

COMPETITION LAW IN KENYA - A Snapshot

Introduction

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 recognised the need to introduce 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 It was intended to be a transitional measure and has now become outdated.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 (RTPs), collusive tendering, monopolies and concentrations of economic power and 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 the High Court. The Commission has 33 staff, 22 of whom are in professional grades. The caseload of the Commission has been relatively light since its commencement, with 15 restrictive trade practice cases and 22 merger cases handled in 2004. Most RTP 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, although there is a proposed bill that was tabled in the Parliament in May 2009 and consideration should now be given to including such measures in a new competition law.

Therefore, 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 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. This briefing paper will also lay focus on the rationale of introducing an independent competition authority as well as the need to enforce a competition policy in Kenya.

Box 1: The Objective

The objective of Kenya's competition law is to "....encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices for connected purposes..." (Republic of Kenya 1990:5)

Competition Policy & Law in Kenya

The competition law in Kenya originated with the price control ordinance of 1956, renamed the Price Control Act of 1956, and revised in 1972. The underlying philosophy of the Kenyan competition law has been to protect consumers against price increases. Indeed, price control has been “...central to Kenyan law...” (CUTS, 1996:2). In the late 1980s, the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 (RTP Act) was enacted, but has been undergoing revision of late.

Kenya’s current competition law aims to protect the process of competition. It emphasises reducing entry barriers and restrictive business practices, irrespective of which group they affect. **The Act covers three main areas:**

- Restrictive Trade Practices (RTPs, section 4-21): Addresses associations, discrimination in supply, predatory trade practices, collusive tendering and collusive bidding at an auction;
- Control of Monopolies (sections 22 to 32): Defines provisions for the control of monopolies, mergers and takeovers; and
- Control and Display of Prices (sections 33 to 39): Defines the provisions relating to price control, which are now being revoked.

The law depicts a broad range of entities, key among them consumers, customers, distributors, monopoly undertakings, retailers, trade association and wholesaler, all falling under Section 2 of the Act.

The Proposed Competition Bills¹

An Act of Parliament² has been tabled to promote and safeguard competition in the national economy; protect consumers from unfair and misleading market conduct; provide for the

establishment, powers and functions of the Competition Authority and the Competition Tribunal; and for connected purposes.

It also proposes to do away with provisions relating to price control, while introducing some on abuse of dominance. The other provision is the transfer of key functions, under the Restrictive Trade Practices, Monopolies and Price Control Act, from the Minister³.

Why a Competition Law in Kenya?

Studies conducted signify the rationale of promoting a sound competition policy in Kenya, with the increasing liberalisation and private sector growth⁴.

The proposed Competition Authority proposed should aim to promote synergies between competition policy and poverty reduction. The Authority 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.

Another example is the apparent reluctance of the authorities to be actively involved in the determination of interest rates, despite the fact that most Central Banks in Western economies, that are seen to be the paragons of market economies, are heavily engaged in such determination.

One exception though that comes to mind in this regard is the order that was given by the Communications Commission of Kenya (CCK) in February 2007, capping

Box 2: The Proposed Bill

A Bill that seeks to protect consumers has been approved by the Kenyan Parliament in late 2009. The Bill will repeal the Restrictive Trade Practices, Monopolies and Price Control Act and aims to strengthen the regulation and promotion of competition. The Restrictive Trade Practices Tribunal, to be set up in Mid-2010, will be named a Competition Tribunal, with more responsibilities, and the Monopolies and Prices Department will also be known as the Competition Authority. “This is in line with recent developments at Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) where new regional competition laws protect consumers”, according to the proposed bill.

Box 3: What the Proposed Bill Entails

The Act is divided into six parts

Part I - Preliminary

Part II - Provisions Relating to Restrictive Trade Practices

Part III - Control of Monopolies and Concentration of Economic Power

Part IV - Provisions Relating to the Control and Display of Prices

Part V - Establishment of the Restrictive Trade Practices Tribunal

Part VI - Miscellaneous Provisions

Note: *Part IV of the Act is redundant, but was retained because of the opposition of liberalisation from some constituents. It also indicates that the current Act is transitory.*

the charges for mobile phone calls at Sh30 (US\$0.39) per minute, following a complaint by Celtel that the market leader, Safaricom, was engaging in an 'unfair trade practice' by charging high tariffs for calls made to rival networks.

At the same time, the CCK capped the interconnection rate between the two networks at Sh6.28 (US\$0.080), down from Sh8.12 (US\$0.104) per minute. Arguably, this intervention by the CCK has played some role in the fall of mobile phone tariffs witnessed in the last one year and, in particular, those charged for inter-networks calls. The downward trends have been experienced by the inception of two other operators in Orange and YU networks.

What is, however, interesting is that, despite market liberalisation that has taken place in the country in the last two decades, the country still retains the Restrictive Trade Practices, Monopolies and Price Control Act in its 1990 form. For instance, sections 35 to 38 of the statute give power to the Minister for Finance to fix prices in respect of goods and services produced or provided by monopoly undertakings.

But, even in its present form, the statute can still be used, particularly by civil society groups, such as CUTS, as a tool for fighting restrictive trade practices that hurts consumers. The connection between such practices and the realisation of social and economic rights, particularly in the current state of the world economy, is all too clear.

The Restrictive Trade Practices, Monopolies and Price Control Act provides that anyone who is aggrieved by a restrictive trade practice may lodge a complaint in that respect to the Minister for Finance, through the Monopolies and Prices Commissioner. Such practice is broadly defined in Section 4 of the Act to include an act that reduces or makes impossible the possibility of

consumers willing and able to 'pay fair market prices for the goods and services' to buy them.

However, the Act then goes ahead in sections 6 to 12 to specify what constitutes restrictive trade practices and these are limited to such practices as cartel arrangements, discriminative selling or supply of goods and services, predatory practices to drive competitors out of the market and collusive tendering. From a strict reading of the Act, therefore, it may not be feasible to bring a complaint against unfair pricing of goods and services *per se*, as a complainant would have to first fit in and firmly ground the complaint on one of the restrictive trade practices enumerated in sections 6 to 12 of the Act.

Upon receipt of a complaint, the Commissioner is required to investigate the complaint and forward a report to the Minister. Upon receipt of the report, the Minister is empowered to require the person guilty of a restrictive trade practice to desist from such practice. In addition, the Minister may order some form of compensation to consumers and competitors who may have been affected by the practice.

Competition law and policy, therefore, present tools that could be used to rein in abuses of market power and thus protect consumers from the inherent hazards of the market economy.

The current law in Kenya is, however, inadequate for this purpose and the gap cited above in relation to difficulties likely to be encountered in respect of a complaint against unfair pricing of goods and services is but one illustration of such inadequacy.

This highlights the need to urgently review and reform the current law, so as to ensure its utility and effectiveness for its stated ends of encouraging competition and controlling monopolies.

Box 4: Key Recommendations in the New Proposed Bill of 2009

1. Creating an autonomous Competition Authority;
2. Enhancing sanctions, hence making them more deterrent;
3. Granting the Director General authority to hire private investigators;
4. Granting power of search and seizure during investigations (based on an assessment);
5. Providing for exemptions;
6. Granting the Authority power to process all types of mergers;
7. Setting time limit for processing a merger;
8. Requiring the Authority to give reasons for approving or rejecting a merger;
9. There is need to Grant the Authority power to charge fees;
10. The Bill should ensure provisions on Consumer Welfare; and
11. Part on Price Control should be removed.

References

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Endnotes

- 1 <http://www.kenyalaw.org/Downloads/Bills/2009/200903.pdf>
- 2 This Act may be cited as the Competition Act, 2009, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint and different dates may be appointed for different provisions.
- 3 The Act gives the Minister of Finance the mandate under the restrictive trade practices.
- 4 CUTS undertook a study in Kenya in 2002 as part of its 7Up Project, A Comparative Study of the Competition Regimes of Seven Developing Countries of the Commonwealth, namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

© CUTS International 2009. This Briefing paper has been written by Fredrick K. Njehu of and for CUTS Africa Resource Centre (CUTS ARC), Nairobi, Yaya Court-Room No.5, Ring Road Kilimani. P.O. BOX 8188-00200 Nairobi, Kenya Ph: +254 -20-3862149, 3862150. Fax: +254-20-3862149 Mobile: +254 721 612 664/ 733 990 202. Email: nairobi@cuts.org Website: <http://cuts-international.org/Nairobi>.

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