clearly states under section 3(2) that the Competition Authority is a Department of the Treasury. The Competition Authority's independence or autonomy is therefore not assured as it falls under the authority of the government. The actual appointment of the Commissioner is not provided for under the Act. It can be assumed that the Commissioner is appointed under the general civil service conditions which govern any other government employees. In fact, all the previous Commissioners and the current one were recruited through the civil service procedure.

The other staff and officers of the Competition Authority are appointed under the government civil service system. They regard themselves as government employees working for the Ministry of Finance. They perceive the Commissioner as an institutional head, as they can still refer any personnel matter affecting them to the Ministry for remedy.

Consequently, the situation exists whereby the administrative function of the Commissioner is shared with the Ministry whereas the law enforcement function is shared with the Minister of Finance. In practice, the Commissioner's powers are neither independent nor absolute. The Commissioner is placed under the general supervision of the Permanent Secretary in the Ministry of Finance. What is important is that the Commissioner's decision-making process should be free of political influence and be based on sound competition principles.

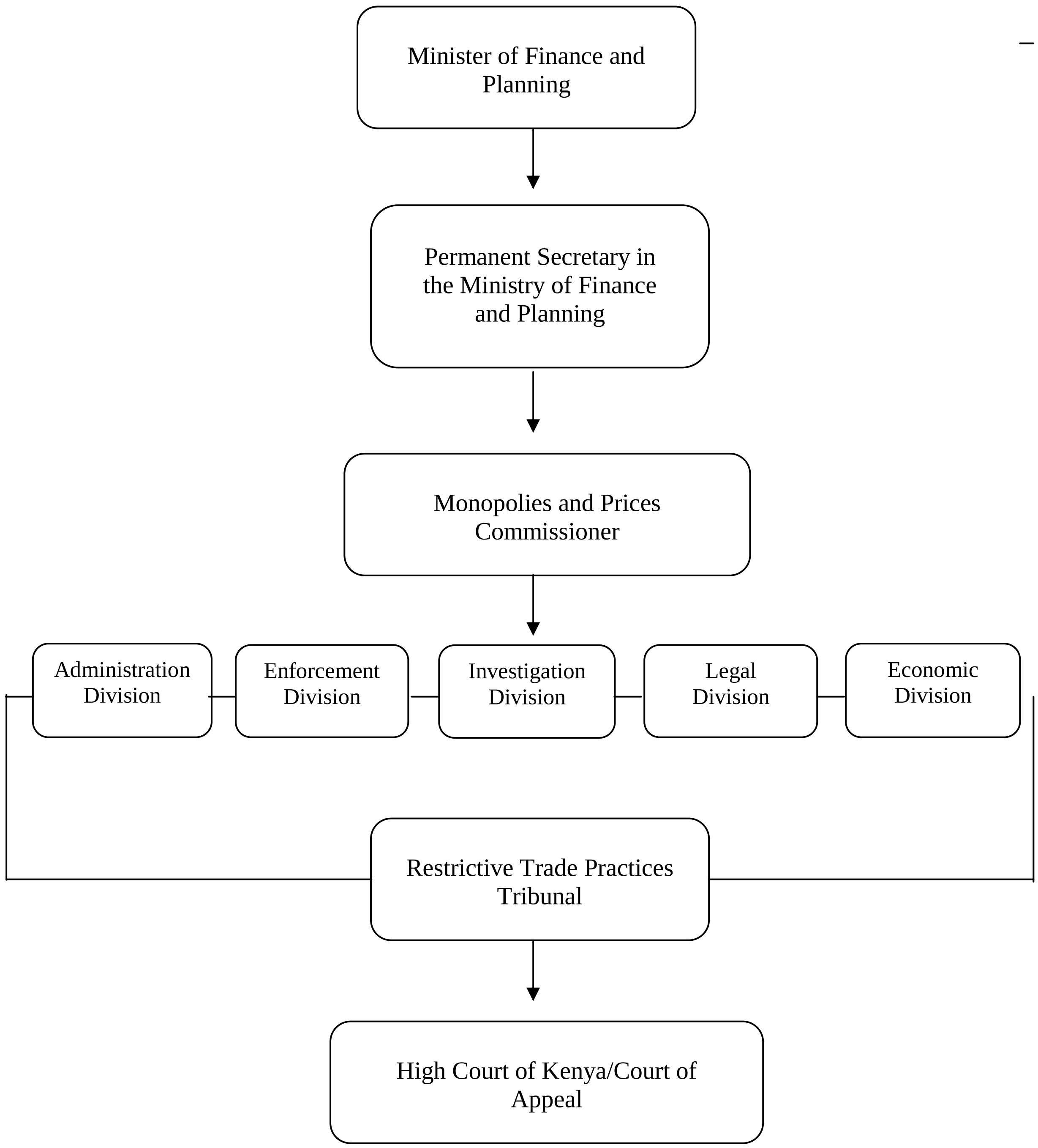
The powers of the Commissioner as spelt out in the Act consist of receiving complaints from aggrieved parties, investigating complaints, hosting of public hearings, evaluation of cases and making recommendations to the Minister of Finance for the final determination. Section 14 of the Act provides for the powers of the Commissioner to investigate any complaint from any person who considers his or herself aggrieved as a result of a restrictive trade practice. The Commissioner may also in this instance initiate investigations. In carrying out his investigative duties, the Commissioner may authorize any person in writing to have access to documents or enter premises.

The Act provides for elaborate powers given to the Commissioner in the performance of his duties and investigations involving restrictive business practices, unwarranted concentrations of economic power and assessment of mergers and takeovers. These powers shall be elaborated when we later consider the enforcement procedures and practices.

The Ministry of Finance plays a very important policy and legislative role, and also plays a role in staff appointments. The Treasury is also responsible for the budget of the Competition Authority.

Box 7

Structure of the Commission



3.4 The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to section 64(1) of the Act, a Restrictive Trade Practices Tribunal was established in 1991. The composition of the Tribunal is as follows: the Chairman who must be an advocate of the High Court of Kenya and of not less than seven years standing, and four members. The Act does not prescribe any qualifications for the other four members. However, the members of the Tribunal shall hold office for five years and may be re-appointed for another five-year term.

It would appear that once constituted by the Minister of Finance, the Tribunal shall operate independently of the office of either the Minister of Finance or the Commissioner. The Tribunal operates as a collegial body, although it is not a formal court. The quorum for a meeting of the Tribunal shall be the chairman and two other members. The Minister, under section 64(5) may make rules prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of an appeal. The Minister may also make rules prescribing the procedure to be adopted by the Tribunal in hearing an appeal, and the manner in which the Tribunal shall be convened and the location and time where the sitting shall be held.

Section 25(1) provides for a person aggrieved by an order of the Minister to dispose of interests to appeal to the Tribunal in the prescribed form. The Tribunal also receives appeals against orders of the Minister made under section 18 of the Act. Consequently, the principal function of the Tribunal is to arbitrate over competition disputes resulting from ministerial orders made on the recommendation of the Commissioner. Section 67(3) gives the Tribunal powers to overturn, modify, confirm, or reverse the order appealed against. Under section 68 of the Act, the Tribunal may direct the Minister to reconsider the matter, rather determine any appeal.

When appeals are brought to the Tribunal under section 32 against any order of the Minister under section 31, the merger or takeover to which the appeal relates to may not be consummated pending the determination of the appeal.

Since the Competition Authority was established, only one appeal case has been presented to the Tribunal. In fact, the current Tribunal has neither administratively nor considered a case referred to it in the time since it was first appointed. It is very doubtful if its existence is known by the business community. A discussion with its chairperson revealed that, since their appointment, they have not met.

The non-operation of the Tribunal can be partly attributed to the general low level of the activities of the Competition Authority. The number of decisions which can be appealed has been comparatively low. There have also been suggestions that, as the Tribunal is appointed by the Minister and adjudicates on the Minister’s decisions, the would-be users of the Tribunal system have no confidence in the system. The independence of the Tribunal is doubted.

The lack of awareness of the existence of the Tribunal by the business community has also contributed to its non-performance. Amongst most of the people interviewed there was a general lack of knowledge of the institutions involved in competition law administration and enforcement, although they knew the existence of the Competition Authority.

Further, the functions of the Tribunal are not specific and clear from the Act. Its establishment is not provided for fully in the Act. For example, it has no secretariat, no premises or building, no budget, and does work on a full-time basis. It has been described as ‘a practically redundant body’. The suitability of the Tribunal system is examined below when considering the judicial system in Kenya.

3.5 The High Court of Kenya

Section 25(2) provides for the party who is dissatisfied with the decision of the Tribunal to appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him; the decision of the High Court shall be final. The law further provides that any appellants to the Tribunal under sections 20(1), 25(1) and 31(1) in respect to the ministerial orders made pursuant to the provisions of sections 18(1), 24(1) and 31(1) respectively, may appeal to the High Court of Kenya if dissatisfied with the decision of the Tribunal,

The High Court of Kenya is part of the judiciary, and is required by virtue of the principle of separation of powers embodied in the Kenyan Constitution, to be independent from the executive and the legislative branches of the Government. In order to ensure the independence of the judiciary, there are constitutional restrictions on the appointment, conditions and tenure of High Court Judges.

However, there have not been competition cases which have been appealed to the High Court since the establishment of the Competition Authority. This again, can be attributed to the lack of a competition culture in Kenya. It is important to observe that the High Court is not a specialized Court for competition cases. Just like in other jurisdictions, it shall be rare to find judges who have experience in adjudicating competition cases. This also extends to lawyers in practice. For competition law is still regarded as a new field. The country is still in the process of developing its own expertise in the field.

3.6 Competition law enforcement: procedure and practice

The Commission is established by the Act and has a number of responsibilities including the power to enforce the Act. There is now a general consensus that countries should ensure that their competition laws effectively halt and deter anti-competitive practices, more especially hardcore cartels, by providing for:

(i) effective sanctions, of a kind and level, adequate to deter firms and individuals from engaging in cartels or anti-competitive practices; and

(ii) adequate enforcement powers and institutions, including powers to obtain documents and information.

Enforcement issues represent one of the main difficulties in introducing competition law. The available enforcement capabilities and approaches must dictate the substantive approach of the law. It would be counter-productive to introduce a sophisticated piece of legislation that would be difficult or impossible to enforce by the competition authority. However, establishing an efficient enforcement agency capable of implementing sophisticated competition legislation should be seen as a long-term objective. Even competition authorities in developed countries had many years to perfect their enforcement capabilities.

The key provisions of the Act related to enforcement can be placed in the following three categories:

- Enforcement procedures for restrictive trade practices (RTP) complaints (Box 8).
- Enforcement procedures for the control of unwarranted concentrations of economic power (Box 9).
- Enforcement procedures for the control of mergers and takeovers (Box 10).

3.7 Restrictive trade practices

In relation to restrictive trade practices, sections 13-20 of the Act give a detailed procedure to follow when carrying out inquiries and investigations into restrictive trade practices.

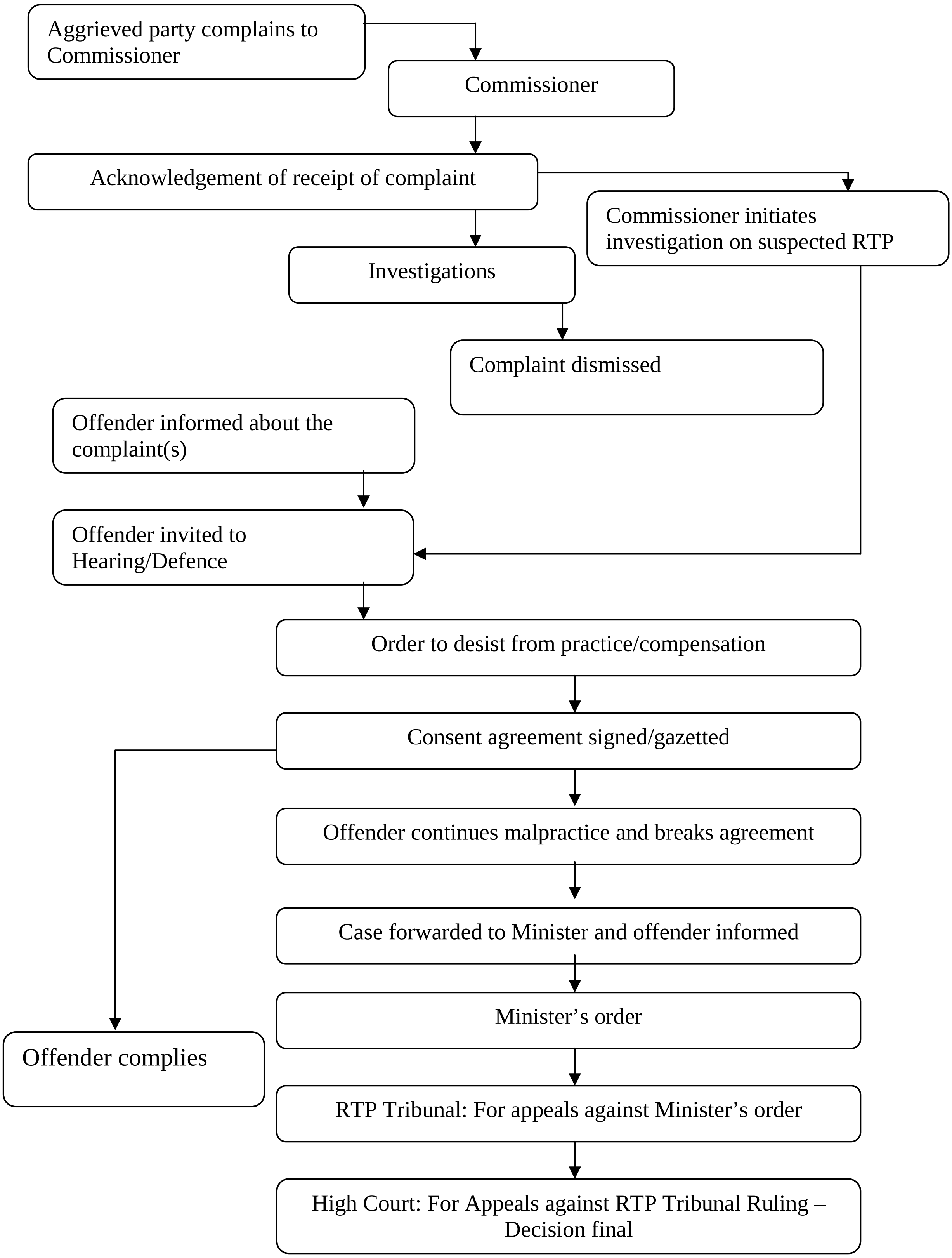
In the case of restrictive trade practices any aggrieved person may submit a complaint to the Minister, through the Commissioner, in the prescribed form. The Commissioner investigates the complaint and may inform the target of the complaint about the allegations and the evidence adduced, and invite that person to comment on the allegations and the evidence, and indicate what remedies the person would propose in order to bring his trade practices into conformity with the law. The Commissioner may also inform the person complained against that the weight of the evidence supports the allegations that have been made and request the person in question to take specific steps to discontinue the practice; in addition, the person may have to compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers, competitors or customers to participate fully in producing or trading in the goods or services to which the allegations relate.

In case there is no response to the Commissioner's communication by a given date or any remedial action taken is deemed by the Commissioner to be inadequate, the Commissioner is required to invite the person to negotiate a consent agreement which enjoins that person to desist from specified practices and to compensate for their past effect. Such an agreement is gazetted and copies sent to any person complaining of the said practice/s and to any other persons the Commissioner deems to be affected by the agreement.

Should the preceding measures not be effective, either because of lack of satisfactory steps or because of a breach of the agreement, the Commissioner then informs the person in question that he proposes to recommend that the Minister make an order regulating the practices in question and that a hearing on the desirability will be held on a specified date. Upon concluding the requisite investigations under section 16, including the holding of a meeting, the Commissioner presents his report together with recommendations to the Minister.

Box 8

Enforcement procedures for restrictive trade practices (RTP) complaints



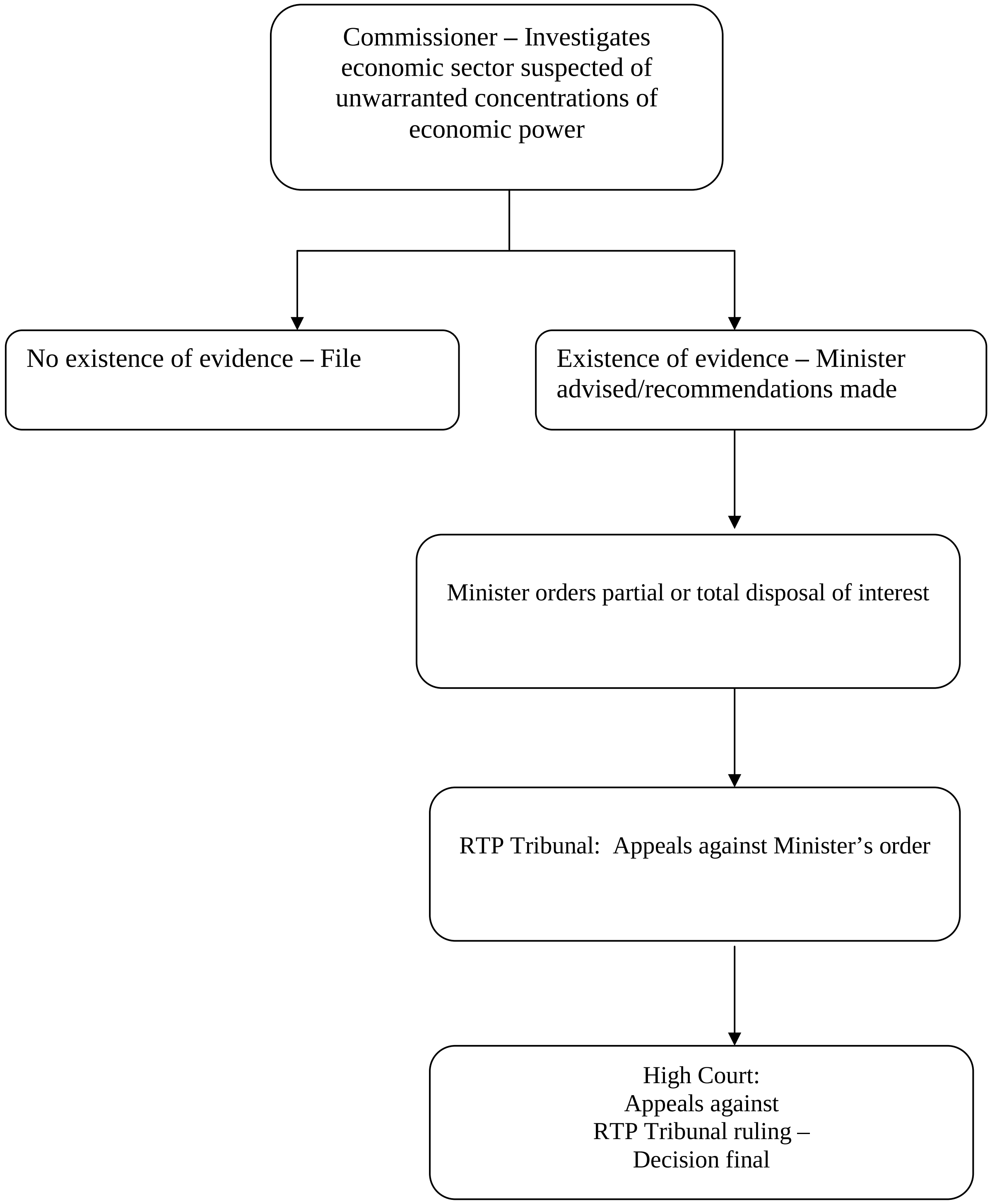
3.8 Control of unwarranted concentrations of economic power

In the case of abuse of monopolies and dominant positions, the Minister directs the Commissioner to investigate any economic sector which features one or more factors relating to unwarranted concentrations of economic power. The Commissioner then reports back to the Minister who may make an order directing any person 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 supply of services as the Minister deems necessary to remove the unwarranted concentration. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

A concentration may arise where two or more independent undertakings merge or where one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings. Many of these types of transactions will therefore fall within the merger regulations. These may include mergers, the creation of joint ventures and management buy-outs. Concentrations which fall within the merger regulations require to be notified to the Minister.

Box 9

Enforcement procedures for the control of unwarranted concentrations of economic power

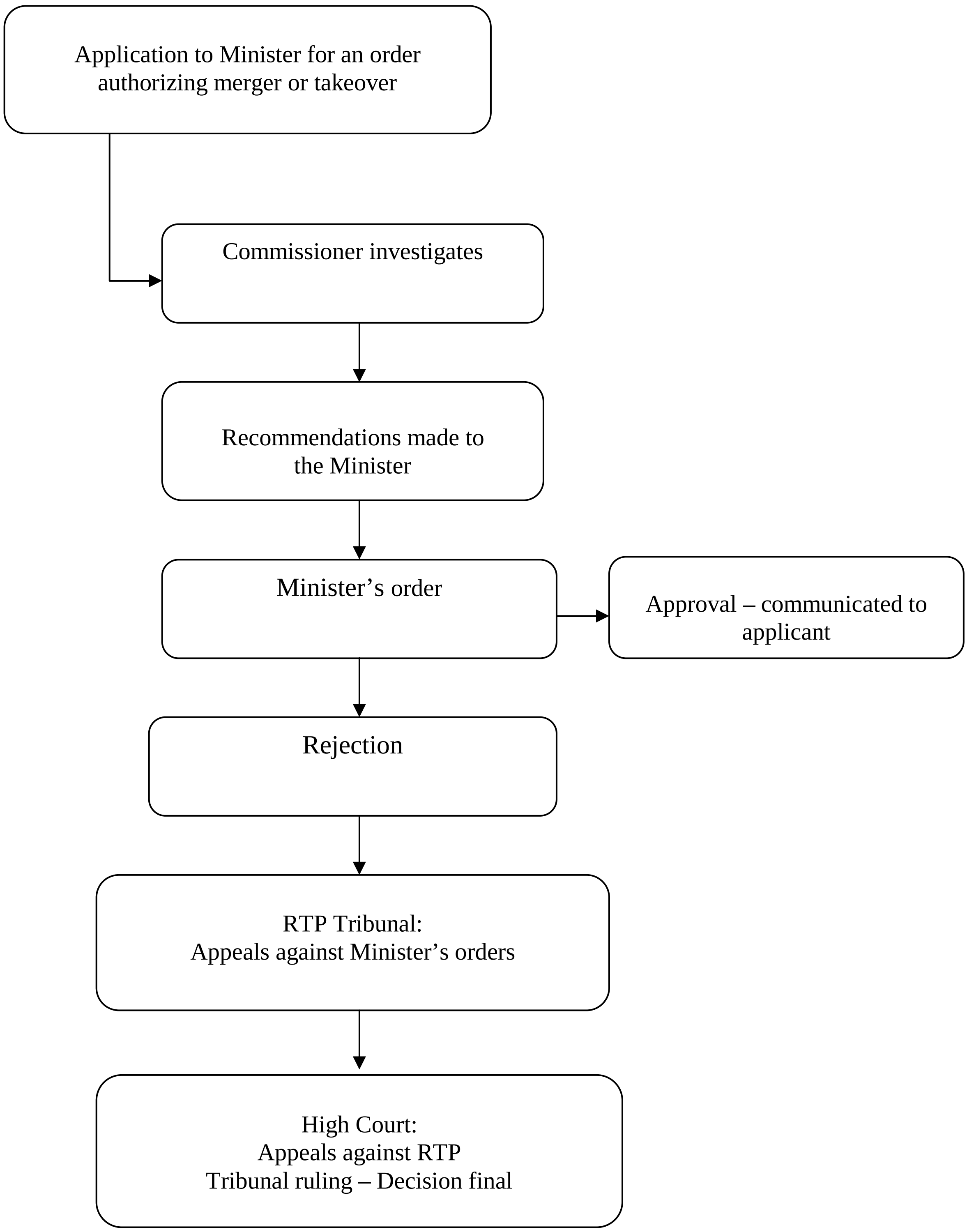


3.9 Control of mergers and takeovers

Horizontal mergers or takeovers taking place without an authorizing order from the Minister are illegal *ab initio* and not justiceable. Any person intending to effect a merger applies to the Minister through the Commissioner for action by the Minister. After considering the Commissioner's recommendation, the Minister may make an order concerning the application. The Minister's approval may be conditional or unconditional. The Minister is required to issue an order for authorization to be published in the Gazette as soon as reasonably practicable after the order is made. Publishing the authorization in the Gazette is important as other infractions of antitrust law are treated differently: the Minister's order in cases of control of unwarranted concentrations of economic power do not need to be gazetted. An aggrieved person has recourse to the Restrictive Trade Practices Tribunal and finally to the High Court.

Box 10

Enforcement procedures for the control of mergers and takeovers



3.10 Other enforcement methods

3.10.1 Administrative resolution

The least severe way the Commissioner resolves complaints of alleged contraventions of the Act is by administrative resolutions. Such resolutions may include:

- Referral or advice to a more appropriate agency;
- By means of a simple resolution which consists of reverting to the business concerned and requesting it to inform the Commission that it will cease to engage in the conduct;
- In negotiating an administrative resolution the Commission aims to ensure that the offending conduct ceases and also seeks to obtain suitable redress.

Such resolutions lack formal legal enforcement, although they may provide relevant evidence in proceedings against the form if subsequent enforcement litigation ensues.

3.10.2 Judicial system

The effectiveness of competition law enforcement in addressing anti-competitive practices largely depends on the actual degree of enforcement action by the Commission and the role of the tribunal and courts or the judiciary as institutions of enforcement.

It also needs to be recognized that the judicial systems in most developing countries are inadequate forums for resolving business disputes. There are very few judges, if any, who are familiar with market-oriented legal principles, and even fewer who are aware of the basic concepts of industrial organization underpinning competition policy. The court system is also beset by extraordinary delays and irregularities in processing cases.

A competition system can compensate for these deficiencies partly by trying to minimize participation by the existing judiciary in the application of the law. This can be accomplished as in Zambia and Malawi by giving the competition authority's decisions the force of law and allowing affected parties to stay the operation of the authority's orders only by appealing them to the High Court or special higher tribunal. A second approach, which has been adopted in South Africa, is to create a special competition policy tribunal or business court to hear competition disputes. A third method is to establish special divisions within the existing judiciary to handle competition matters, this approach has been adopted in Zimbabwe. In no event can (or should) the judiciary be excluded from the process. All judicial participants involved in resolving competition cases, including members of the Board or tribunal or business courts, will require training. The urgency to provide training is especially acute where competition law such as is the case of Kenya provides for a private right of action to enforce the statute.

In South Africa, the application of the competition law combines administrative and quasi-judicial approaches. The Commission has the first responsibility with respect to matters arising under the Competition Act. Decisions in contested matters are made by the Tribunal, on the record and after an open hearing of the views of the Commission and the parties. The Tribunal also has power to impose sanctions. And parties may appeal any final Tribunal decision to the Competition Appeal Court, which has the status of a High Court.

3.10.3 Sanctions and remedies

The Commission must have at its disposal an array of remedies and sanctions that it can impose as circumstances warrant. Unless the Commission has adequate powers to address the competition harm that results from violations of competition law and to prevent recurrences of those violations, the law will quickly become ineffective.

The competition law enforcement process reflects the legal tradition of the country concerned and therefore varies from country to country. In some countries, criminal penalties and multiple damages play a central role. In others, the administrative process plays a major role; in some other countries, an informal process is preferred over a formal enforcement process.

No penalties have been imposed since the establishment of the competition authority. Consequently, it is still not known what approach the competition authority will take in deciding whether to pursue a criminal or civil track. Generally speaking, the choice of proceedings along a civil or criminal track has implications on the burden of proof the competition authority has to bring before the courts. The former calls for 'balance of probabilities' while the later calls for 'beyond reasonable doubt'. It has been argued that a developing competition authority is better advised to pursue the civil track as opposed to the criminal track. This is because in most competition litigation, a lot of skill is required to prove 'intention'. For example, the Kenyan Competition Law requires 'proof of intention' when dealing with predation under section 10 of the Act.

Penalties and offences under Kenyan law are mentioned throughout the Act, depending on the section of the Act. The question to consider is whether it is prudent to impose criminal sanctions for competition offences. The approach to the question of penalties and offences varies among developing countries. It is important for Kenya to first consider and compare its current provisions of sanctions and penalties with those to be found in other business-related laws.

Given the range of sanctions available in the Act, Kenyan courts should be able to impose a combination of sanctions, taking into account the overall penalty impact imposed.

3.10.4 Fines and imprisonment

The views of the Commission staff suggest that action taken in response to an alleged contravention should be designed to serve one or more of the following purposes:

(i) undo the effects of the contravention;

(ii) prevent a future contravention of the Act, both immediately and in the longer term, and to promote and encourage community-wide compliance with the national competition law;

(iii) provide deterrence; and

(iv) compensate a person or business who has suffered loss or damage as a result of the contravention of the competition law.

Broadly speaking, these purposes address both the immediate issue at hand, i.e. the specific contravention and its effects, as well as the longer-term implications of non-compliance on a market's competitive processes.

3.10.5 Penalties and offences

The Act provides for both civil and criminal sanctions for contravening the Act. Section 21 and 26 of the Act makes it an offence for any person, regardless of whether they are the principal or agent, who contravenes or fails to comply with an order made by the Minister in respect of a restrictive trade practice, and in respect unwarranted concentrations of economic power. As regard to a merger, section 27(3) makes it an offence to carry out a merger or takeover without the authorisation order by the Minister. In all the above three instances, the Act provides for jail sentences and fines.

The fines contained under the Act such as section 21(2) and (3) do not appear to have had the required deterrent effect. The fines provided for under the Act range from $1,500 to $3,000 although maybe the fines were initially modest, their value has been overtaken by other factors such as inflation. The Act has no mechanism for review of fines. The law requires a tough fining policy in order to deter firms from engaging in collusive behaviour and to deal with serious breaches of competition rules.

Kenyan legislation should introduce fines which are in line with present-day requirements, but also be fair and proportionate to the infringement. The policy objective is to impose penalties on infringing undertakings which reflect the seriousness of the infringement and ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

3.10.6 Imprisonment

Contraventions of competition laws attract prison sentences in some jurisdictions, including Kenya. In Australia, the Australian Competition and Consumer Commission has recently called for “the introduction of criminal sanctions, as in many other countries, including jail for up to seven years, for the most serious breaches of the competition provisions of the Act, i.e. 'hard-core cartels' by big business”. Recent debates in the US have highlighted the credibility problem of talking tough but not acting tough and commentators; some decision-makers are now calling for increased jail penalties because in reality very few senior executive actually serve time for anti-trust violations.

Clearly the threat of imprisonment in a developing country like Kenya remains the most powerful deterrent against individuals contravening competition law. It is also a punishment that cannot be passed on to others, e.g. by price increases to consumers or business purchasers, or absorbed by a corporation, i.e. a corporation could not go to jail in lieu of an individual but could pay a fine. It might also send a strong message to international audiences that the country is really serious about competition law. However, there are also dangers associated with this option:

- The credibility of both competition law and the agencies involved will be greatly harmed if it was perceived that heavy sanctions such as imprisonment were imposed in an unfair manner on either senior executives of large multinational businesses or those involved in smaller local businesses.
- There would be a far greater incentive for businesses, particularly multinational firms, to frustrate investigations and the enforcement of orders.
- The critical process of building broad community acceptance, particularly within the business community, of a new law prohibiting long established business practices, will be compromised if the penalty regime is inconsistent with perceptions of proportionality to the identified mischief.

Consideration should be given to retaining imprisonment in the law as it offers the most effective deterrent in a developing country setting. Fines tend to be abused by multinational corporations due to their strong financial base compared to weak currencies in the recipient countries.

3.10.7 Procedure for remedies under the Act

In matters concerning restrictive trade practices, the *malfeasor* may be required by the Minister to desist from the prohibited trade practices; the Minister may further also require the *malfeasor* to take specific steps to assist existing or potential suppliers, in order to compensate for the past effects of the particular infractions.

In the case of unwarranted concentrations of economic power, i.e. abuse of monopolistic or dominant positions, the Minister may direct the *malfeasor* to dispose of such portion of his interests in production or distribution, or the supply of services as the Minister deems necessary, to remove the unwarranted concentration.

In the case of mergers and takeovers, any action taken without the Minister’s authority is void *ab initio* and unenforceable in legal proceedings.

3.10.8 Persons who suffer loss or damage

Enabling persons who have suffered loss or damage as a result of a contravention of competition law to be compensated for that loss, is an important objective of action to enforce the law. The Minister under section 18(1) of the Act, in relation to restrictive business practices, may by notice in the gazette, require a person to desist from the offending practice and may require him to take positive steps to assist existing or potential suppliers, competitor, or customers, in order to compensate for the past effects of those practices.

The ability of an affected consumer to win compensation for his or her losses is likely to encourage popular support for enforcement. This is likely to appeal to the general public as much as to the persons actually receiving the compensation. Competition law should allow courts to make compensations in those cases where the person being fined has insufficient means to pay a fine.

3.10.9 Availability of private rights of action

Kenya is a common law country, hence a private right of action is generally available under the constitution. Consequently, a person who suffers loss or damage from conduct of that violates the law may recover the amount of loss or damage by action against the violator. Such action must be commenced within a specified period after the date on which the cause of action accrued. Consequently, the general law provides for a right of private action for firms or persons who consider their competitors or others are engaging in unfair marketing practices or if they consider they have been adversely affected by illegal conduct.

However, private enforcement of the Act, although it has never happened before, is also generally possible, i.e. individuals and corporations with an economic interest or individuals who have suffered a personal loss can take action under the Act and the courts may award certain remedies. Private individuals (third parties) may also take action under the Competition Act to obtain remedies against anti-competitive conduct. However, private actions are rare in Kenya because the incentives for pursuing cases privately are not so strong as, under the cost rules, the loser of a case must also pay the cost of the winning side. Actions under the Competition Act will be taken in the High Court of Kenya.

3.11 Investigative Tools

3.11.1 Obtaining information, documents and evidence

One of the major tools available to the Commissioner is the use of section 14(2), which allows him or any other person authorized in writing by him, to obtain information, documents and evidence when investigating possible contraventions of a restrictive trade practice and to make copies of these documents. Section 14(3) empowers the Commissioner, or any person authorized by him, to enter any premises and to inspect any documents in the possession or under the control of a person who the Commissioner has reason to believe is in charge of the premises.

Under section 23(3) the Commissioner may require any person possessing records relating to the investigations of unwarranted concentrations of economic power to give him copies of the records or alternatively to submit the records to him for copying. Section 29(1) empowers the Commissioner when investigating a merger to require any participant in any economic sector within which a merger or takeover is proposed to take place, to grant the Commissioner or any person authorized in writing by him, access to records and make copies of those records.

There appear to be no safeguards against likely abuse by the officers of the competition authority. The power to enter or search premises should be exercised only if there are reasonable grounds for suspecting that the law has been infringed. However, the law should have provisions on:

- privileged communication;
- self-incrimination;
- disclosure of confidential information;
- access to legal advice.

3.12 International issues in competition law enforcement

The Republic of Kenya is a member of the World Trade Organization (WTO), the Common Market for Eastern and Southern

Africa (COMESA), the East African Community (EAC).

The above international and regional bodies have provisions in their statutes on competition law and policy. Commission officials have played an active role in articulating the Kenyan position on competition law and policy in the international and regional meetings. In fact, the Commissioner chairs the National Reference Committee on Competition and Trade. He has been and continues to be instrumental in all the deliberations leading to the enactment of the East African Community competition regime.

At the WTO, the Commission has continued to participate in the negotiations on the Doha Development Agenda. COMESA competition regulations and rules have been adopted at a regional level and are now already in place and being implemented in all COMESA member states.

Similarly, the negotiations leading to the establishment of the East African Community competition regime will soon be finalized and become law in Kenya, Tanzania and Uganda.

Kenya's membership of WTO, COMESA and EAC has placed additional responsibilities on the Commission. This will mean that the Commission will need to find support for capacity building and infrastructure development.

The Commission is the national focal point in all matters relating to competition law and policy. It also has informal cooperation agreements with South Africa, Zambia and Zimbabwe in the field of technical assistance.

3.13 Agency resources, caseload, priorities and management

3.13.1 Funding of the competition authority

As a government department, the competition authority relies on the government's budgetary allocations to finance its operations. Unlike other autonomous competition authorities in the region, the Kenyan competition authority does not charge fees and does not receive funds from donors or obtain private loans from financial institutions.

As a result of its sole dependence on government funding, the competition authority like most of the government departments, has continued to experience serious under-funding. Some key programmes have continued to suffer due to the under-funding; principally-affected are training, hiring of consultants to carry out special assignments; office automation, and attractive salaries for staff, etc.

Box 11

Estimates of expenditures for the Monopolies and Prices Commission (2000-2005)

Year	**2000/2001**	**2001/2002**	**2002/2003**	**2003/2004**	**2004/2005**
Estimate in Kshs	17,933,200	16,953,226	21,439,759	27,901,167	22,173,165
Estimate in US$	239,109	226,043	285,863	372,015	295,642

3.13.2 Management

The competition authority as earlier stated is headed by a Commissioner who is accountable to the Minister of Finance through the Permanent Secretary to the Treasury.

The Commission has an authorized staff of 63 officers. The actual number of staff currently employed is 31. The academic qualifications of the staff is very high. Almost all senior staff have a Master's degree. And almost all the staff have received some form of training in competition law and policy. The staff have benefited from UNCTAD training programmes on competition law and policy. There have been some bilateral arrangements between the Commission and the Competition Commission of South Africa where the two institutions have exchanged staff.

The Commissioner is highly qualified in both law and economics, and commands respect in both professional circles, the business community and the government. He is outspoken and has managed to bring the concept of competition law and policy into the public domain.

A good number of staff have further benefited from attachments to competition authorities in developed countries, e.g. Japan and Germany.

The structure and staffing of the Commission is contained in the Ministerial Rationalization Report of the Ministry of Finance and Planning of March 2000 (Although over the years this has been replaced by the structure appearing in Box 7). This report forms part of the Civil Service Reform Programme. The Commission is currently organized in five divisions, namely:

- Administration;
- Planning and evaluation;
- Restrictive trade practices;
- Legal division;
- Computing and documentation.

The Planning and Evaluation Division is headed by a Principal Economist whose duties and responsibilities consists of:

(a) Handling all cases on mergers and takeovers in accordance with the provisions of Cap. 504 of the Laws of Kenya.

(b) Dealing with concentrations of economic power and advising the Commissioner on whether divestiture is necessary or not. The Division institutes surveys in sub-sectors believed to have concentrations or where restrictive trade practices may be suspected to be occurring.

(c) Dealing with cases of monopoly undertakings which lead to abuse of dominant position.

(d) Dealing with international trade matters.

(e) Liaising with the computing and documentation division in developing management information systems for the department.

(f) Monitoring product and factor prices, ownership patterns, new investments and business failures and evaluating contractual agreements and articles of association of businesses and professional bodies.

Restrictive Trade Practices (RTP) Division is headed by an Economist and is responsible for assisting in competition policy enforcement through the examination of market behaviour and performance. This essentially involves research and investigation of cases relating to restrictive trade practices. These are the anti-competitive practices that have the effect of restraining free and fair commercial activities including: cartelisation, collusion, refusal to deal, discriminatory deals and predatory practices.

The Legal Division supports other divisions in matters pertaining to law and law enforcement. This division is responsible for drafting legal notices that include directives, orders or instructions of the Minister on changes made in the Act, litigation, case procedures, compliance and follow-up, legislative exemptions to competition law, harmonization of other laws with the Act and review of Cap. 504, Laws of Kenya.

Computing and Documentation Division is charged with offering support services to other divisions. These services include application of software programmes, repairs and maintenance of computers, recording and updating cases, designing questionnaires, data input, cataloguing all documents and other materials in the department and identifying violations of Cap. 504 in the print and electronic media.

Administration Division is responsible for office premises, procurement of equipment, security, personnel, transport, and budget estimates preparation.

Provincial Offices are charged with the responsibility of carrying out preliminary investigation and analysis of anti-competitive practices in their areas of jurisdiction.

3.13.3 Constraints

The Commission has, in the years it has been in operation, identified the constraints it is facing in the administration and enforcement of competition law and policy. The Commissioner has ranked the major constraints faced by the Commission and his conclusion are as follows:

The department's present organizational structure was inherited from the Price Control Department. The price control structure facilitated the administration and enforcement of fixed prices of goods and services whereas the present competition policy function is concerned with the economic examination of practices of market players with the view of detecting any restrictive business practices and abuse of dominance in the market place which restrain, distort or prevent free and fair competition. There are six provincial offices, in addition to the departmental Head Office in the Treasury Building. As a result of the dramatic change of policy and functional mandate, the inherited structure and staffing of the department are unsuitable for an efficient and effective competition policy office. There is great need to change the perception of the staff. The prevailing mindset should evolve from to price control to competition.

Competition policy functions and competition law enforcement are specialized fields in which multi-disciplinary experts in economics, Law, financial analysis, market analysts, among others, play crucial roles as a team while, at the same time, functioning effectively individually. The organization structure of the Monopolies and Prices Commission should therefore have the flexibility to e respond to market changes so that it is able to attract and retain needed multi-disciplinary skills. Competition policy provides the necessary linkage between various development policies and can therefore contribute to the achievement of development objectives in a free-market economy.

Competition policy structures essentially work towards coordinating and harmonizing mechanisms in the regulatory framework of the various sectors of the economy such as industry, trade, privatisation, investment, consumer affairs, deregulation and so on. However, the linkage between the various structures has not been established.

The existing law does not directly provide for consumer protection and fair-trading. Clear provision for these two policies in the law would provide competition policy and law administrators and enforcing agencies with useful tools to interpret the substantive rules in the application of the law on practical cases in the market place.

Provisions in the existing law are quite often in conflict with provisions of several existing sectoral laws. These sectoral laws ought to be harmonized with competition legislation provisions and the country's policy of a free market economy. Sectoral laws such as, among others, the Trade Licensing Act, Import, Export and Essential Supplies Act, Agriculture Act, Tea Act, Intellectual Property Act, Protection of Foreign Investments Act, ought to be streamlined so that in matters of competition policy, sectoral laws become subservient to the general competition law.

3.13.4 Case priority and handling

The Commission's work largely follows developments in the marketplace, this often takes the form of information received about violations of the Act and other complaints and inquiries. The Commission has, on its own initiative, began making inquiries especially from press reports. In this regard it has an officer in the Administration Division charged with preliminary analysis of competition cases arising from the media.

The government has also continued to give additional responsibilities to the Commission. For instance, the Commissioner chairs the National Reference Group on Competition and Trade Negotiations constituted in to support work held under the Doha Development Agenda. The Commission is the contact point for all competition matters relating to the East African Community Treaty and the COMESA Treaty.

The screening and handling of complaints and enquiries forms the major part of the Commission's day-to-day activities. These complaints are received by phone calls, personal visits, letters, etc. The Commission's staff is expected to give advice, acknowledge complaints and commence the inquiry process, where necessary. The Commission pays a lot of attention to how it deals efficiently with complaints and inquiries. The Commissioner has stated that he is aware that the manner it deals with complaints plays a major role in how the public perceives the Commission.

The rest of the work follows from the implementation of the various provisions of the Act. It was observed that the Commission has handled the smallest number of cases, compared to other competition authorities in the COMESA region, this is in spite of the fact that Kenya having a robust economy. The explanation of this phenomenon was that, unlike other competition authorities, the Commission is constrained by its institutional arrangements and insufficient autonomy in the Act, to allow it to carry out more functions. It is evident that more anti-competitive practices in the economy have continued to be practiced without being noticed or reported to the Commission.

The other explanation can be attributed to lack of motivation of the Commission's officers. It was evident during the interviews with the officers that their salaries were on the lower side compared to their counterparts whose organisations have been turned into statutory bodies. It was suggested during the inquiries that the only way the Commission officers were going to be adequately motivated was to legislate for the Commission as a statutory body with autonomous status. A Commission with autonomous status shall be able to introduce better conditions of service.

As regards priorities for case handling, it is rather difficult to determine given the low volume of cases being handled by the Commission annually. However, from the annual statistics (Box 12), it would appear the Commission has handled more cases under the merger control provisions, than other provisions of the Act.

4: CASEWORK, EXEMPTIONS AND SECTOR-SPECIFIC REGULATION

4.1 Casework review

The Monopolies and Prices Commission has dealt with an average of 20 restrictive trade practices cases and 27 merger and takeover cases a year over the five-year between 2000-2004. The numbers of case considered by the Commission is given below.

Box 12

Cases considered by the Monopolies and Prices Commission from 1989 to 2004

Year	Restrictive trade practices cases	Merger and takeover cases
1989	7	6
1990	6	9
1991	6	10
1992	7	9
1993	7	7
1994	13	9
1995	15	14
1996	15	11
1997	10	11
1998	15	12
1999	18	24
2000	18	37
2001	18	23
2002	15	35
2003	35	19
2004	15	22

Source: Monopolies and Prices Commission

The Commission terminates most restrictive trade practices cases without issuing a formal published decision. Under section 15(1) and (2) the Commission informs the person alleged to have contravened the Act of the evidence and invites comments on the evidence. If the Commission takes the view that the weight of the evidence supports the allegations, the person concerned is requested to discontinue the practice and compensate for its past effects. Only if the person fails to respond to this request, does the Commission invite him or her to negotiate a consent agreement. Only two consent agreements (under section 15(3) of the Act) have been published in the Gazette. The first consent agreement was made in 1991 and provides that a carbonated soft drink manufacturer will refrain from exclusive dealing and predatory practices against the marketing of its competitors' products. The second consent agreement was made in 2003 and relates to the insurance industry. The Association of Kenya Insurers agreed to cease recommending premium rates (see Box 2).

If a person who has committed a restrictive trade practice fails to enter or comply with a consent agreement, the Commission can recommend to the Minister that an order is made to regulate the practices in question (under section 18 of the Act). The Minister has made four such orders. The orders relate to tobacco distributorship (1992), carbonated soft drinks (1993), wines and spirits distributorship (1996) and computer software (2004).

The Commission was directed by the Minister to investigate two economic sectors because of the possible existence of an unwarranted concentration of economic power under section 23 of the Act. These two cases concerned the carbonated soft drinks sector (in 2003) and the cement industry (in 2004). In neither case did the Commission find any need to recommend the disposal of interests. No such orders to dispose of interests have been made under section 24 of the Act.

4.2 Exemptions from the competition law

Section 5 of the Act has been interpreted as a wide exemption from the tenets of competition law. The exemption relates to trade practices that are directly associated with the exercise of exclusive or preferential trading privileges conferred by an Act of Parliament, and those associated with the licensing of participants in certain trades and professions by government agencies acting in accordance with an Act of Parliament. Regulated enterprises consider themselves to be exempt from the competition law by virtue of this section.

4.3 Sector-specific regulation

There are sectoral regulators for the tea, coffee, sugar and petroleum sectors, as well as in the utility sectors such as telecommunications, as well as in the financial services sector.

Contacts between the Monopolies and Prices Commission and the various sectoral regulators who act independently of the Commission do not appear to be very frequent. Sectoral regulators are responsible for many technical issues other than competition; however, it is not clear how their remit on competition issues is handled in the context of their technical regulation activities. Where a regulator exists in a sector, section 5 of the Act is generally interpreted in such a way that the Commission has no jurisdiction to intervene in respect of any restrictive trade practices which may exist in the sector.

Some of the regulators have explicit responsibility for competition issues in their sector. For example, the Communications Commission of Kenya (CCK) has a duty under section 23(1)(b) of the Kenya Communications Act 1998 to "maintain and promote effective competition". Under the Kenya Communications Regulations 2001, the CCK, "shall … promote, develop and enforce competition" (section 5(1)).The regulations go on to describe unfair competition as any abuse of a dominant position that: unfairly excludes or limits competition; entering into any agreement or engaging in any concerted practice which unfairly prevents, restricts or distorts competition; or entering into anti-competitive mergers. The CCK can investigate any licensee which it has reason to believe has engaged in unfair competition. It may subsequently issue an order requiring the licensee to desist, to take action to remedy the unfair competition and to pay a penalty.

The Capital Markets Authority issues licences to companies operating in the capital markets. It can prohibit mergers between these companies and would seek advice from the Commission. In the same manner, mergers in the insurance industry need the approval of the Insurance Commissioner, as well as the Monopolies and Prices Commissioner, both of whom give their advice to the Minister.

Box 13

OECD guidelines for apportioning competition-enhancing tasks between competition agencies and regulators

1. It might not always be necessary to employ economic regulation to address problems arising from alleged market power either because such power could be too transitional to be worth worrying about or because light-handed regulation may possibly be a superior alternative;
2. Technical regulation will not likely fit well within competition agencies;
3. Since there area advantages in combining economic regulation with technical regulation, economic regulation should probably not be organised as a stand-alone function;
4. Given what has been said about technical and economic regulation, there seem to be three practical alternatives:
   - combine technical and economic regulation in a sector-specific regulator and leave competition law enforcement entirely in the hands of the competition agency;
   - organise technical regulation as a stand-alone function and include economic regulation within the competition agency;
   - combine technical and economic regulation in a sector-specific regulator and give it all or some competition law enforcement functions.
5. Separating competition law enforcement from regulation means sacrificing certain synergies and having to adopt measures ensuring firms that are not subjected to inconsistent demands, but it also ensures that both policies are administered by agencies thoroughly understanding them and having cultures suited to their implementation;
6. If a decision is made to combine competition law enforcement and economic regulation, serious attention should be paid to differences in how competition agencies and regulators conduct their principal functions because this could significantly influence how they would carry out a combined mandate;
7. In sectors expected to evolve reasonably quickly to being workably competitive (i.e. transition sectors), assuming a decision has been made to combine economic regulation with competition law enforcement, it would probably be better to locate these functions within the competition agency than within a sector-specific regulator;
8. In non-transition sectors, it is decided to combine economic regulation with responsibility for ensuring non-discriminatory access to necessary inputs, this is probably better done within a regulator than within the competition agency;
9. Because competition agencies appear to have a comparative advantage over regulators when it comes to enforcing prohibitions of anti-competitive behaviour and reviewing mergers, such agencies should have exclusive jurisdiction in those domains, or at least retain concurrent jurisdiction along with a regulator;
10. There seem to be good reasons for organizing regulators as general rather than sector-specific agencies (moreover, some of the difference in performance expected from competition agencies and regulators would likely disappear if the regulator were general instead of being sector-specific in nature); and
11. Economic regulation, especially that being applied to markets in the process of liberalization, should be subject to sun-setting, and should not be renewed unless the competition agency believes that is justified by continued market power; thought should also be given to requiring regulatory forbearance in any market which is workably competitive, and once again the competition agency could usefully be involved in that determination.

Source: OECD (1999), *Relationship between regulators and competition authorities*. DAFFE/CLP(99)8.

4.4 Sector studies

The Commission has prepared reports on the state of competition and the possible existence of restrictive trade practices in eight sectors of the economy. The reports are summarised below.

4.4.1 Small-scale tea sector

Tea is Kenya's leading foreign exchange earner, accounting for about 4 per cent of GDP, and providing direct and indirect employment to about 3 million Kenyans. The smallholder production of tea is managed by a limited liability company, the Kenya Tea Development Agency (KTDA), which also operates processing plants. There are about 400,000 small-scale growers (and about 70 large-scale growers) with the average small-scale farm being about 0.4 hectare or 1 acre. All tea growers are required to register with the Tea Board of Kenya in order to obtain a licence which specifies the minimum number of hectares on which tea may be grown. However, there are no barriers to entry.

The farmers pick and then deliver the tea leaves to the nearest buying centre where they are sorted and checked by a factory inspector. The green leaf is then transported to the processing factories, using factory transport. There are 54 processing plants under KTDA management and approximately 39 are owned by private companies. The main shareholders in the factories under KTDA management are the farmers. To establish a tea processing plant, it is necessary to obtain a licence from the Tea Board of Kenya. The price paid to farmers for the green tea is set by the KTDA, and is normally around 20 per cent of the price it would fetch in the market.

The work carried out by tea packers adds value to the raw product. Although there are 200 packers registered with the Tea Board of Kenya, only 60 are operational. The packing plants owned by the Kenya Tea Packers Association (KETEPA) account for 67 per cent of tea for the domestic market (which accounts for 5 per cent of total production). KEPTA obtains its supplies directly from KTDA factories, while other packers buy their tea at the Mombasa auction. Farmers and private companies own 65 and 35 per cent of KETEPA's capital, respectively.

The East Africa Tea Trade Association (EATTA) brings together tea producers (both Kenyan and non-Kenyan), buyers, brokers, packers and warehousing companies, and organizes the Mombasa tea auction. About 85 per cent of Kenyan tea is sold through the Mombasa auction, which is the second largest in the world after Colombo and is considered to be the price leader internationally.

There are 60 buyers affiliated to EATTA, but the top 5 buyers account for 65 per cent of all Kenyan tea traded at the auction and 50 per cent of all teas traded in the course of the 2003/2004 financial year. The Commission was informed of collusive bidding by major buyers who were suspected of purchasing large quantities of tea in order to control prices. The Commission recommended that an investigation be initiated.

4.4.2 Coffee sector

There has been a decline in coffee production in recent years and it has been overtaken as a foreign exchange earner by tea, horticulture and tourism. Coffee is grown on large estates, as well by small-scale growers and cooperatives, the latter sectors are increasingly responsible for rising production and quality levels.

The KPCU provides coffee cooperatives and plantations with essential services and facilities such as storage in rural areas. Coffee is delivered to KPCU branches for milling, grading and electronic sorting before it is sent to be marketed and auctioned. Marketing is also undertaken by the KPCU. Farmers are prohibited from roasting coffee for local consumption. The Coffee Board of Kenya (CBK) is responsible for regulating and promoting coffee production. It carries out registration and issues licenses to the various parties such as pulping stations, millers, warehousemen and exporters. All coffee in Kenya is sold through a central auction. The auction is operated under the rules and regulations of the Coffee Trade Associations.

Multinational companies dominate the buying of coffee, but there are a large number of dealers (over 90) at the auction.

Coffee prices are currently low due to oversupply on the world market, coupled with high costs of production. Poor infrastructure adds to high transport costs and lack of affordable credit prevents farmers from buying needed inputs such as fertilizers and pesticides to produce high quality coffee to compete in the world market.

The Commission concluded that if there were more marketing agents it would encourage competition in coffee marketing, and believes that the CBK should licence more competent marketing agents. The opportunity to add more value, by roasting and packing the coffee, for example, would assist the industry.

4.4.3 Sugar sector

The sugar industry is estimated to contribute 3.4 per cent of GDP and directly and indirectly employs a large workforce.

The Kenya Sugar Board (KSB) was created by the Kenya Sugar Act of 2001, which provides for the development, regulation and promotion of the sugar industry. The KSB tries to encourage private participation in the industry while it concentrates on regulation. The government, farmers and millers' representatives are represented on the KSB board. KSB currently licenses sugar mills, and only a small amount of sugar is destined for export.

The government has a majority shareholding in all the sugar firms except Mumias (where it has a minority interest) and West Kenya (where it has no interest). Mumias controls over 30 per cent of the market, based on turnover figures. Imports make up another 30 per cent of the market and the next largest share is held by Chemelil which has 15 per cent market share. The four other major companies each have less than 10 per cent market share.

The Commission takes the view that Mumias is a price leader and that other firms follow suit. The Mumias distribution agreement requires distributors not to sell competing products, nor to sell at recommended prices and within designated geographical boundaries. Investigations are continuing on the basis of possible contraventions of sections 6(1)(a)(i), 6(1)(d) and 6(1)(i) of the Act.

4.4.4 Petroleum sector

From 1 January 2004, all importers of crude oil and petroleum products for domestic consumption have to be sourced through an Open Tender System (OTS) centrally coordinated through the Ministry of Energy. Under the OTS, companies bid and the winner imports the oil on behalf of the other companies. After importation, the companies with no loading/depot facilities have to rely on those with such facilities. The current Government regulation requires that 70 per cent of the country's petroleum products requirements should be imported in crude form and the rest in refined form. Due to the OTS, all the oil companies incur fairly similar costs, with differences occurring in overhead costs.

The Commission investigated pricing in four products, namely premium petrol, regular petrol, diesel and kerosene in the Nairobi area. The national market has five main players with a combined market share of 82 per cent. The companies in this industry determine their prices using the cost build-up process together with the import parity pricing and then add their margins. Since the price elasticity of demand for petroleum products is generally inelastic, oil companies can be expected to pass on to consumers the whole cost increment. The Commission found that over the period examined (July 2003 and May 2004), the aggregate expected changes in the prices of premium and regular petrol were less than the actual changes, while for diesel and kerosene the observed changes were more than the actual changes. This could be attributed to the presence of other variable costs. There were instances of parallel price movements, but these did not occur with high enough frequency to justify allegations of explicit coordination.

4.4.5 Alcoholic beverages sector

The Commission's launched an investigation of this sector after receiving complaints from the distributors of Kenya Breweries Limited (KBL). Currently, KBL has a monopoly of the beer market. In 1998 Castle Brewing Limited entered the beer market but exited in 2002. Several other beer companies have entered the market but none have been able to stay the course.

KBL manufactures, imports, exports and distributes beer and spirits all over the country. It sells its products through appointed distributors located across the country and also sells directly to retail outlets. The Commission conducted oral interviews and obtained questionnaires during its investigation. Interviews were conducted with 18 distributors (out of a total of about 60), KBL and several other companies operating in the market. The Commission concluded that the following major provisions in the KBL agreement with distributors appear to contravene the Act:

(i) Territorial allocation: the agreement defines the geographic area within which the distributor must transport or sell the products (section 6(1)(i));

(ii) Exclusive dealership: the agreement bars the distributor from involvement in manufacturing, importing, marketing, distribution or sale of any goods which are similar to or competitive with KBL brands in Kenya. The distributors are also prevented from using their vehicles which are used for transporting KBL brands to transport any other goods (section 6(1)(a)(i)).

(iii) Price fixing: the agreement empowers KBL to fix the wholesale price of its brands and distributors cannot sell at any prices different from those fixed by KBL (section 6(1)(d)).

The Commission noted the absence of adequate provisions in the Act to control dominance in the market.

4.4.6 Carbonated soft drinks sector

The Minister of Finance directed the Commission to investigate the carbonated soft drinks sector, believing that it might feature one or more factors relating to unwarranted concentrations of economic power.[4] The Minister had received complaints from other companies and was aware of the dominance of Coca Cola and its vertical integration with its bottling operations and its distributors. The Commission conducted an investigation which included interviews with the major players in the industry and a sample of 85 distributors.

The investigation found that section 23(1)(a) of the Act, which deals with the control of a chain of distributing units, the value of whose sales exceeds a third of the relevant market, was relevant to the activities of Coca Cola East Africa Limited. Section 23(1)(b) concerning companies that control two or more physically distinct units which manufacture substantially similar products, and supply more than one third of the value at ex-factory prices of the domestic market, applied to Coca Cola Holdings Limited. Finally, section 23(1)(c) which applies to a person who has a beneficial interest exceeding 20 per cent in a manufacturing enterprise, and simultaneously has a beneficial interest in one or wholesale or retail enterprises which distribute products of the manufacturing enterprise, is relevant to ICDC and Softa Bottling Company.

During the investigation, several potential restrictive trade practices came to light and were addressed in a draft consent order. These included possible resale price maintenance, territorial allocation, exclusive dealership arrangements and tied selling. However, the Commission suspended its investigation under section 23 when some of the complainants took the matter to the High Court. The High Court proceedings have not been concluded.

[4] Gazette Notice Number 1020 of 10 February 2003.

4.4.7 Cement sector

There are three cement manufacturers in Kenya: Bamburi Cement Limited (BCL), East African Portland Cement Limited (EAPC) and Athi River Mining Company Limited (ARM). BCL is the largest of the manufacturers with a market share of 57 per cent, followed by EAPC with 37 per cent and ARM with 6 per cent. A small quantity of cement is imported. This is clearly a concentrated market with a HHI index of 4654.

There is cross-ownership within the industry. BCL has a 41.7 per cent shareholding in EAPC and a 15.17 per cent shareholding in ARM, and is represented by three directors on the board of EAPC and one director on the board of ARM. The largest shareholding in BCL in turn is held by Lafarge, the largest cement producer in the world, which owns 73.26 per cent of the shares. NSSF controls 15.79 per cent of the shares of BCL and 27 per cent of the shares of EAPC.

BCL supplies ARM with all its requirements of clinker, a raw material that is mixed with gypsum to produce cement. BCL and EAPC sell their products through appointed distributors and also directly to large contractors, but ARM sells through general dealers. BCL's distribution agreement has a restrictive clause that prohibits the distributors from selling competitors' products.

BCL has leased and developed two berths at Mombasa port which results in the company being charged a port tariff of $1.5 per ton by the Kenya Ports Authority. However, their competitors must pay a port tariff of $15 per ton when they use the other general berths.

The Minister of Finance directed the Commissioner to investigate the cement sector as he believed the sector might feature one or more factors related to unwarranted concentrations of economic power under section 23 of the Act.[5] The Commission did not find any need to recommend a disposal of interests in the sector.

[5] Gazette Notice of 23 January 2004.

4.4.8 Electronic media sector

The Commission investigated this sector in response to an application to the Minister on 28 February 2002, for approval for the acquisition by Nation Media Group of a 75 per cent shareholding in Capital Group Limited. The Nation Media Group is the leading player in this sector with interests in newspapers and radio and TV stations. Capital Group Limited owns a radio station.

The media sector may be broadly classified into the two main categories of the print and the electronic media. This has now been expanded to include the internet and billboard advertising, which may be viewed as alternative advertising in competition with newspapers, TV and radio.

The print media comprises daily newspapers, periodicals and billboards. The main market players in the print media are the Nation Media Group, The Standard Newspaper Group, the Kenya Times Media Trust and Kalamka Limited (the People Newspaper).

The electronic media is classified into radio or TV broadcasting. There are currently 18 individual radio stations and 7 TV stations. The main radio stations are KBC, Capital, Nation, Kiss 100, Kameme, BBC Metro East and Family, while the main TV stations are the KBC, the Kenya Television Network, STV, the Nation TV, Family TV, Metro 1 and the DSTV.

The Nation Media Group is the leading company in the media sector followed by the Standard Newspaper Group. The two are the publishers of the two leading daily newspapers, and also own broadcasting stations. The Nation Media Group is the proprietor of the Nation radio station and the Nation TV station while the Standard Newspaper Group is the proprietor of the Kenya Television Network.

The Kenya Broadcasting Corporation with the leading radio and TV stations is the market leader in the electronic media. The media sector has undergone major structural changes since 1989 with the licensing of many independent media operators. The KBC was the only broadcasting company for many years until 1989 when KTN entered the market as the first private TV station. Capital radio entered the market in 1996 as the first radio station to compete with KBC radio. The sector witnessed further changes when Standard Newspaper Group acquired the KTN in 1997. In 1999 the Nation Media Group bought out the East African Television Network through its subsidiary the Africa Broadcasting Network. However, the Nation Media Group was not granted the necessary licences to operate the airwaves allocated to EATN. In the same year, the Nation was licensed to operate a radio station and Nation Radio was launched in October 1999.

Each radio station has its own target audience. Capital radio is an entertainment radio station which mainly targets youth and young adults, while Nation radio is mainly for business broadcasts, with some entertainment services, and mainly targets middle-aged and older listeners.

The responsibility for issuing licences, price regulation, establishing interconnection principles, type approve equipment and managing radio spectrum equipment lies with the Communications Commission of Kenya (CCK), the regulatory body for the sector. This role was initially performed by the then Ministry of Information and Broadcasting but it was taken over by the CCK after being established in February 1999.

CCK regulations do not allow one company to have more than one frequency channel in a particular area. For example, a company that is already assigned one FM frequency to broadcast in the Nairobi area should not be assigned another FM frequency for the same area because the same can be used for all the broadcasts in that particular area. Such a move would put one company in control of scarce radio spectrum resources at the expense of other deserving applicants.

Market shares were estimated for the major media companies in the electronic and print sub-sectors. The figures were estimated using audience figures with market shares for the radio stations being estimated using the number of people tuning in to the various stations; with regard to TV stations market shares were estimated using the number of people viewing the various TV Channels. In the case of the printed media the figures were estimated using the number of adults (i.e. over 15 years) reading the printed media and the advertising figures were estimated using sales volume.

The Kenya Broadcasting Corporation is dominant in both the Radio and TV markets. It operates five radio stations, namely KBC General Service, KBC National Service, Metro, KBC Luo and Coro. The total market shares for KBC in radio broadcasting is approximately 52.2 per cent and 29.8 per cent in TV broadcasting. The KBC operates under an Act of Parliament which was not repealed when the sector was liberalized.

The Nation radio which has an estimated market share of 12.1 per cent ranks third after KBC and Kiss 100 with 12.6 per cent Capital ranks fifth with 8.5 per cent while Kameme is sixth with 5.4 per cent. Other radio stations are Citizen, Baraka, Rehema, Central, Sayare, Iqra, Sound Asia and Voice of America each with less than 1 per cent market share.

In terms of TV broadcasts, the Nation TV ranks fourth with an estimated market share of 18 per cent, after KBC with 29.8 per cent, KTN with 18.6 per cent, and STV with 18.2 per cent. Other TV stations are Family, Metro 1 and DSTV with market shares of 7.2, 6.8 and 0.7 per cent, respectively.

The combined market share of Nation radio and Capital radio is 20.6 per cent which is less than 33.33 per cent, the statutory level above which it would raise competition concerns. It would rank second to KBC in terms of market share in radio service.

The proposed transaction would result in the Nation Media Group enhancing its market shares in radio broadcasting from 12.1 to 20.6 per cent. However, this enhanced market share is unlikely to cause substantial injury to competition because of two main reasons. First, the market share for the two radio stations is below the level of 33.33 per cent, which is the statutory threshold. Secondly, each radio station has a particular niche market and it is therefore unlikely that the proposed transaction increases the market power of the Nation Media Group in radio broadcasting. Furthermore, competition in the radio broadcast service is keen with upcoming and competing radio stations.

However, the sole responsibility for allocating all radio and TV frequencies rests with the CCK, the sector regulator. According to CCK regulations, a company cannot operate a certain frequency without direct allocation or licensing by the CCK. This implies that the Nation Media Group cannot acquire the frequencies allocated to Capital Group through the proposed transaction without authority from CCK. The CCK has indicated that it is opposed to this transaction. The Minister did not approve the proposed acquisition.

5: CONSUMER PROTECTION ISSUES

Kenya's competition law does not contain explicit provisions on consumer protection. In fact, the Commission would find it difficult to justify its activities if it becomes involved in consumer protection matters. Although favoured by most stakeholders, the actual need for comprehensive consumer legislation is still the subject of debate.

5.1 The protection of consumer interests: its relevance to Kenya

The issues most often discussed are whether there are reasons to combine competition policy and consumer protection in one authority. Obviously, the protection of consumers against deceptive and fraudulent behaviour by sellers has strong links to competition policy, and many countries in the region have seen advantages in combining those branches of market regulation in one authority. Competition policy is designed to increase consumer welfare in one way or another. For example, increasing the economy's efficiency is the best way of maximizing consumer welfare. Further, the optimum allocation of resources can be achieved by maintaining competition and the beneficiaries are consumers.

On the other hand, it is argued that consumers need protection from the exploitative tendencies of large corporations. It is alleged that large enterprises abuse their dominant powers over consumers by selling at monopoly (or cartel) prices and by imposing unfavourable terms of trade. An adequate legislative and policy framework is required to protect consumers and industrial users from anti-competitive practices. In fact, there are strong reasons for believing that less mature regional markets are often more vulnerable to anti-competitive practices. The reasons for this include:

(i) high 'natural' entry barriers due to inadequate business infrastructure, including distribution channels;

(ii) substantial asymmetries of information in both product and credit markets; and

(iii) a greater proportion of local (mostly non-tradable) markets.

In these circumstances, consumers in Kenya need stronger legislation to protect them against cartels, monopoly abuses and anti-competitive practices. However, although consumer protection is one of the principal objectives of competition policy, the right mix to use in applying the combination of both competition and consumer principles still needs to be found.

5.2 Different approaches in the region and elsewhere: consumer protection

In a number of countries, consumer protection legislation is included in competition law, but is separated in others. All national competition laws within the region (apart from South Africa) include consumer protection provisions as do the national competition laws of countries as diverse as Poland, France, Canada, India, Lithuania, Venezuela and Australia.

Even in countries where competition law and consumer protection law are separated, the links between them are often recognized by assigning the administration of the laws to a single authority, as is the case in Algeria, Hungary, Peru, the United Kingdom and the United States. Any of the two approaches can be followed by Kenya. However, combining consumer protection provisions in competition legislation is favoured for the reasons given below.

5.3 Importance of including certain consumer protection provisions in the national competition law

There are strong reasons for the inclusion of appropriate consumer protection provisions in competition law. Among the advantages are:

- COMESA's Competition Regulations have embraced consumer provisions hence need to have a clear law on consumer welfare;

- maintaining an institutional emphasis on the consumer welfare objective of competition law;
- reducing the opportunity for business to deny consumers the benefits of competitive markets by engaging in unfair practices;
- providing the agency with the opportunity to demonstrate tangible outcomes quickly and cheaply;
- ensuring earlier and stronger engagement with consumer stakeholders (through consumer groups);
- providing market-driven inducements for domestically-traded goods and services to meet basic standards of fair trading;
- providing a basis for linking to overseas enforcement agencies and the international markets supervision network.

It should be acknowledged that inappropriate inclusion of consumer protection provisions can create some disadvantages, namely by:

- distracting focus and diverting scarce resources away from competition investigations;
- duplicating existing national laws and institutions; and
- creating higher standards for goods and services traded across national borders.

Managing the risk of unduly distracting focus and diverting scarce resources away from competition investigations is largely a question of prioritization and administrative efficiency. Managing the extent of any cost disadvantages to internationally-traded goods and services is a question of ensuring the minimum possible compliance costs and raising market awareness of the extra value derived from compliance with the law.

The goals of consumer protection in the context of a country's competition law should be to deliver a system of regulation that achieves as high as possible a level of consumer protection while, at the same time, keeping costs to business and government to a minimum. Regulators are also keen to ensure that the system is simple and sufficiently flexible to respond quickly to the market.

6: COMPETITION ADVOCACY

To have an effective advocacy function, it is important that the enabling legislation, in this case the Kenya competition law, provides the Commission with a clear mandate to carry out advocacy. The current competition law of Kenya is silent on advocacy and competition awareness, and both topics are absent from the law’s objectives.

In a situation where the Commission has no legal mandate to carry out advocacy functions, it becomes difficult for such an authority to justify its advocacy functions to the stakeholders. Further, the Competition Authority in Kenya as earlier stated, is a government department, and subject to government controls when it comes to press statements. The government regulations require a specific officer to carry out the function of spokesman. Consequently, all public affairs or publicity questions need to be channelled to the office of the government spokesman. This has not worked well for the Kenyan Competition Authority. The Commissioner is not formally permitted to issue press statements or call a press conference. It is only the Secretary to the Treasury who can issue a press statement on behalf of the Commissioner.

Despite the constraint, the office of the Commissioner is aware of the need to develop and initiate methods of building awareness and ensuring wider support for competition law and policy among the public and within the business community. The current Commissioner acknowledges that the creation of a “competition culture” within a country is fundamental to the success of the agency, and ultimately for the effective implementation of competition law and policy.

As a result of the unfavourable competition environment, the Kenyan Competition Authority has found itself faced with the formidable task of creating a “competition culture” within the country. It is aware that for developing competition authority, advocacy through education and persuasion is a more effective tool for effective implementation of competition policy. The current situation is that the tools available to the Kenyan Competition Authority for competition law enforcement are unlikely to result in advancing the cause of competition advocacy.

The Commissioner, despite the legal and administrative constraints, has taken up the initiative to create public awareness and promote competition compliance. He has made sure that the Commission’s activities are reported in the national press and has been frequently quoted; likewise the press and the public at large have made frequent enquiries on competition matters.

The numbers of cases referred to the Commission by both government and non-governmental organizations has increased in recent years. As result, the Competition Authority has continued to comment and offer advice and opinions on various economic matters. The Commission has also become an integral part of the policy formulation process at the Ministry of Trade and Industry, as well as other ministries. The Commission’s staff members are also being co-opted onto various government committees involved in policy formulation.

The Commission has taken the initiative to create public awareness and promote competition compliance to bring about a competition culture, and has done so in the face of existing legal and administrative constraints. The Competition Authority has carried out a number of awareness raising strategies, including:

- Participating and organizing conferences, seminars and workshops to promote an understanding of the role of competition in a market economy. Various trade and professional associations invite the Commission to participate and present papers at their events. The Commission has also taken such events to circulate its various publications, and explain how it makes its decisions.

- The Commission seeks to create public support for competition enforcement by demonstrating how consumers and the public benefit from an effective competition policy. The Commission has been active in large number of sectors, including the poultry, agro-processing (maize meal processing, fresh vegetables and flowers), oil marketing, beverages, construction (cement), and alcohol beverages. The Commission dealings with companies in these sectors have resulted in various undertakings and signed compliance programmes with the Commission. In some cases, the dominant firms in these sectors have entered into various restrictive agreements with the weaker parties to ensure that they continue to dominate the relevant markets. In such cases, the Competition Authority nullified the agreement's anti-competitive provisions and opened up the sectors to more competition. The compliance programmes agreed with the Competition Authority became the basis for interventions by the Commission whenever the anti-competitive habits relapse.

- The Commission has on various occasions called on institutions outside to develop competition expertise and has used government channels to encourage senior government officials and politicians to raise awareness of the Act in their speeches and communications to trade and business associations. The Minister of Commerce and Industry has made a number of speeches with input from the Commission. The use of public officials is very effective for free and maximum media coverage.

- The Commission has also stopped the government from taking particular action; managed to modify government action; and has advised it to take a particular course of action.

Above all, the Commission has continued to publish its enforcement decisions. These are sent to the press, to all interested parties, and are accessible to the public. In addition, summaries of decisions are published in the Commission's widely circulated Annual Report. It is likewise using public events throughout the country to communicate the government's policy approach on competition, by means of statements, speeches and articles. The Commission has just recently established a website, which will enhance public awareness of its activities.

The Commission has continued to develop a better understanding of its procedures. There is greater transparency in the application of the competition principles. It has also enhanced transparency and certainty in its procedures by publishing its guidelines and notices on how it analyses competition matters.

6.1 Advocacy and awareness building

Stakeholders broadly agreed that the strategy for addressing Kenya's weak competition culture needs to be focused around a substantially reinforced programme of advocacy and awareness building targeted at the various stakeholder groups. In this regard, it was suggested that the Commission establish a dedicated advocacy division or unit comprised of persons who would focus solely on this important work.

A clear advocacy and communications strategy needs to be developed by the Commission to promote awareness:

- in the area of pro-competitive reform of rules and other measures, or administrative practices that distort competition;

- of competition policies by specific stakeholder groups;

- among the general public so that they have a better understanding of the benefits of competition, the Act, the role of the Commission;

- among the general public of specific cases and policy initiatives.

Competition advocacy needs to be carried out in conjunction with other key stakeholders, e.g. the Law Society of Kenya and Kenyan universities. This creates more than a single champion for competition, through creating formal linkages with opinion leaders.

The Commission should also possess sufficient powers of enforcement to fight and stop cartels. It is desirable that the Commission views prosecution or contested litigation as its 'least preferred option'. Kenya having a developing Competition Authority, emphasis should be on alternative forms of dispute resolution, i.e. a broader programme of compliance should be established through legislation. Through this compliance programme, communication and education through competition advocacy should play a major role.

6.2 Helping to build capacity of Kenya's competition institution

There was general agreement regarding the Commission's capacity building needs. The various options identified for addressing those needs include:

- obtaining donor funding to permit the Commission to hire additional staff, purchase required computer and office equipment, establish a small library or resource centre, prepare advocacy and communications materials, organise awareness building events, and travel to important regional and international seminars;
- a multi-year capacity building programme specifically developed for the Commission and financed by donor agencies;
- enhanced participation by the Commission in regional capacity building events organized by UNCTAD and other international agencies.
- secondment of Commission staff to one or more competition enforcement agencies in other regional countries or in developed countries (it was recognized that only a small number of staff can be seconded at any given time, and that this measure is therefore a complement to, rather than a substitute for, other capacity building efforts).
- working with long-term resident advisors from other competition agencies or who have substantial experience in working with agencies (once again, it was recognized that this option would be a complement to, rather than a substitute for, other capacity building efforts)

In addition to the Commission staff, it was recognized that members of the Tribunal also require sustainable training in antitrust analysis and case handling.

The Commissioner stressed the importance of the Commission being able to have its word to say with respect to any capacity building programme that might be developed to address its needs.

6.3 Competition policy and poverty reduction

Competition authorities in developing countries should promote competition policy as a means of reducing poverty. An effective competition policy can enhance economic growth by making individual markets more efficient and the benefits can result in poverty reduction. Competition advocacy plays an important role in achieving these outcomes.

The private sector is an important engine of growth which can make a significant contribution to the reduction of poverty. Markets are the mechanism by which the private sector operates and competition policy is concerned with ensuring that markets function efficiently and produce the predicted benefits. The World Development Report 2000/2001 argues that markets are central to the lives of poor people. By providing opportunities to engage in productive activities, markets in the private sector can promote growth and poverty reduction. The benefits of more efficient markets will reach poor people and help to reduce poverty to the extent that poor people can participate in these markets.

In developing countries such as Kenya, poor people can participate in markets in a number of ways. As consumers, they can benefit from lower prices, improved quality and more choice, which are the expected outcomes of a competitive market. As employees, they can benefit from better paid and more productive jobs and the net effect on employment can be positive as the market expands. Poor people can also participate in the market as entrepreneurs, particularly if there is scope to establish small businesses. Finally, improved economic growth should result in higher tax revenues; and if these are used to provide services or infrastructure which poor people can access, this provides another means of reducing poverty.

Competition policy can make a direct contribution to economic development by promoting an efficient allocation of resources, preventing anti-competitive conduct and excessive levels of concentration in the economy. It can also enhance a country's ability to attract foreign direct investment, and enhance the benefits of privatisation and regulatory reform.

If economic growth is to reduce poverty and help to achieve the Millennium Development Goals, the benefits must reach poor people. Establishing competitive markets in the private sector is one way of making a significant contribution to this process, provided poor people have access to the markets and thereby gain the incentive and the means to improve their economic position.

7: FINDINGS AND POSSIBLE POLICY OPTIONS

7.1 Overview

The current Kenyan competition law was originally seen as a transitional measure as the country moved from a price control regime to a market economy. Its replacement by a modern competition law is now overdue. The Kenyan Government has recognized this situation and has established a Task Force to review the law.[6]

[6] Gazette Notice No. 3692 of 20 May 2005.

Box 14

Terms of Reference of Task Force on Review of Competition Law

The terms of reference of the Task Force are to:

1. review the institutional framework to provide for an autonomous Competition Authority with an established mechanism for management and technical manpower and to provide for functions and powers of the Authority;
2. revise the enforcement procedures to make them easy to follow by Competition officials, the courts and also the business community;
3. provide, if necessary, the time frames and thresholds for merger and takeover cases;
4. clearly spell out litigation procedures and to assign specific functions to each institution;
5. assess the relevance of part IV of the Restrictive Trade Practices, Monopolies and Price Control Act on price controls;
6. review the functions of the Competition Tribunal;
7. review provisions of the Restrictive Trade Practices, Monopolies and Price Control Act relating to exemptions;
8. harmonize the competition laws with other laws regulating competition in other sectors;
9. review the provisions dealing with Restrictive Trade Practices;
10. harmonize the law with the best international practices and more specifically with the proposed EAC and COMESA laws in cases involving cross border competition;
11. align the law with Kenya's international obligations in the Competition area; and
12. present a report and a draft Bill to the Minister within a period of one year.

20 May 2005

The Restrictive Trade Practices, Monopolies and Price Control Act is outdated and fails to provide a comprehensive and effective framework for competition policy in Kenya. The Act contains a number of unusual provisions which have proved to be difficult to implement. This is reflected in the fact that no orders have been made relating to unwarranted concentrations of economic power. The most obvious gap in the current law is the lack of any provisions relating to an abuse of a dominant position. Since Kenya is a member of COMESA and the East African Community, the new law should be harmonized with the competition regimes in these two organizations.

The Monopolies and Prices Commission has responsibility under the Act for investigations of anti-competitive practices and provides advice to the Minister of Finance who takes any final decisions. The Commission is, to all extent and purposes, a Ministry.

The Commission was established in 1989 and has been able to acquire a good amount of experience over the years, even though its caseload has been fairly light, particularly in the early years. The Commission's recent investigation of a number of sectors has revealed the possible existence of cartels and other anti-competitive practices which would warrant further investigation.

The Commission has 22 professional officials, all of whom have some training in relevant legal areas and economics (for example, three members of staff completed Master's degrees in 2003). All technical officers have been received some training outside the country. There is a need to gain further experience of enforcing the law and case handling and in this respect, further capacity building is essential.

The Competition Tribunal has been under-utilized and has only dealt with one case since it was established. The Tribunal, whose members are appointed by the Minister, hears appeals from decisions made by the Minister, which is an unsatisfactory situation.

The Commission is not autonomous, being a department of the Ministry, and therefore has little or no scope to engage in competition advocacy activities. For example, the Commissioner does not directly issue press releases or give press conferences as these matters are generally handled by the relevant Minister. This is a serious restriction since competition authorities have an important advocacy role to play, particularly in developing countries. Indeed, the terms of reference of the Task Force established to review the competition law include the request "to provide for an autonomous competition authority". There does not appear to be a strong competition culture in Kenya and many stakeholders referred were unaware of competition law and the Commission. It is therefore important that the Commission acquires a higher profile and assumes a more pro-active role in promoting competition in the Kenyan economy. This is particularly important as the enforcement work undertaken by the Commission is limited.

Consumer organizations are not prominent in Kenya and consequently there is little lobbying to promote the benefits of competition. There are no consumer protection provisions in the current Act, but there are such provisions in the COMESA law. If the Commission were to be given powers to deal with consumer protection issues, it would help to raise the Commission's profile and would also provide a means of demonstrating how consumers can benefit directly from the work of the Commission.

There is a comparatively large number of regulators in Kenya covering a number of sectors from telecommunications to the tea industry. All the regulated sectors are considered to be exempt from the competition law enforced by the Commission, although some of the sectoral regulators have responsibility for competition issues. Clearly, technical regulations have an important role to play alongside competition scrutiny, particularly when considering potential mergers. The case of the proposed merger between the media interests of the "Nation" and "Capital" groups is an example where the technical regulatory requirements led to the prohibition of a merger which did not raise any competition concerns. However, the current relationship between competition law and sectoral regulation is not clear. There is a need to rationalize the application of competition law and better define the relationship between the various regulators and the Commission.

The overall architecture of the Kenyan competition regime needs to be redesigned. The Restrictive Trade Practices, Monopolies and Price Control Act should be repealed and replaced with a modern competition law. The institutional structure also needs to be revised. The interaction between the Commission, the Tribunal and the regulators should be clarified so that responsibilities are clearly assigned and understood. The new enforcement procedures should, in line with the terms of reference of the Task Force to review the competition law, be made “easy to follow by competition officials, the courts and also the business community”.

7.2 Policy options for consideration

7.2.1 Replace the Restrictive Trade Practices, Monopolies and Price Control Act with a modern competition law

The Act which was only intended to be provisional should be repealed. The Government has referred to the Act as “outdated”[7] and it is clear that it has outlived its usefulness. Part IV of the Act dealing with price control is now obsolete. A modern competition law, which could be based on the UNCTAD model law, should be drafted taking account of the particular circumstances of the Kenyan economy. This new law should also provide for the control of anti-competitive agreements, the prohibition of an abuse of a dominant position, and for the control of mergers and takeovers. Enforcement procedures should also be revised to ensure that the new law provides for effective investigation powers and appropriate remedies. The new law should be harmonized with the COMESA competition law and the proposed EAC competition law.

7.2.2 The Monopolies and Prices Commission to be become an autonomous competition authority

The competition authority should be autonomous, but not independent, of Government. The trend in many countries is towards a board structure, with members of the board appointed by the Government, rather than a single individual taking all the decisions. It is particularly important for the authority to be autonomous so that it can engage in advocacy activities and be a visible advocate of competition and consumer welfare.

7.2.3 Competition authority to have a formal advocacy role

Given the importance of advocacy work in a developing country, the competition authority should have a formal role, set out in the legislation, to comment on matters relating to competition. The authority could be required to review proposed or existing laws and regulations, and other government activities, and identify and advise on any anti-competitive effects and consequent inefficiencies. Furthermore, the authority should address the general lack of knowledge about the competition law by educational activities and publicity, by commenting on topical issues and by pursuing high-profile cases of anti-competitive conduct. This will help to generate a competition culture which is currently lacking in Kenya.

[7] Kenya Economic Recovery Strategy for Wealth and Employment Creation (2003-2007).

7.2.4 Sectoral regimes to be brought within the competition law framework

In principle, the competition authority should be able to consider competition issues across all sectors of the economy. This is a practical arrangement, since in a developing country where specialized knowledge of competition issues is limited, it is unlikely that sectoral regulators will have the required expertise. However, these same regulators clearly have an important role to play in technical regulation and this should be coordinated with the competition authority's scrutiny of competition issues. Several different models are to be found in other countries. The regulators can be given independent, or concurrent competition powers (which is not recommended for the reason given above), or they can be required to consult the competition authority on competition issues, or it could be required to consult them before deciding any competition issues in the sector. However, there needs to be a clear understanding about how potentially overlapping or conflicting powers are to be exercised.

7.2.5 Merger control thresholds and time frames for review to be introduced

There are no merger thresholds in the current legislation. This means that all mergers, even small transactions which are very unlikely to have any adverse effect on competition, are subject to the approval process. This results in a misallocation of resources which could be better employed on other matters. Thresholds should be introduced in the new law and should be set by empirical research to ensure that only potentially anti-competitive transactions are subject to control. Consideration should also be given to introducing timeframes for merger review. This is referred to in the Task Force terms of reference, together with merger thresholds, and would have the effect of providing greater certainty for the business community.

7.2.6 Consumer protection provisions to be added to the law

Although consumer protection measures, such as the control of misleading advertisements, are not strictly speaking part of competition law, they are closely related and there is considerable advantage in combining the two areas, particularly in a developing country context. Taking action to enforce consumer rights is often easier than competition policy enforcement and it can produce results which are obvious and of immediate benefit to many consumers. This has the effect of raising the profile of the competition authority and demonstrating its relevance and effectiveness.

CONCLUSIONS

This report has shown that:

- there is a very weak competition culture in Kenya;
- an extensive programme of advocacy and communications, directed towards a broad range of stakeholders, is required to promote a greater awareness and understanding of the benefits of competition, the terms of the Act and the mandate of the Commission;
- the Commission urgently requires substantial training and financial resources to develop and execute such a programme and the various materials that will be needed;
- the Commission's management requires training on strategic planning (e.g., setting objectives/priorities), managing different programmes, and on how to build and organize an effective antitrust enforcement agency, etc.

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