Kenya ❖

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Kenya[1] is located in East Africa, bordering Somalia to the East, Ethiopia and Sudan to the North, Uganda to the West, and Tanzania to the South. The country, a former British colony, has an Indian Ocean coastline of 536km. The founding President, Jomo Kenyatta led Kenya from independence in1963 and ruled the country until his death in 1978, when President Daniel Toroitich Arap Moi took power in a constitutional succession. The country was a *de facto* one-party state from 1969 until1982 under the ruling Kenya African National Union (KANU) party. President Moi acceded to internal and external pressure for political liberalisation in late1991.

Subsequent Presidents were President Mwai Kibaki from 2002, who in turn was succeeded by President Uhuru Kenyatta after the March 2013 elections.

PROFILE	
Population:	41.61 million***
GDP (Current US$):	33.62 billion***
Per Capita Income: (Current US$)	820 (Atlas method)*** 1,541 (at 2005 PPP.)**
Surface Area:	580.4 thousand sq. km
Life Expectancy:	57.7 years**
Literacy (%):	87.4 (of ages 15 and above)**
HDI Rank:	145**

Sources:
- World Development Indicators Database, World Bank, 2013
- Human Development Report Statistics, UNDP, 2013

(**) For the year 2012
(***) For the year 2011

Economy

The regional hub for trade and finance in East Africa, Kenya has been hampered by corruption, notably in public service, and by reliance upon several primary goods whose prices have remained low. In 1997, the IMF suspended Kenya's Enhanced SAP due to the government's failure to maintain reforms and curb corruption.

A severe drought from 1999 to 2000 compounded Kenya's problems, causing water and electric energy rationing and reducing agricultural output. As a result, for the first time since independence, GDP contracted by 0.2 percent in 2000. The IMF, which had resumed its financial support in 2000 to help Kenya through the drought, again halted lending in 2001 when the Government failed to institute several anti-corruption measures.

Despite the return of strong rains in 2001, weak commodity prices, endemic corruption, and low investment limited Kenya's economic growth to1.2 percent. Growth lagged at 1.1 percent in 2002 because of erratic rains, low investor confidence, meager donor support, and political infighting upto the elections. In the key December 27, 2002 elections, Daniel Arap Moi's 24-year-old reign ended, and a new opposition government took on the formidable economic problems facing the nation. In 2003, progress was made in rooting out corruption, and encouraging donor support, with GDP growth edging upto 1.7 percent. In more recent times the economy has suffered from periodic drought and never quite grew at more than 5 percent.

Like most African countries, after independence in the early 1960s, Kenya's development strategy was informed by the need for rapid economic growth through, amongst other things, import substitution. In pursuit of these policies, economic planning was centralised and tended to be inward looking. As the country faced various difficulties posing questions over the premises of the policies, economic liberalisation was commenced by the government.

However, the most explicit commitment to the sustained liberalisation of the Kenyan economy arose in the early 1990s when the government initiated reforms in the financial services industry and virtually removed price controls for most industries. The purpose of this paper is to illustrate the competition scenario within this historical context, placing emphasis on the country's political economy and the main policy trajectories influencing the development and reforms of Kenya's competition law, processes and developing institutions.

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1 http://cia.gov/cia/publications/factbook/geos/ke.html#top

Competition Evolution and Environment

Before independence in 1963, Kenya's economy was fairly rudimentary in terms of industrial development and the degree of monetisation. Most of the consumer items required by the small settler community were imported from the United Kingdom and the protection of this consumer base was maintained through a price control regime under the Price Control Act of October 16, 1956.

At independence, Kenya's leaders made the decision to attempt fast economic growth by focusing, initially, on the export of primary agricultural commodities. Since the colonial Government had restricted the extent of Kenyan participation, the focus on production was vindicated as the application of the additional labour ensured rapid expansion. Government's main policy documents stressed the need for self-sufficiency.

In these circumstances, there was no impetus to develop formal institutions or policy frameworks for competition between firms in the economy. In addition to maintaining the price control regime, the Government so restricted the importation of most foreign goods into the country through high tariff barriers. It is noteworthy to mention here that other policy documents, such as the Trade Licensing Act, Cap 497; Imports, Exports and Essential Supplies Act, Cap 502; amongst others, hindered real competition.

It is in the area of industrial policy, where import substitution was taken most seriously. This involved the creation of public enterprises in main areas of the economy. A majority of these large enterprises were allowed to retain monopoly status in the quest to build them through economies of scale. The general feeling was that there was a need to create home grown corporations to compete with a variety of transnational corporations (TNCs) in financial services and manufacturing.

Following the first oil crisis, and the collapse of the East African Community (EAC) in 1977, the Kenyan Government was compelled to review its strategy and allowed for a relaxation of import restrictions. This policy shift was primarily directed towards raising the pressure on domestic manufacturers, in order to facilitate export earnings and, to this extent, was not overly concerned with immediate consumer welfare. Broadly, therefore, the rudimentary principles of a competition policy were in place, but the price controls and tariff protection for some sectors were maintained.

Thus, up until the 1980s, the Kenyan economy was not only closed, but was also characterised by little or no competition between firms. At the same time, the SoEs had proliferated and covered agriculture, banking, telecommunications, tourism, postal, and other infrastructure services. As the declared intention was to encourage the growth of the SoEs, there were no periodic assessments of the costs and benefits from the maintenance of these monopolies. The variety of consumer goods in the country was also limited.

By the early1980s, it was obvious that this strategy did not work because the majority of SoEs were not only providing poor services, but they were debt ridden and had high expenditures. It was clear that these were symptoms of inherent inefficiencies and poor management. Due to their dependence on public resources, the need to keep these institutions running had enormous budget implications. The Government made the decision that expenditure control was imperative.

Working Party on Government Expenditure (WPGE)

In1982, the Government appointed the Working Party on Government Expenditure (WPGE) to study the performance of SoEs and to make recommendations on reducing Government expenditures related to the SoEs, in particular. Amongst the recommendations by the WPGE was that direct government involvement in the domestic economy ought to be reduced through progressive divestiture from some of the SoEs. It reiterated that the country would explore options for encouraging private sector involvement in the economy, so that the choice of products, investments and employment would be largely driven by the private sector.

In sections 89 to 91 of its report, the WPGE deemed that the success of the liberalisation and divestiture would depend on the establishment of institutions and rules to facilitate the interaction between firms. More specifically, the proposals argued for the need of a properly structured institution, to capture the economic activities of enterprises, and ensure effective competition in the economy. This institution would be able to gather, correctly analyse and disseminate information, to all players and consumers.

The findings of the WPGE report were echoed in the *Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth*. Amongst the commitments, with clear implications for competition in the economy, were the:

- Progressive removal of price controls; and
- Minimisation of Government control of the economy.

Pursuant to the proposals in the report, recommendations in WPGE and policy intentions of the Session Papers, a Bill was drafted in 1987 and presented to the legislature.

Subsequent to legislative debates and revisions, the Restrictive Trade Practices, Monopolies and Price Control Act (*Cap 504)* was passed into law in 1988, and became effective from February 01, 1989.

The Act created the competition authority, namely the Monopolies and Prices Commission, as a department within the Ministry of Finance. It is also clear from the name that the Government did not fully intend to suspend its price control functions, as the bill retained portions for control of prices under part IV of the Act.

Equally significant was that the debate on the Bill did not consider the need for a consumer protection law, and this may have been out of the assumption that price control would suffice. Thus, Kenya's competition law defined specific RTPs, unwarranted concentration of economic power (mergers and take overs), and price control functions. It also created two institutions i.e. the Monopolies and Prices Commission (department) under the Minister for Finance, and the tribunal to hear appeals arising from the findings of the commission. This law also specified criminal penalties that would be imposed by the formal Courts for infringements.

From 1993 onwards, Kenya embarked on a liberalisation process of the economy, by making announcements of the intention to commence privatisation and deregulation. Soon thereafter, the Government lifted the price control functions and this immediately rendered substantial portions of the law in effective. Since 2001, the law has been undergoing substantive review, directed toward updating and restoring its relevance to the prevalent economic circumstances. Kenya's Law Reform Commission is still considering the publication of a final draft for debate in the legislature. This delay is further evidence of the slow pace of law reform in the country.

Recent Competition Legislation and Institutions

Recently, however, there have been attempts to speed up the process of the review and seek recommendations that will see new revised/reformed legislation/institutions in place. The Government, in mid-2004, established a task force for competition, headed by the commissioner of Monopolies and Prices Commission.

A modern Competition Act was operationalised on 1st August, 2011. This Act, generally, aims at '...Promoting and safeguarding competition in the national economy, to protect consumers from unfair and misleading market conduct, to establish the Competition Authority of Kenya (CAK) and the Competition Tribunal and for connected purpose's' (Republic of Kenya (2010:2). Generally, it encompasses all the generic issues of any competition legislation and also it includes provisions on consumer welfare.

The Act provides for; among others, separation of the policy, management and regulation function. The policy matters are under the Minister; management is under the Board, appointed by the Minister and vetted by Parliament, and, regulation is under the Director-General. This is the best practice which helps in enhancing accountability and also insulates the regulator's decisions from externalities. In terms of accountability, the Authority is accountable to Parliament by producing Annual Report. The Act also creates a Competition Tribunal and accords the Tribunal powers to inflict penalties and empowers it to issue 'desist and stop orders'. The Act also provides for the Authority to appeal against the Tribunal's decisions.

Box 1: Price Fixing, CAK Vs Kenya Private Healthcare Providers (PHP) Consortium

In July 2012, CAK finalised and determined an investigation regarding PHP Consortium which had recommended the percentage by which fees may be revised by private hospitals.

The Authority issued a cease and desist order and demanded proof of compliance. This enforcement action prevented the Healthcare providers from adjusting their prices upwards by 20 percent.

Source: CAK (2013)

Sectoral Regulation and Anticompetitive Business Practices

There have been commendable developments in the last five years in terms of sectoral regulation and control of anti-competitive practices. The advent of mobile telephony has opened up the sector to massive inter player competition. Hence this section looks at one sector where there is still need to encourage completion: the energy sector.

Energy Sector

Kenya embarked on fundamental structural and regulatory reforms in the energy sector after mid-1990s following the enactment of the Electric Power Act, 1997 and later the Energy Act 2006. Currently, the power sector, in Kenya, is regulated by the Electricity Regulatory Commission (ERC), which was established under the Energy Act. Compared to the previous Energy Regulatory Board (ERB), ERC is more autonomous and independent though subject to the provisions of the State Corporations Act.

In the electricity sub-sector, the ERC has been instrumental in the efforts to regulate the sector. Whereas there are many players in generation and transmission, the electricity sub-sector is dominated by the Kenya Power and Lighting Company (KPLC) – lately renamed Kenya Power, which enjoys a monopoly in the distribution of electricity in the country. As a result of the lack of effective competition in the electricity supply distribution, consumers are experiencing poor quality service, including unexplained power fluctuations, blackouts and huge increases in power tariffs.

There is an urgent need to introduce a competitive electricity market Kenya which though a long process may need to urgently start the market off with large consumers being given the right to go directly to generators and contract for their supplies and to pay the transmission and distribution. Eventually small consumers would need to be given a similar choice. Whereas KenGen, the main generator may need to remain dominant its pricing will need to be better regulated and be careful to limit its future generating development to areas where it has expertise—increasingly geo-thermal.

Consumer Protection

In Kenya, hitherto, consumer protection has been provided for in a number of statutes and articles, scattered within the Kenyan jurisprudence.

The new Competition Act provides for consumer protection. Specifically, the law provides, *inter alia*, for prohibition of mis-leading representations/ advertisements'; unconscionable conduct; and supply of unsafe goods. As an endeavour of encouraging private enforcement in the area of consumer protection, the Act encourages formation of consumer groups as a means of advocating for consumers rights. The Act, included consumer protection in the country's competition law.

Kenya did not have a comprehensive consumer protection regime as various aspects of consumer protection were contained in disparate pieces of legislation.

Also, the Common Market for Eastern and Southern Africa (COMESA) competition regime subsumes consumer protection. Under this arrangement, and in accordance with the principle of subsidiarity, national competition authorities will be called upon, whenever necessary, to handle consumer protection cases on behalf of the regional authority. The COMESA competition legislation was passed by the Council of Ministers on December 07, 2005 and the constitution of the secretariat is on-going, after the swearing in of Commissioners in October, 2011.

In addition, the EAC competition regime also subsumes consumer protection. Under this arrangement, also, and in accordance with the principle of subsidiarity, national competition authorities will be called upon, whenever necessary, to handle consumer protection cases on behalf of the regional authority.

These obligations create a compelling rationale for consumer welfare to be included in the competition law. Otherwise, it will be difficult for the country to effectively undertake its regional commitments in the consumer protection area. Even in countries where the competition law and consumer protection law are separate, the links between them are often recognised by assigning the administration of the laws to a single authority; for example in the UK and the US.

It is also important to take into account the UN's Guidelines on Consumer Protection in which comprehensive guidelines were adopted in 1985. This set includes, *inter alia*, measures devoted to the promotion and protection of consumers economic interests along with standards for the safety and quality of consumer goods and services; distribution facilities for essential goods and services, measures enabling consumers to obtain redress; education and information programmes, etc.

In this context the United Nation's Guidelines on Consumer Protection refer explicitly to the set of principles and rules for the control of restrictive business practices and recommend governments to develop, strengthen or maintain measures relating to the control of restrictive and other abusive business practices, which may be harmful to consumers. Based on this, the Constitution of Kenya has recognised consumer protection.

There are a number of governmental and NGOs that address consumer interests in the country. These include the Kenyan Bureau of Standards (KEBS); the Government Chemist, Weights and Measures Department, in the Ministry of Trade and Industry; the Departments of Public Health and Family Health in the Ministry of Health; the Commissioner of Monopolies; and the Judiciary. The laws that established these institutions have many clauses that protect the consumer from abuses by the traders.

In December 2012, Parliament passed the Consumer Protection Act 2012 into law. The Act was later assented to by the President and came into force on March 14, 2013. The main objective of the Act is to provide for the protection of the consumer and prevent unfair trade practices in consumer transactions. The Act gives a consumer the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of good or services to the consumer. This right cannot be ousted by any agreement between the parties. The Act establishes the Kenya Consumers Protection Advisory (CPA) Committee that shall aid in the formulation of policy related to consumer protection, accredit consumer organisations, advise consumers on their rights and responsibilities, investigate complaints and establish conflict resolution mechanisms amongst other duties.

The CAK endeavours to work with NGOs, like the Consumer Information Network (CIN), CUTS and others to help consumers, at another level, in protecting their interests.

With the establishment of CAK it is envisaged that consumer protection in Kenya will be a reality with programmes to enforce various aspects of protecting the rights of consumers.

Concluding Observations and Future Scenario

The new Competition Act explicitly stipulates that the primary jurisdiction regarding competition matters and consumer welfare is domiciled within CAK. However, CAK is aware that some sector regulators are reluctant, a common scenario all over the world, to cede some of 'their' jurisdictional turf to the CAK. This is more likely to happen in regard to sector regulators who have been in existence before Cap. 504 came into being and also where sector regulators are tasked, explicitly, with functions relating to competition. Symbiotic relationship with the sector regulators is a must in its endeavours of creating and sustaining competition in the markets. However, this relationship should be informed and coalesce around the fact that CAK has a comparative advantage when it comes to competition and sector-specific regulators have a comparative advantage in economic regulation and for some aspects of access regulation.

Therefore, CAK's interactions with sector regulators are inevitable. With the foregoing, CAK will need to actualise an interactive framework with the sector regulators aimed at allowing certainty in all matters apposite to competition regulation. This will lead to sustainable competition culture and also facilitate 'frictionless' competition enforcement.

On regional cooperation, the EAC, Competition law is given life by Article 75 of the Treaty. The East African Legislative Assembly (EALA) actualised these commitments by enacting the EAC Competition Act, 2006. The Act aims at *'... protecting fair Competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority and for related matters'*. Though the Act has not been operationalised, it contains provisions relating to the generic issues of any competition law legislation: restraints in trade; control of mergers and acquisitions; abuse of market dominance and consumer protection. It also contains provisions on subsidies and public procurement.

The COMESA Competition Commission is expected to enforce the *COMESA Competition Regulations,* ratified by the Council of Ministers on December 17, 2004. These regulations are supposed to address the extraterritorial infractions among the Member States. An orderly working relationship based on best practice will need to be established on how CAK works with these regional bodies.

Competition policy and law will play an important role in future promotion of effective markets in Kenya and the EAC region. The desired economic outcomes for Kenya as detailed in the *Vision 2030* will to a very large extent depend on the effective promotion of competitive markets.

References

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