

## Greater Visibility on Competition Issues Needed for a Vibrant ‘Culture of Competition’ in Kenya



*One of the East African Community’s (EAC) strategies to achieve the Community’s mission of improving the quality of life of the people of East Africa is through promotion of fair markets to help achieve economic development. Following the entry into the common market the need to ensure that markets are competitive for the mutual benefit of the regions’ producers and consumers became paramount and this was evident by the fact that Heads of States enacted the EAC Competition Act in 2006. However, since the enactment of the EAC competition law progress in its operationalisation has been rather slow. Implementation and in some cases enactment of national competition laws has been successful to varying degrees in the five member states. This brief presents an overview of the state of competition in Kenya, to help inform stakeholders about the need for competitive markets in the country and indeed within the Community.*

### Introduction

The quest for economic independence after gaining political independence, forced Kenya to developing national champions (State-owned Enterprises, SoE). However, the advent of Structural Adjustment Programmes (SAPs) of the 1980s led to the opening up of the economy, which was earlier dominated by SoEs. The country has since been continuing to open up her markets and this is evident in that the private sector contributes about 80 percent of the country’s gross domestic product (GDP). The level of liberalisation in the country underpins the need to have competitive markets if the people are to benefit from the expected advantages of liberalisation.

This brief summarises findings from a detailed research report, which tracked the implementation of the Kenyan competition regime and documented some existing anticompetitive practices in the country. The research was conducted by undertaking both desktop research and primary fieldwork.

### The Policy Context

The SAPs were introduced in 1979 with the overall objective of restoring the countries’ macroeconomic stability and to revive the

country’s economic growth through better resource mobilisation and efficient use of resources. While the SAPs did not achieve the intended outcome, it did set the stage for greater private participation in the economy through deregulation of the markets.

The government adopted the poverty reduction programmes around 1980 to address the structural rigidities in the country, revamp economic growth and reduce poverty levels. Some of the key strategies included in these programmes included reduction of control and licencing requirements, expansion of the export markets and improving domestic financial services. These actions created to enabling conditions for greater competition in certain markets.

While there were a number of restructuring programmes underway, the public procurement process was not left behind. The procurement policy has undergone considerable reforms to ensure effectiveness in public finance management, greater transparency, increase public confidence, maximise economic growth and ensure competitors are treated fairly.

Public procurement policies also included provisions for preferential treatment to be accorded to certain marginalised groups such as People Living With Disability (PLWD), the youth,

local manufacturers and other disadvantaged groups. Though such preferences given to these groups may be deemed as contravening the letter and spirit of a competition law, but these were considered necessary given the country's developmental needs. Adequate supervision of the operationalisation of this provision was crucial to ensure that these exemptions were not abused and were utilised by the intended beneficiaries.

The agricultural sector in Kenya accounts for about 80 percent of the employment in Kenya – both formal and informal and directly accounts for 24 percent of GDP. Looking back into the history of this important sector in Kenya's economy reveals that the state controlled the commodities to be grown and the marketing processes through various established statutory boards. The agriculture sector was also covered under the auspices of the SAP.

There was also removal of government support in terms of subsidies, which many have argued against and as a result there was a general shift towards privatisation in the sector. The current Agricultural Sector Development Strategy encourages the private sector to invest in the agricultural sector. However, there are still a number of anticompetitive practices in the agricultural sector like price fixing of commodity prices – maize and sugar. Anticompetitive practices have resulted in high cost of certain commodities like fertiliser, thereby affecting its usage by farmers.

The trade policy environment in Kenya transitioned from a closed market to liberalised markets. This has seen Kenya take part as members in international trade blocs like the WTO and regional blocs such as Common Market for Eastern and Southern Africa (COMESA) and EAC with a general focus of increasing trade for the benefit of Kenya. Notably, the trade blocs that Kenya is attached to have a number of trade policies that are keen on ensuring the reduction of fair trade barriers and seek to promote competition, however the effectiveness of these pro-competition policies squarely depend on the commitment by Kenya to ensure compliance in her market.

Kenya has also engaged in bilateral trade agreements with other nations, which are aimed at ensuring preferential treatment in certain trade activities. This, however, also needs to be dealt with caution so as to ensure that these agreements do not stifle the gains made in ensuring competitive markets prevail in Kenya.

### **Operationalising the Kenyan Competition Act**

The inherent weaknesses of the Restrictive Trade Practices, Monopolies and Price Control Act, and the need to align the competition regime with the level of market liberalisation and globalisation, motivated the government to review the Act. A series of consultations were conducted since 2004. The consultations led to the enactment of





the current Competition Act, 2010 Cap. 504. The Act was enacted in December 2010 and operationalised on August 01, 2011. Generally, the objective of the Act is to modernise competition regulation in order to support the market economy and consequently deepen consumers' benefits derived from the market-based economic policy.

The Government of Kenya has made significant progress in terms of the operationalisation of the Act. The Board to spearhead the management of the authority is currently in place. Unlike the previous case, the Board members were competitively selected and vetted by the Parliament to meet the constitutional threshold. The Director General, who is in charge of regulation has been appointed by the Board and approved by the Parliament. The Board has appointed senior staff members.

The Authority has already published the market definition guidelines, merger applications and withdrawal forms and will soon publish the merger filing fees and threshold guidelines. These guidelines and regulations are intended to enhance predictability and certainty while also minimising the transaction costs. The Authority has developed relevant guidelines to ensure transparency, predictability and certainty in the exemption process. The Competition Authority of Kenya has developed a 'strategic plan' highlighting its implementation priorities for the immediate future.

A key challenge to successful operationalisation of the Act is the creation of a culture of competition and motivating consumers to play a role in promoting a healthy competition regime. An appellate body, the Competition Tribunal, will also be established with the mandate of adjudicating appeals resulting from determinations of the Authority.

## **Interface with Relevant Policy Matters**

### ***Sector Regulation and Competition***

Competition authorities and sectoral regulators often share a common goal of economic efficiency. Sectoral regulators achieve their objectives by being the 'in-market' regulators setting the 'rules of the game' by regulating entry conditions, technical details, tariff, safety standards, access, control over price, quantity and quality etc. These regulators carry out several functions, including balancing conflicting interests, promoting competition, facilitating investment and ensuring overall development of the sector.

However, despite sharing a common goal, it also needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Both competition authorities and sectoral regulators approach the issue from different angles.

Sectoral regulators co-exist and provide specialised regulation for sectors that require in-depth domain knowledge for their regulation. Hence, the Competition Act 2010 provides for the formulation of MoUs to establish an operational framework between key sector regulators and the Competition Authority of Kenya. The regulations informing the operation of the sector regulators also provides for the possible collaboration between the two regulators. The Authority has since signed two MoUs with the Kenyan Communication Authority and Kenya Civil Aviation Authority.

Further, the Competition Act 2010 provides that in case of conflict of regulators, the decisions of the Competition Authority through the competition regulations overrides decisions of sector regulators based on sectoral regulation.

### ***Consumer Protection and Competition***

Consumer protection in Kenya for the longest time was scattered in various laws and not necessarily the sole purpose of the institutions tasked with ensuring their implementation. The first law that explicitly set out to take care of consumer welfare was the Competition Act 2010, later Kenya's legislature deemed it is best to have an overarching Consumer Protection Act which was enacted in 2012. The Competition Act deals with the supply side of the market to ensure the consumer benefits and the Consumer Protection Act deals with the demand side of the market and ensures that the consumer is protected as he engages in various market activities.

The history in the formation of a consumer protection regime in Kenya brings out the need for various institutions charged with consumer protection, from the sectoral institutions to the competition authority need to coordinate their activities and harmonised their regulations and policies to block any loopholes that may result in the detriment of the consumer.

### ***Anticompetitive Tendencies***

Review of media reports on anticompetitive practices has shown that there are a number of alleged anticompetitive practices found in various





sectors in Kenya. Some examples of recent developments include the banking, breweries, mobile telephony, public transport sectors.

The cases of anticompetitive practices in Kenya's experience in the banking sub-sector showed that the players in the market have similar interest rates and have a number of hidden charges which are not revealed to consumers. It was further established that moving from one bank to the other was very difficult for consumers. It was discovered that in the breweries sub-sector the biggest market share-holder was also a dominant player in the production value chain. In the communications sector it was found that the one player has a market share of about 67 percent and until a number of players started coming in when the choice call and message tariffs went down though they have still been found to be dominant in the mobile money products. The commuter transport sub-sector was also found to be having cartel like behaviors amongst the various buses in operation and they end up charging the consumers exorbitant prices.

### ***Cross Sectional Perceptions***

Generally about 80 percent of the perception survey respondents believed that the level of competition in key markets was moderate, while some thought it to be high. The respondent unanimously agreed that the levels of competition have an effect on consumer welfare and about 64 percent believed that it has an impact on their daily lives (e.g. retail goods, etc.). The respondents also identified the sectors perceived to be having monopolies as energy sector, the telecommunication sector, transport sector, consumer retail goods, and water sub-sector.

On awareness of legislations and institutions that ensure to enforce competition in the Kenyan markets and the protection of consumers it was found that 71 percent of respondents were aware of legislations that ensure there is competition and further a 79 percent showed their knowledge of the institutions put in place to implement these laws. However, 46 percent of respondents felt that no action was taken on any complaints





lodged in cases when they have been reported. About 86 percent of the respondents were of the opinion that competition issues are not well understood in Kenya, it was also believed that the business community are the most conversant group on competition matters, followed by politicians however consumers were believed to be the least knowledgeable when it comes to competition matter.

The low level of understanding on competition issues was attributed to poor visibility of competition issues by 70 percent of respondents, and lack of political will by 30 percent. On seeking redressal, when one encounters anticompetitive actions in their daily operations, a majority revealed that they would seek help from a consumer forum, while others would complain to the concerned company or the competition authority, and similarly there was a large number that said they would take no action.

## Recommendations

- *Public Awareness Creation and Capacity Building:* One of the immediate actions necessary for more effective

operationalisation of the Competition Act is to develop programmes which will facilitate the creation of a competition culture and also to motivate stakeholders to assume their role in promoting a healthy competition regime in Kenya. Awareness on roles and mandate of the Competition Authority of Kenya will allow consumers and producers to engage meaningfully with the institution.

- *Increased Competition Authority Engagement with the Media:* Among the causes identified for low awareness levels of competition issues was low media publicity and visibility on competition issues. It is therefore imperative for the Competition Authority to deliberately partner with the media to use the media as a platform for increasing the understanding of competition issues in the country. Additionally, given that it was found that there is need for improvement in the media reporters understanding of competition issues, the authority should similarly have programmes that build the capacity of reporters to understand and identify and then responsibly report anticompetitive

practices to increase the consumers' awareness on competition issues around them.

- *Formalise the cooperation between sector regulators and CAK through MoUs:* The Competition Act 2010 provides for the development of MoUs between sector regulators and the Competition Authority. The authority has since drafted two MoUs with the Communication Authority and the Kenya Civil Aviation Authority. The MoUs are expected to ensure to have a more formal mode of interaction between the sector regulators and the authority to ensure harmonisation of procedures and clear cut roles between the regulators on matters relating to competition and consumer protection. A similar approach should be taken with all sectoral regulators as soon as possible and the MoUs should be signed.
- *Regular Stakeholder Consultation in Competition Authority's Market Enquiry Processes:* One of the core mandates of the Competition Authority is to ensure promotion of a healthy competition culture in Kenya. It is, therefore, vital for the Authority to engage various stakeholders who will be able to guide them given that this will help the commissioning of market inquiries in areas that impact on the consumer daily. It also needs to have more regular consultation with key stakeholders.
- *Maximise competition authority's independence through alternative funding sources as stipulated in Section 78 of the Competition Act, 2010:* To ensure independence of the Competition Authority, financial dependence on the government should be reduced to a minimum to facilitate autonomous market enquiry decision-making and resolution of

anticompetitive practices by the authority. The Competition Act 2010 provides the legal framework for the Competition Authority to gather funding through donors other than the government. This is an area which needs further strengthening to ensure that the agency is truly autonomous.

- *Alignment of Kenyan Competition framework to regional legislation (COMESA, and EAC):* The Competition Authority should ensure that actions under the Kenyan Competition Law does not contravene provisions of the EAC Competition Law and/or the COMESA Competition Law.

## Conclusions

The competition policy regime in Kenya has gone through a number of reforms since independence that have enabled a number of factors in promoting competition in the present day. This however, still has room for further improvement and outreach to ensure that a culture of competition is developed among consumers.

This, therefore, requires the Competition Authority to have strategic partnerships which ensure that competition culture is promoted from all fronts within government and civil societies for the benefit of the consumer. It also entails greater engagement of the relevant Ministry (responsible for competition issues in Kenya) with other Ministries to percolate the need for competition reforms across the economy.

There is also need to ensure that the consumer is informed and empowered to take action when they encounter anticompetitive practices in their mundane activities. There is also a general need to have capacity building of all stakeholders to bring out the benefits of a competition culture in the markets to the producers and consumers alike.

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