



The State of Play of Competition Policy and Law Reforms

The Case of Kenya



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Abbreviations

ACPs	Anticompetitive Practices
AGOA	African Growth and Opportunity Act
ASDS	Agricultural Sector Development Strategy
CAK	Competition Authority of Kenya
CCK	Communications Commission of Kenya
CIN	Consumer Information Network
COFEC	Kenya Consumer Federation
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil Society Organisations
CUTS	Consumer Unity & Trust Society
ECN	European Competition Network
EDP	Export Development Programme
EABC	East African Business Council
EAC	East African Community
EPZ	Export Processing Zone
ERC	Energy Regulatory Commission
ERS	Economic Recovery Strategy
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IEA	Institute of Economic Affairs
IFC	International Finance Corporation
IMF	International Monetary Fund
IPRSP	Interim Poverty Reduction Strategy Paper
LSK	Law Society of Kenya
KCO	Kenya Consumer Organisation
KECOPAC	Kenya Consumer Protection Advisory Committee
KSC	Kenya Seeds Company
MDGs	Millennium Development Goals
MoU	Memorandum of Understanding
MPC	Monopolies and Prices Commission
NCPB	National Cereal and Produce Board
KNBS	Kenya National Bureau of Statistics
SAPs	Structural Adjustment Programmes
SEZs	Special Economic Zones
SSA	Sub-Saharan Africa

UNCTAD United Nations Conference on Trade and Development
WPGE Working Party on Government Expenditure
WTO World Trade Organisation

1. Introduction

Socio-political History and Evolution of Competition

Kenya's economy is one of the largest in the region, and the rest of sub-Saharan Africa (SSA). Kenya is found on the Eastern side of Africa and borders the Indian Ocean between Somalia and Tanzania to her north and south respectively. Kenya lies on a total area of 582,650 sq km with a gross domestic product (GDP) per capita of US\$1800 (WDI, 2012). Kenya gained Independence in the year 1963. The country opted for a mixed economy that was market-based, supportive of the already existing private sector (the European settlers) and open to foreign investments.

At the time of Independence, the government started strengthening its own powers particularly those of the President and the ruling party as well as the state apparatus. However, it did not take the government long to realise that though they had political control of the country, they needed economic independence and sovereignty, considering most of the companies that had the largest contribution to the country were foreign-owned. This meant that they had to match up their political capacity with their economic power.

The government began a large-scale programme of state intervention in the first ten years of Kenya's independence. The large injections of investment capital, which were aimed at diversification, were combined with deliberate generation of demand to stimulate the economic reform process. The investments brought in another dimension in creation of a large public sector, which the government claimed as one of its major achievements. The process resulted into the displacement of foreign capital by largely state controlled and manned companies, which restricted certain sectors to nationals.

The government further introduced measures 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. Basically, the measures of state intervention were partly to displace foreign interest thereby strengthening its own base. Additionally, specific policies were introduced during this period. For instance, price control and other related consumer subsidies were introduced in 1956 and seen as a form of social redistribution mechanism (UNCTAD 2005). The government also introduced the import substitution policy, which was adopted as an industrialisation strategy in the 1970s. Entailed in the policy, were measures that offered trade protection for domestic infant industries that were set up to produce substitutes for previously imported consumer goods.

The government's control of the economy was also strengthened by the regulatory framework and steady expansion of controls on domestic prices, interest rates, foreign exchange controls as well as import and export restrictions. Some of these controls were introduced in response to some succession in economic shocks that adversely affected economic situations and prospects like the capital flight that was witnessed in the country. The other shocks that affected the country were the boom-bust cycle of

the tea and coffee prices in 1976- 1977 as well as the collapse of the East African Community (EAC) in 1977.

Economic Performance and Private Sector Development in Kenya

Kenya has experienced different business cycles in the economic performance since independence, with the worst economic performance experienced in the year 2007-2008 as result of the political instability. However, the trend in economic performance has experienced an upward trend where the economic conditions improved in 2013 resulting in 5.0 percent real growth of the GDP up from 4.6 percent in 2012.¹

Increase in demand supported by an expansionary fiscal stance with modest credit growth boosted the economic performance. Increases in domestic expenditure, especially household consumption and domestic investment expenditure largely drove the economy's growth. Household consumption and gross fixed investment increased by 2.8 and 12.5 percent respectively.²

The current account deficit, which averaged more than 10 percent of GDP in 2011 and 2012, narrowed in 2013 to 7.5 percent of GDP by September 2013. The improvement reflected lower import demand and higher exports of services.³

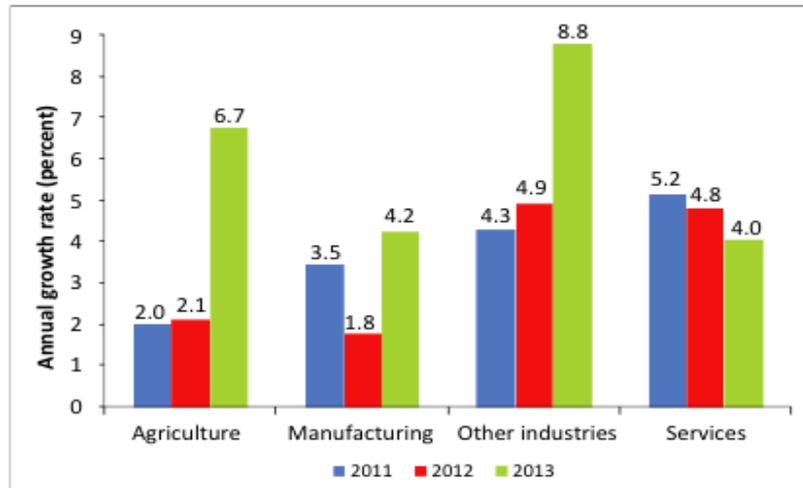
Agriculture, manufacturing, trade, tourism, transport and communication and financial services, account for over 80 percent of the private sector's contribution to total GDP. However, closer analysis of the growth sectors reveals that the service sector is the largest, accounting for more than 50 percent of the GDP at basic prices, and contributing about 56 percent of growth in GDP in 2011. The main drivers of growth are wholesale and retail sub-sectors (17.4 percent), transport and communication (12 percent) and financial intermediation (7.3 percent). Financial services, trade, transport and communication are the fastest growing sectors in Kenya's economy. Transport and communication and financial services act both as enablers and drivers of economic growth. As such, the relatively rapid growth in these sectors is a positive development for Kenya.

¹ The World Bank (2013), 'Kenya Economic Update: Reinvigorating Growth with a Dynamic Banking Sector'

² Kenya Economic Report, 2012

³ Supra Note 1

Figure 1: All Sectors Except Services Showed Strong Growth in the First Half of 2013



Source: World Bank, based on data from the Kenya National Bureau of Statistics

The private sector's output in Kenya is growing steadily (the absolute value of private sector output increased by 68% between 1996 to 2011) and is driving growth in the economy. The contribution of the private sector to formal employment has also risen, creating the majority of new formal jobs in Kenya. The annual growth rate of formal employment is approximately three percent, which matches the average annual labour force growth rate (1990-2005). The impact of private sector activities on these two key elements of economic growth suggests that the health of the economy as a whole is highly dependent on the performance of the private sector.

Economic Structure of the Private Sector in Kenya

The private sector is comprised of a productive formal sector of big businesses, underpinned by a massive, poorly understood informal sector. According to Kenya National Bureau of Statistics (KNBS) calculations, almost 9 out of 10 working Kenyans are employed in the informal sector, of which, most are traders in the wholesale and retail trade sector. Relative to other African countries, Kenya's economy is considered to be diversified, and the transport, telecommunication and financial hub of East Africa. Kenya's formal private sector is well split across activities, with tertiary activities dominating and increasing in importance, driven primarily by trade and transport activities. The primary sector is an important for base employment but is gradually shrinking in importance. While the proportion of contributions (in terms of GDP and employment) by formal primary activities is declining, the contribution of secondary activities remains relatively stagnant. Almost half of Kenya's exports are sold to African countries and Kenya benefits greatly from trading with regional neighbours.

Kenya's exports are dominated by low processed agricultural produce. Tea and cut flowers are the largest goods exports, with the remainder of Kenya's top 10 exports comprised of coffee, petroleum oils, cigars and cigarettes, iron products, selected carbonates, cements, palm oil, and leguminous vegetables. Kenya holds a relatively high world ranking in the export of certain products, including tea (2nd largest exporter), cut flowers (4th largest exporter), leguminous vegetables (2nd largest

exporter), palm oil (14th largest exporter), and selected carbonates (8th largest exporter). In each of these five export product areas; the country's global market share is increasing – suggesting particular strengths in these areas. On the other hand, Kenya appears to be losing some ground in the export of coffee and cigarettes, showing decreasing market share in industries that are growing globally. Transportation services account for almost half (43 percent) of the value of Kenya's exported services, with travel services and government services each responsible for approximately 20 percent of service export output.

2. Government Policies that Impinge on Competition

Structural Adjustment Programme and Competition

The era of economic policy reforms, which followed the import substitution industrialisation period was characterised by the concept of the Structural Adjustment Programmes (SAPs) that were introduced in 1979. SAPs initiatives were implemented with assistance from World Bank and the International Monetary Fund (IMF). The fundamental objectives of SAPs were to restore the developing countries to macroeconomic stability; and revive economic growth through increased resource mobilisation and to foster efficient use of resources. The common motivation inclined to economic reforms involved the reduction of the government's direct involvement or intervention in economic activities.

The government adopted various economic policies to implement the major economic policy reforms, which consisted of market deregulation. The market deregulation required phasing out of public sector monopoly control in the markets of foreign exchange, credit, and agricultural commodities as well as the privatisation of commercial state enterprises. The reforms also emphasised the importance of opening up markets, which were traditionally heavily regulated or operated by a single, often state-owned business. Sectors, which were subjected to the economic reform process, include telecommunication, air transport, postal service and the energy sector (UNCTAD, 2005).

The efficiency gain attributed to the economic reform process was to be achieved through greater reliance on market forces and the private sector and by reducing the role of the government. The economic reform process implied getting prices right by eliminating market distortions and increasing competition in the domestic economy. The enhancement of competition was to be achieved through deregulation, phasing out public sector monopoly control in markets for foreign exchange, credit, and agricultural commodities, and privatisation (O'Brien and Ryan, 2001).

The period of economic reform further emphasised on macroeconomic stabilisation through monetary, fiscal and exchange rate management. However, the policy agenda also included the interest rate deregulation; deregulation of domestic prices; cereals market liberalisation; and decontrol of markets for agricultural inputs and agricultural outputs such as meat, dairy products, cotton and sugar.

Other features of the reform period have been export incentive schemes, reform of financial management and regulatory reforms, family planning, and financing for reforms in the health and education sectors. The SAPs implemented in the period of 1990s paved the way for the liberalisation of the economy and established the Kenyan government's commitment to free market policies and a vibrant private sector-led growth, as enshrined in the Vision 2030 blue print. However, the outcomes of SAPs were characterised by poor performance of the economy and increasing levels of poverty. This implies that the SAP, to some extent, belied the expectations of the World Bank and IMF, implying thereby that the approach of the said institutions of

‘one-size fits all’ is not necessarily the appropriate quick fix, as it fails to consider the ground realities, the extant polity, the political forces at play and the ethos of the country.

Poverty Reduction Programmes

The government has implemented a series of policy strategies based on the poor outcomes of SAPs, which were implemented in 1980s and 1990s. The government adopted the Interim Poverty Reduction Strategy Paper (IPRSP) in June 2000 to respond to the structural economic rigidities. The strategy paper outlined the measures aimed at revamping economic growth and poverty reduction by focussing on facilitating sustained and rapid economic growth; improving governance and security; increasing the ability of the poor to raise their income levels; improving the quality of life of the poor; and improving equity and participation. Among the key instruments adopted to implement the strategy were the reduction of control and licensing requirements, expansion of tourism and export markets, and to improve domestic financial services.

The Government of Kenya further developed the Poverty Reduction Strategy Paper (PRSP). The strategy outlined priorities and measures necessary for poverty reduction and economic growth. Kenya’s poverty eradication plan was formulated in line with the goals and commitments of the international Millennium Development Goals (MDGs), to reduce the proportion of people living in extreme poverty by half by 2015. The PRSP built on past efforts aimed at poverty alleviation and in particular the IPRSP which identified interim measures and strategies necessary for facilitating sustainable and rapid economic growth, improving governance; raising income opportunities of the poor; improving the quality of life; and improving equity and participation.⁴ These principles remain valid and relevant and form the basis of the PRSP. The specific objectives of the policy strategy included the following:

Box 1: Poverty Reduction Strategy Paper

- Promoting access to markets and market opportunities for the poor
- Improving the overall effectiveness of public resources geared towards poverty reduction
- Enhancing the security of the poor by addressing critical issues of marginal groups in marginalised areas and protecting the vulnerable groups. This is important in dealing with crisis and shocks
- Emphasising and allocating increased resources targeted on human capital development. This is an aspect that has to be addressed in the PRSP
- Generating employment, improving productivity and conditions in the labour market

Source: Kenya Poverty Reduction Strategy Paper (2010)

The above analysis on the past economic policies and reforms developed implies that the government has focussed on the open market strategy to generate employment, improve productivity and conditions to facilitate poverty reduction. The analysis also confirms government’s commitment to promote competition in the Kenyan economy.

⁴ Kenya Poverty Reduction Strategy Paper (2010),
<http://www.imf.org/external/pubs/ft/scr/2010/cr10224.pdf>

Public Procurement Policy and Competition

The public procurement system in Kenya has gone through a series of reforms to comply with the current globalisation regime. For instance, the manufactured goods were to be imported from Great Britain during the colonial period. The procurement in the colonial period raised competition concerns, given that only one firm was mandated to procure goods and services. The procurement and supplies of goods and services was also centralised, where all government departments were to obtain their common-user supplies from the Supplies Branch.

The procurement of supplies services was conducted under a Central Government system even after independence until the 1970s. However, a major shift occurred in 1978 where the system was placed under the Treasury's mandate from the Ministry of Public Works and, additionally, the Supplies Manual was also introduced. The existing loopholes during the colonial and postcolonial period in the procurement system motivated the World Bank to conduct a countrywide review on Public Procurement. The review demystified various weaknesses, such as reduced effectiveness of public financial management; government inability to deliver services effectively; obscure rules not based on fair competition and transparency rendering the system to abuse and the lack of a legal framework to enforce procurement rules.

Given the inherent weaknesses in the procurement system, the enactment of the Exchequer and Audit (Public Procurement) Regulations, 2000 through which the central system was abolished. Furthermore, the Public Procurement Directorate and Public Procurement Appeals Board were established. The Procurement reforms also led to the enactment of the Public Procurement and Disposal Act, 2005. The Act was established to maximise economic growth and efficiency; promote competition and ensure that competitors are treated fairly; promote the integrity and fairness; increase transparency and accountability in procurement procedures; increase public confidence in those procedures; and facilitate the promotion of local industry and economic development. The legislation currently acts as the reference document in the procurement domain.

The Public Procurement and Disposal Act govern the bulk of tenders published by different government departments. Government tenders are normally published in the daily government newspapers. In some cases, external donors fund some tenders. Such contracts are usually open to international bidding, but there are circumstances in which the tenders favour companies from the funding agency's home country. There are also allegations of cases on exclusive contracts offered by the Government of Kenya to preferred companies on ten-year exclusive contracts. These contracts directly contravene the requirements under competition regulations in Kenya as enshrined in the Competition Act 2010.

According to some stakeholders, it would have been a check and balance against the government, if someone, who could not get the contract because of the policy of the government, had informed the Competition Authority challenging the government policy. Even civil society could have taken action. This demonstrates that the awareness of the need for competition in the market is not present among stakeholders. Further allegations have been made in the procurement of infrastructure projects in Kenya which raises concerns on whether the government is committed to adhering to procurement rules and regulations in Kenya (see Box 2).

Box 2: Coast MPs Oppose New Railway Deal

Questions have emerged on the tendering for the construction of the Sh220 billion Mombasa-Malaba-Kampala-Juba standard gauge railway that President Uhuru Kenyatta is expected to launch in Mombasa. Attorney General Githu Muigai has raised concerns about the integrity of the process leading to the award to a Chinese firm. The giant Dock Workers Union and coast MPs protested against using the Kenya Ports Authority to secure the loan. The Parliamentary Transport Committee asked why the tender was single sourced. Nyali MP Bolo Awiti requested a ministerial statement on whether China Road and Bridge Corporation has the capacity to implement the project. However, Transport Secretary Michael Kamau defended the Chinese company saying due diligence was carried out before the award of the tender. However, the AG has now submitted a legal opinion criticising Kenya Railways for “picking and choosing alternate procurement methodologies over the same subject matter”. In the letter to the Director General of the Public Procurement Oversight Authority (PPOA), Maurice Juma, Githu said the award was an “assail to the rule of the law.” Kenya Railways wrote to the PPOA defending its decision to use direct procurement for the tender. In January, PPOA wrote back to Kenya Railways asking it to further justify direct procurement. Kenya Railways responded that its contract with CRBC was the result of the negotiated grant between the Kenyan and Chinese governments. “The so-called government to government agreement is not a method for selecting suppliers so as to support the award of the contract absent on actual process of selecting project developers or components suppliers,” Githu has now warned.

Source: Ibrahim Oruko and Martin, November 2013, The Star Kenya

Recently, the government has also made an amendment to Public Procurement and Disposal Act 2005 under the Public Procurement and Disposal (preference and reservations) (amendment) regulations, 2013. The objective of new regulations is to grant the youth and other disadvantaged groups in Kenya preference in the supply of goods and services to the government. This is in line with one of the key promises of the Jubilee government to give the youth, persons with disability (PwDS) and women at least 30 percent of all supply contracts to the government. Some stakeholders argue that the preference shown to youth, PwDs and women seems to be a step in the right direction but it could contravene Competition Law. For this reason, necessary exemptions under the Competition Act, 2010 are called for and that the government should address the issue legally.

The regulations also seek to favour local businesses by granting exclusive preference to local contractors who supply motor vehicles, electrical goods, furniture and other items, which are fully assembled or manufactured in Kenya. Road works and electrical installations of below 1 billion, other public works of below 500 million and supply of goods and services of below 100 and 50 million respectively are now exclusively reserved for Kenyans. Such regulation implies that the government has preferential procurement policies to certain groups of the society, which may affect competition landscape in the public procurement system and also open room for corruption if not properly governed.

Agricultural Sector Development Policies and Competition

Agricultural Performance

Agriculture is the mainstay of Kenya's economy. In 2009, agriculture was contributing 24 percent of GDP directly, which was valued at Kshs 342 billion and another 27 percent indirectly, which is valued at Kshs 385 billion. The sector also accounts for 65 percent of Kenya's total exports and provides more than 18 percent of formal employment and more than 60 percent of informal employment in the rural areas. The agricultural sector comprises six major sub-sectors, namely industrial crops, food crops, horticulture, livestock, fisheries and forestry, employing such factors of production as land, water and farmer institutions (cooperatives, associations, etc.).⁵

The Industrial crops sub-sector contributes 17 percent of the GDP and 55 percent of agricultural exports. Horticulture has recorded a remarkable export driven growth in the past five years and is now the largest sub-sector, contributes 33 percent of the GDP and 38 percent of export earnings. Food crops contribute 32 percent of the GDP, but only 0.5 percent of exports, while the livestock sub-sector contributes 17 percent of GDP and 6 percent of exports. Livestock and fisheries sub-sectors have a huge potential for growth which has not been exploited.⁶

Even though several factors are responsible for the current state of affairs in the performance of the sector, good economic policies and effective institutional and legal frameworks are imperative for fostering competition in agricultural markets, which, in turn, can have a beneficial impact on agricultural production. The current development framework in the agricultural sector is an outcome of the past policy regimes adopted since independence. It would thus be imperative to understand the historical architecture of the various policies inclined to agricultural development in Kenya.

Agricultural Policy and Competition

The responsibility of controlling policies was vested in the Ministry of Agriculture but the implementation of policies was undertaken by a plethora of public institutions in the early years after independence. Although farmers had their own institutions (such as the Kenya Farmers Union for purchase and distribution of farm inputs and marketing of outputs, the Kenya National Farmers Union for policy advocacy on behalf of farmers, and co-operative societies for marketing of outputs), in reality, the state controlled the commodities to be grown and how it was marketed through established statutory boards which affected the competition regime during this period. For instance, in 1979, the government established the National Cereals and Produce Board (NCPB).

NCPB was formalised by the enactment of the National Cereals and Produce Board Act (Cap 338) which empowered the NCPB to regulate and control the collection, movement, storage; sale, purchase, transportation, marketing, processing, distribution, importation, exportation, and supply of maize, wheat and other scheduled agricultural produce. The control system was undertaken by licencing and regulating the key

⁵ Agricultural Sector Development Strategy, 2009-2020

⁶ *Ibid*

players, such as farmers, traders and millers (Export Processing Zones Authority, 2005).

After 1980s, economic policy was liberalised and the role of the government in the economy reduced. Continuing with this trend, in 1988 the government commenced the grains sub-sector reform programme by reducing the monopoly powers of the NCPB. The reform process continued until 1993 when the grain subsector was fully liberalised. As a result, there were more market outlets, improved distribution and availability of maize outlets and improved distribution and availability of maize in all parts of Kenya (Mutahi, 1996; Nyangito, 1997 and 1998; Nyangito and Ndirangu, 1997). These initiatives were supplemented by proposals on a decontrol and relaxations of fertiliser import licencing systems, price decontrol and removal of obstacles in the marketing and distribution systems.

Detailed policy reforms for the whole economy were spelt out in Sessional Paper No. 1 on Economic Management for Renewed Growth (Kenya, 1986), which contributed to promoting the competition regime in the agricultural subsector. The policies spelt out in the paper included a liberalisation of markets from government controls and a concomitant shift to open market operation and a removal of government support (subsidies) on most investments and services and a corresponding shift towards privatisation and cost sharing.

The other policies that contributed to the market development in the agricultural sub-sector included the formulation of the Economic Recovery Strategy (ERS). The ERS outlined the development strategy and policy priorities that were to be undertaken to successfully bring the economy back to a sustainable growth path.⁷ Following the expiry of ERS in December 2007, the government embarked on the Vision 2030 strategy to guide national development over the next 23 years. The aim of Kenya's Vision 2030 is to create *'a globally competitive and prosperous country with a high quality of life by 2030'*. It aims to transform Kenya into *'a newly-industrialising, middle-income country providing a high quality of life to all its citizens in a clean and secure environment'*. One of the specific aims of the Vision 2030 is to improve market access for smallholders through better supply chain management. It also aims at adding value to our farm and livestock products before they reach local and international markets.

It is in the context of the objectives of the Vision 2030 that the Government of Kenya formulated the Agricultural Sector Development Strategy (ASDS) to support the implementation of the Vision 2030. The overall aim of the strategy is to establish the agricultural sector as a key driver of the projected rate of annual economic growth under the economic pillar of the Vision 2030. The ASDS encourages the private sector to invest in agricultural production at all levels of the supply chain and to enter into public-private partnerships across various sub-sectors wherever possible. This is to be achieved through, for example, improved access to finance and technology for input supply, farm production, storage and assembly, processing, distribution, and wholesaling and retailing activities.

⁷ Ministry of Agriculture Strategic Plan, 2008-2012

There are various strategies currently being implemented to enhance access of inputs among various stakeholders in sectors, like importation, the provision of subsidised seeds and fertiliser through the Ministry of Agriculture and NCPB. For instance, in 2010-2011, the Ministry of Agriculture and NCPB spent Ksh 3840 billion to procure fertiliser, provide subsidised seed and facilitate distribution. The efforts led to the reduction in the price of a 50kg bag of DAP fertiliser from Ksh 6,400 to Ksh 2,200. There are also plans to establish a regional fertiliser plant to further reduce the price of agricultural inputs (KIPPRA, 2012).⁸

The inputs are distributed through a wide range of stockists and merchants all over the country. Also, some cooperative societies and commodity boards supply inputs to members. However, the use of improved seed has remained low due to poor distribution systems and the monopoly of the supply of seed by the Kenya Seed Company (KSC), which concentrates its operations in high-rainfall areas. The use of fertiliser is low due to its high price, attributed to the high cost of transportation and distribution systems.⁹

Despite the reforms to enhance affordable access to inputs in the country, there are allegations of competition concerns on the conduct of business transactions in the fertiliser market as well as the welfare effects on different actors along the supply chain. *There are also cases of competition concerns in the regulation of sugar and maize imports especially in the manipulation of the price of sugar and maize by influencing the approval of import licences in the Kenyan market.*¹⁰ *Such allegations should be closely investigated to assess their implications on the state of competition in the respective subsectors (KIPPRA, 2012).*

Trade Policy Regime and Competition

Kenya's trade policy regime has evolved through distinct policy frameworks ranging from import substitution policies (1960s-80s); trade liberalisation through SAPs (1980s) and export-oriented policies (1990s). The 2009 National Trade Policy guides the current trade regime for Kenya. The country's trade policy recognises international trade as a strategic priority in realising the objectives of raising business productivity; encouraging increased international trade and investment; stimulating and supporting micro, small and medium enterprises (MSMEs) to participate more in international trade; enhancing the competitiveness in both the export and domestic markets; addressing market distortions; encouraging value additions and diversification; and improving market access (National Trade Policy, 2009).

The trade policy ensures that the trade sector in Kenya is influenced by commodity acts and regulations contained in other various Acts under the administration of several ministries and public institutions. The policy and previous legislations have contributed to progressive liberalisation in Kenya, which has significantly reduced tariff levels, eliminated price controls and licencing requirements leading to modest growth in export markets. In the global context, Kenya is a member of the World Trade Organisation (WTO), which came into effect in 1995. The country has also increased its efforts in fostering regional economic integration that has resulted in the

⁸ Kenya Economic Report 2012

⁹ Agricultural Sector Development Strategy,

¹⁰ State of Competition in the milling and Bulk storage market

establishment of the EAC, Common Market for Eastern and Southern Africa COMESA) and the Inter-governmental Authority on Development (CUTS, 2009).

The regional economic communities (RECs), such as COMESA and EAC have provisions aimed to address cross-border related anticompetitive practices. For instance, members agree to prohibit agreements between undertakings or concerted practice, which restrict or are designed to restrict competition in COMESA. Kenya, together with the other EAC Partner States, is also negotiating a new trading arrangement with the EU- Economic Partnership Agreements (EPAs) as successor to the Cotonou Partnership Agreement (successor to the Lomé convention). The new trading arrangement will replace the non-reciprocal trade preferences arrangement offered to Kenya and other African, Caribbean and Pacific (ACP) countries under the Cotonou Partnership Agreement. The primary objectives of the EPAs are to foster sustainable development, integrate the ACP states into the world economy and fully comply with the prevailing WTO rules. Just like the Doha negotiations, competition policy; investment and private sector development; trade, environment and sustainable development; intellectual property rights; and transparency in public procurement are some of the key concerns in the negotiation process.

The inclusion of competition of provisions in trade agreements has significant potential benefits, if harmoniously enforced. The competition policy in free trade agreements (FTAs) or regional integration frameworks, would curtail the discretion and flexibility of host governments in regulating the entry and operations of foreign firms, and to prevent any favourable treatment being given to domestic firms. Developing countries, like Kenya tend to lose more from the anticompetitive practices of multinational corporations (MNCs), which have particularly detrimental consequences in a context of scarcity:¹¹

Box 3: Cartel Affected Imports

Levenstein and Suslow examined 16 products which were cartelised during the 1990s and for which reasonably reliable trade data was available. They estimated that the total value of such ‘cartel-affected’ imports to developing countries was US\$81.1bn. This sum was equivalent of 6.7 percent of all imports to developing countries and 1.2 percent of their combined GDP.

Source: Levenstein & Suslow, Private International Cartels and their effects on Developing countries. World Bank Paper (2001)

The aforementioned case implies that Kenya is set to benefit from the regional competition regimes in the two legislations. However, the extent to which the regional competition provisions can promote regional public goods and tackle market failures is dependent on the nature of provisions and the degree of their implementation and enforcement. This implies that the country’s domestic policies should be harmonised with the regional competition laws to support an effective enforcement of the regional competition laws. However, the existence of conflict between the national and regional competition authority raises extra-territorial concerns, which might affect an effective implementation of competition legislations.

¹¹ Levenstein and Suslow. Private International Cartels and their effects on Developing countries. World Bank Paper .2001

A proper cooperation framework would be imperative to avoid any possible future conflicts between the regional and the national competition authority like in other jurisdiction with more advanced competition framework. For instance, through the European Competition Network (ECN), the European Commission and the national competition authorities in all EU Member States cooperate with each other. Such cooperation means informing each other of new cases and envisaged enforcement decisions, coordinating investigations, where necessary, helping each other with investigations, exchanging evidence and other information. Another example in the African context is the review of COMESA Merger Control Notification Thresholds, which has taken place since January 2013.¹² The review through the COMESA Competition Commission and the Council of Ministers is to facilitate better regional cooperation and streamline merger notification thresholds within the region.

Kenya has also signed bilateral trade agreements with about 27 countries around the world. Some of the countries include China, Argentina, Bangladesh, Bulgaria and Nigeria. Given that some of the trade agreements would imply offering preferences to the other party, the bilateral trade agreements might have implications on competition, where some companies from specific countries like China may be the periodic beneficiaries of the government tenders, especially on infrastructure development. This could be confirmed by the recent award of the tender on the construction of the railway line where there were allegations that proper procurement procedures were not followed.

Investment and Industrial Policy

Among the countries in SSA covered by the International Finance Corporation's (IFC) investing across borders, Kenya restricts foreign ownership in more sectors than other economies. Foreign capital participation in telecommunications, for example, is limited to a maximum of 70 percent. However, the law provides foreign investors with a grace period of three years to build up the required domestic capital contribution of 30 percent. In the transportation sector, there are ownership restrictions in railway freight, port and airport operation, in which foreign investment is allowed only up to 50 percent.

Furthermore, the Merchant Shipping Act of 2009 requires 50 percent local ownership in shipping operations. On the other hand, unlike in most other countries covered by the Investing Across Borders indicators, domestic as well as international passenger air transportation is fully open to foreign capital participation. The tourism sector, one of the country's most important industries, is also fully open to foreign companies, as are the manufacturing and primary sectors.

The Government of Kenya provides a wide range of tax incentives to businesses to attract greater levels of Foreign Direct Investment (FDI) into the country. The primary beneficiaries of Kenya's tax exemptions and incentives are therefore large domestic firms and foreign multinational companies. However, recent government estimates are that Kenya is losing over Ksh 100 billion a year from its tax incentives and exemptions. Furthermore, despite these generous tax incentives, Kenya has attracted

¹² Marelus, M. 2014, 'African Merger Control' Interview with the COMESA Competition Commission

relatively low levels of FDI in recent years. The structure of restriction in terms of investment would have implications on the competition landscape among the different subsectors in the economy.

In terms of industrial policies, Kenya is currently implementing an industrialisation strategy that was outlined in a sessional paper adopted by the Parliament in 1996. The strategy aims to transform Kenya into an industrialised state by 2020, particularly through the support of export industries. Vision 2030 also recognises industrial promotion as critical to the achievement of the country's development objectives. In 1990, an Export Processing Zone (EPZ) programme was inaugurated in Kenya as part of the Export Development Programme (EDP) being undertaken by the government to transform the economy from import substitution to a path of export-led growth.

These zones employ close to 40,000 workers and contribute to 10.7 percent of national exports. Over 70 percent of EPZ output is exported to the US under the AGOA. Some manufacturers also believe that EPZ rules are not properly enforced and there is, therefore, unfair competition with non-EPZ manufacturers. The number of investors in EPZs in Kenya has declined from over 100 a decade ago to about 80. As part of the government's strategy to address this problem, there are plans to move towards Special Economic Zones (SEZs).

Labour Policy and Competition

The Kenyan labour market is guided by the Employment Act 2007 and the Labour Institutions Act (No. 12 of 2007). The minimum wages are imposed by the government under the regulation of wages and orders issued annually under the Labour Institutions Act. The Minimum Wage Guidelines, once set by the Minister, are published in the Kenya Gazette and can be obtained at the Government Press. Where employees are members of a registered trade union, their remuneration is also influenced by collective bargaining agreements between the employer and the union. This implies that the country's regulations exempt workers' collective bargaining activities to form unions or group together to negotiate wages and other employment conditions.

Such an exemption is aimed at counterbalancing the superior economic power and bargaining position which most firms/employers have *vis-à-vis* individual workers, and preventing exploitation of labour. While the increased wage costs of collective bargaining activity may increase the costs of production, firms should not necessarily pass on the costs in the form of higher prices for the goods produced if there is effective competition prevailing in the market. It should also be noted that in some cases, the wage rates paid by entrenched monopolists tend to be high, and may make it difficult for new market entrants to hire workers on a competitive cost basis. The trade unions are sometimes aware of this and share in the monopoly profits of the incumbent firms. *The Kenya Competition Authority, through the Competition Act, 2010, therefore needs to be cognisant of such risks and prevent the misuse of the collective bargaining exemptions.*

Consumer Protection Policy and Competition

Kenya did not have cross-market consumer protection legislation or a competition law with substantial consumer protection provisions for a long time. The Restrictive Trade

Practices, Monopolies and Price Control Act (Cap 504) was the main legislation enacted to regulate competition in Kenya. The Act aimed at encouraging competition in the economy by prohibiting restrictive trade practices (RTPs) and controlling monopolies and concentrations of economic power that it deemed harmful to consumer interests. In this regard, its provisions on competition had indirect mandate in protecting the interests of consumers. There have been also sector specific regulations including the following:

Table 1: Sector Regulations

Weights and Measures Act (Cap 513)	The main purpose of Weights and Measures laws is to establish a uniform system of units of measurement, control weighing and measuring equipments in use for trade, control transactions in some goods, and to protect the public against false trade descriptions. It, therefore, safeguard consumers against sale of goods below the indicated quantity by the trader. The Act is enforced by Ministry of Trade, Department of Weights and Measures
The Trade Descriptions Act 1979 (Cap 505)	The legislation aimed at enhancing honesty in business deals. The Act aims to guard against false or misleading prices, insincere depiction of the source of goods or services and trade in goods bearing false hint of origin. However, it is only a deterrent if it is actually enforced and this can only be done through courts
Standards Act 1974 (CAP 496)	The Act ensures consumer protection by setting up specific requirements in terms of quality and safety conditions for goods and services to guard against consumer exposure to sub-standard and unsafe products. The Kenya Bureau of Standards enforces this legislation
The sales of Goods Act 2010 (Cap 31)	This is a commercial law in Kenya enforced by the office of the Attorney General. The Act outlines the provisions for sales contract between consumers and sellers of goods and services. The Act is designed to shield consumers against unscrupulous trading practices

Further developments have taken place to enhance the consumer protection regime in Kenya. The Competition Act 2010 was enacted to promote consumer interests through enhanced competition as well as a specific section concerning consumer welfare that focusses directly on consumer protection. One of the principal objectives of the Act is “to protect consumers from unfair and misleading market conduct.” The Competition Law facilitated the establishment of the Competition Authority, outlaws restrictive and unfair trade practices (UTPs) and regulates mergers as well as unwarranted concentration of economic power. The Law is also expected to create cross-market conduct standards in areas such as fair contract provisions, deceptive advertising, and unconscionable behavior. The Government of Kenya has further enacted the Consumer Protection Act 2012. The purposes of this Act are to promote and advance the social and economic welfare of consumers in Kenya.¹³

¹³ See Article 4 of the Consumer Protection Act 2012

Box 4: The Consumer Protection Act 2012

- a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;
- b) promoting fair and ethical business practices;
- c) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;
- d) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
- e) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- f) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

The committee to oversee the operationalisation of the legislation has been established in November 2013 and had its inaugural meeting in February 2014.¹⁴ The Kenya Consumer Protection Advisory Committee (KECOPAC) has been mandated with its functions through Section 89 of the Consumer Protection Act 2012. The committee is expected to oversee the redevelopment of the regulations to support the implementation of the Act by bringing together representatives of consumer protection organisations, such as Consumer Federation of Kenya (COFEK) (Chair), Consumer Unity & Trust Society (CUTS) (co-chair), Consumer Information Network (CIN), public sector representatives and sectoral associations such as the Law Society of Kenya, The Attorney General's Representative, Kenya Medical Association, Kenya Bureau of Standards, Kenya Bankers Association and the Principal Secretary for Commerce.

On an international scale, there are various frameworks or modalities for the formulation and implementation of the consumer protection-related legislations. Some countries like Zambia, Zimbabwe and Kenya have consolidated both the competition and consumer protection legislations in one law while others countries have attempted to comprehensively address consumer related legislation by formulating a comprehensive consumer law to address consumer-related concerns. There are different arguments that tend to support the need to integrate the consumer provisions within the competition law. It is argued that the principle of subsidiary compels countries in a regional integration framework in COMESA and EAC to handle consumer protection cases on behalf of the regional authority. The absence of integrated/consolidated regulations would make it difficult for the country to effectively enforce its regional commitments in the scope of consumer protection.

¹⁴ <http://www.cofek.co.ke/index.php/14-news/367-cofek-to-chair-kenya-consumer-protection-advisory-committee-kecopac>

In the economies where competition and consumer protection legislations are separate, links between legislations are often recognised by assigning the administration of laws to a single authority. Such framework exists in countries like Algeria, Hungary, Peru, the UK and the US.¹⁵ However, such situations would require a conducive coordination between the institution responsible for the implementation of the Consumer Protection Act 2012 and the Competition Act 2010¹⁶ with an overall objective of maximising consumer protection. *It would thus be important for the Kenya Competition Authority to effectively coordinate with the institutional that will be responsible for the implementation of the Consumer Protection Act, 2012.*

Consumer Protection Act and Sector Regulators

Even though the country has a comprehensive consumer protection law, it should be noted that some of the existing sub-sectoral regulators have a foundation of basic consumer protection regulation, which have been in existence over the years (see Table 2).

Table 2: Sector Regulators

Sector Regulator	Consumer Provision
Energy Regulatory Commission	<ul style="list-style-type: none"> ▪ Was established through the Energy Act 2006 ▪ Article 5(b) mandates the commission to protect the interests of consumer, investor and other stakeholder interests
Communication Commission of Kenya	<ul style="list-style-type: none"> ▪ Established by Article 3 of the Kenya Information Communication Act ▪ The Commission is mandated to protect the interest of all users of telecommunication services in Kenya with respect to pricing, the quality and variety of such services
Kenya Anti-counterfeit Agency	<ul style="list-style-type: none"> ▪ Established by the Anti-counterfeit Act 2008 ▪ Protect consumer from anti-counterfeit goods in the market

Responsibility for competition and consumer protection policies may lie with a separate or a common agency; it may also be either general or sector specific. For example, a telecommunications regulator may also be responsible for competition and consumer protection policies in that sector, as in Zambia. Also, financial regulators in many countries have been given the main role in the protection of consumers in this sector.¹⁷ Article 5 of the Energy Act in Kenya also provides for the establishment of the Energy Regulatory Commission to protect interests of consumer, investor and other stakeholders.

This implies that various regulators have existing mandate in protecting consumer interests. Given the existence of the consumer protection provisions to be enforced by the respective regulators, *it would thus be critical to clarify jurisdictional responsibilities and put in place effective co-ordination mechanisms between different authorities, both to avoid conflicts between different regulators and to reduce uncertainty for regulated entities during the enforcement of consumer-related regulations.*

¹⁵ Okoth ,Owiro and Njoroge Peter ,An examination of Kenyas Compettion Policy and Law,Psaper prepared

¹⁷ Consumer Protection and Competition Policy for UNCTAD 2012

Consumer Protection Act 2012 and Competition Act 2010

Even though the country's Competition Act is comprehensive with consumer provisions embedded in it, there is general concern on how such provisions would be objectively and harmoniously implemented given the existing the Price Control Act and Consumer Protection Act 2012 which is yet to be implemented. The existence of consumer provisions in the Competition Act and a separate Consumer Protection Act implies two cases. The first case would include a hybrid scenario where the competition law also includes provisions related to consumer protection issues and a case where there is separate comprehensive consumer legislation.

The existence of such framework postulates that there will be two institutions, i.e. the Kenya Competition Authority, and according to the Consumer Protection Act 2012, provides for the establishment of a Consumer Protection Advisory Committee to advise government institutions on consumer welfare issues. Even though there is no standard framework work for addressing competition and consumer concerns, different schools of thoughts have been advanced to understand the possible frameworks which could be adopted by the Government of Kenya in addressing general consumer concerns through competition and consumer protection legislations.

One side of argument asserts that the Competition law in its current form would facilitate the work needed by consumer policy by ensuring effective competition in markets. However, it should be recognised that the competition law may not protect all the possible aspects of consumer interest which takes into account consumer concerns, ranging from product quality and safety issues, weights and measures, availability of choices in the market to fair prices of products. This implies that the Consumer Protection Act 2012, would comprehensively complement the Competition Act 2010 in addressing consumer-related concerns.

The extent to which two legislations would complement each other depends on the level at which the distinct objectives of two separate legislations are harmonised. For instance, the competition law is more proactive policy in ensuring efficient production and thus resulting into consumer benefits. On the other hand, the consumer protection policy puts forward mainly a reactive agenda to protect interests of consumers (Sahebodin 2006). This implies that the Consumer Protection Act mainly focusses on the demand side of the market and thus may supplement its enforcement through other existing regulations like the Price Control Act, which may contravene and conflict with the implementation of the Competition Act. *The implementation of the price controls may also violate trade agreements like EAC, COMESA, which Kenya is a signatory to. It is, thus, imperative to create perfect complementarities between two legislations during the implementation process, to avoid any possible constrain in the implementation of the Competition Act and by extension affect the general performance of the private sector.*

Civil Society Organisations and Development Initiative in Kenya

The civil society organisations (CSOs) in Kenya are engaged in a number of national, regional and international advocacy, policy dialogue and communication initiatives related to development issues in Kenya. Through their research and analysis, briefs, conferences, seminars and meetings with trade negotiators, CSOs have been influencing private sector-related policy development issues since 1990. The CSOs

view is that until the late 1990s public policymaking had been predominately an inter-governmental process with little input from other stakeholders, particularly not from the civil society. However, policy failures in achieving the stated objectives and constitutional reforms allowed the civil society to enter the policymaking process. This trend was particularly strengthened after the National Rainbow Coalition in the elections of 2002 since many new members of the Parliament had their roots in CSOs. This led to the increase in the cooperation between the government and CSOs on trade policy issues (CUTS 2009).¹⁸

CSOs are engaged in a number of regional and international advocacies, policy, dialogue and communication initiatives related to trade, poverty and inequality in Kenya. Through researches, briefs, conferences, seminars and meetings with trade negotiators, CSOs have increasingly been influencing policy formulation and development beginning early 1990s (Mably, 2006). This came about from concerns about restructuring initially imposed by multilateral institutions and the implications of trade liberalisation and international trade negotiations on developing and least developed countries (LDCs). There are a number of local, regional and international CSOs in Kenya. Among the most active include KCO, CIN COFEK, CUTS, OXFAM, Action-Aid, Care International, Institute of Economic Affairs etc. (Onyango, Christopher 2008).¹⁹

They undertake advocacy and policy analysis on competition policy, international trade and development agenda, taking a rights-based approach. The influence of CSOs in Kenya has been modest owing to leadership and organisational weaknesses and the absorption of leading figures in government and the political arena. The latter has worked to weaken the watchdog role expected of CSOs in many respects as experienced in the recent past. Even though there has been CSOs engagement on development issues, only few of them are working on or have interest on competition issues in Kenya. *It would thus be imperative to enhance the capacity of various CSOs to be able to advocate effectively on competition policy-related reforms in Kenya.*

¹⁸ Towards a More Inclusive Trade Policy Making: Process and Role of Stakeholders in Select Africa Countries

¹⁹ Onyango, Christopher (2000), 'Role and Influence of Main Interest Groups in the National Trade Policy Making Process,' A Paper for CUTS International, Geneva, FEATS National Inception Meeting in Nairobi, Kenya, October 14, 2000

3. Competition Evolution and Environment

The degree of industrialisation and liberalisation of the economy was rudimentary before independence in 1963. Most consumer items such as sugar, fats, razor blades, pangas, jembes, etc., which were needed by the settler community were imported from UK in support of Her Majesty's motherland. In Kenya itself, the interests of the consuming settlers were protected through a Price Control Regime, which ensured that tenders through the Price Control Act of October 16, 1956 did not exploit consumers of three essential goods and services.

The process of rapid industrialisation and indigenisation of the economy commenced during the attainment of independence on December 12, 1963. The process of reforms involved setting up of import substitution industries to meet Kenyan and EAC requirements and transfer of non-citizen firms to Kenyans. The independent Administration of Kenya enacted the Trade Licencing Act, Cap 497 of Laws of Kenya. The law legalised the takeover of non-citizen firms by citizens of Kenya through denial of Trading Licenses to certain Trades and Businesses (UNCTAD, 2005). The administration also legalised the control of the importation and exportation of goods of any description and the control of supplies essential to the life or well-being of the community through Legal Notice No. 303 of 1964 under the Imports, Exports and Essential Supplies Act, Cap 502 of the Laws of Kenya.

The import strategy programme was informed by the need to create homegrown corporations to compete with a variety of transnational corporations (TNCs) in financial services. The majority of the enterprises were therefore allowed to retain monopoly status in the quest to build them through economies of scale (Owino Kwame, 2004). However, the first oil crisis and the collapse of the EAC in 1977 resulted in Tanzania and Uganda opening their markets to imports from China, Taiwan, Korea, India, etc. with the loss of the larger captive East African market. Kenya's domestic industries found themselves with a very small domestic market and products which could not compete in the export markets because of their high prices, low quality, poor packaging, poor design etc. This was followed by decreasing employment opportunities and falling standards of living.

The existing scenario compelled the country to review its strategy and allowed for a relaxation of import restrictions. The government exposed domestic firms to competition by allowing some imports so as to prepare them for export market competition. Competing imports were selectively allowed into the Kenyan market. The items were progressively removed from the list of banned items and price controlled items removed from price-controlled list progressively. Furthermore, additional industries were licensed to boost domestic competition, lower consumer prices, increase employment opportunities, and improve the efficiency in the use and allocation of scarce resources to competing needs. The open policy was aimed at the improvement of the marketability (competitiveness) of Kenyan products in the export

market, increase job opportunities, lower the cost of living and raise the standard of living for Kenyans throughout the Republic.²⁰

The motivation to formulate Competition Policy and the enactment of a law to support the implementation of such a policy in Kenya was advanced in 1982 by the Working Party on Government Expenditures (WPGE). The WPGE was to study the performance of the SoEs. Amongst the recommendations, made by the Working Group that the direct involvement of government in the domestic economy ought to be reduced through progressive divestiture from some of SoEs. The report affirmed that the government 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.

The report further stipulated, in sections 89 to 91, the need to supplement the liberalisation process through establishment of institutions and rules to facilitate the interaction between firms. The proposal specifically affirmed the need of a properly structured institution, to capture the economic activities of enterprises and ensure effective competition in the economy. It is on this basis that the government enacted the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 504) in 1988. The Act was enacted in 1988 and created the competition agency, namely the Monopolies and Prices Commission (MPC).

The MPC was a Department of the Ministry of Finance mandated to enforce Competition Principles and Rules in accordance with the provisions of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 of the Laws of Kenya. It performed the role of economic regulation and entrench the culture of competition through advocacy and other pedagogical issues. The Commission had a mandate to encourage competition in the economy by prohibiting restrictive trade practices (RTPs), controlling monopolies, concentration of economic power and related activities in accordance with the provisions of Cap. 504.

Although the first competition legislation had some success in addressing competition concerns in the market, the MPC did not have powers to undertake independent or autonomous decision in the competition law enforcement. For instance, the law did not set the threshold for mergers that required the Ministers authorisation. The horizontal mergers were also required to apply for ministers' authorisation order, which wasted time and resources. The other reasons include:

²⁰ Njoroge, PM. [n.d.]. 'Enforcement of Competition Policy and Law in Kenya' including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing

**Box 5: Shortcomings of the Restrictive Trade Practices,
Monopolies and Price Control Act**

- a) The minister was not time bound in regard to issuance of an authorisation or rejection order.
- b) The enforcement process was convoluted. For example, the Commissioner, after gathering evidence that there existed an infringement of the law, was required to request the alleged offender to sign a consent agreement 'not to repeat the offence'. If he repeated, he was required to attend a Hearing that would recommend to the Minister to regulate the conduct.
- c) The Minister was not obligated to publish or state reasons for his rejection of a merger application or approval of mergers with conditions.
- d) Penalty for breach prohibitions would attract a minimal fine of US\$0) or imprisonment not exceeding three years or both.
- e) Also, there were no provisions for advocacy and awareness creation.

4. Progress in Operationalisation of the Kenyan Competition Act

Implementation Progress in Kenya

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.

Specifically, the Act creates the Competition Authority, which is an autonomous public institution. This means the Cabinet Secretary is responsible for policy; a Board, appointed by the Minister, vetted and approved by Parliament is responsible for management, and the Director-General, appointed by the Board and approved by Parliament is responsible for regulation. Such kind of framework ensures that there is separation of responsibilities and hence enhancement of accountability. An appellant body, the Competition Tribunal, will also be established with the mandate of adjudicating appeals resulting from determinations of the Authority.²¹

Stakeholder consultation has shown that the Competition Act 2010 grants the independence of the Competition Authority in legal terms. Stakeholders confirmed that there is no interference from line ministries into the mandate of the Competition Authority; and the Authority has full autonomy, unlike in the previous law, in which the Minister was making the decisions. The decisions of the authority are binding and the board members were selected competitively and vetted by the Parliament to meet the constitutional threshold. However, the Minister has the power to direct the Director General to conduct specific market studies to enquire anticompetitive practices. This has not taken place to date and is therefore not a very great concern regarding the autonomy of the authority.

Currently, the government mainly provides the funding of the authority, while the Act allows the authority receiving funds from donors. *To enhance independence of the Competition Authority, financial dependence on the government should be reduced through alternative funding sources to facilitate for autonomous market enquiry decision-making and resolution of anticompetitive practices by the authority. However, some stakeholders have questioned the effectiveness of this approach.*

²¹ See http://www.cak.go.ke/index.php?option=com_content&view=article&id=99:launch-of-cak&catid=47:news&Itemid=19

Box 6: Specific Objectives of the Competition Act, 2010

- a) Increase efficiency in the production, distribution and supply of goods and services;
- b) Promote innovation;
- c) Maximise the efficient allocation of resources;
- d) Protect consumers;
- e) Create an environment conducive for investment, both foreign and local;
- f) Capture national obligations in competition matters with respect to regional integration initiatives;
- g) Bring national competition law, policy and practice in line with best international practices; and
- h) Promote the competitiveness of national firms

Source: Competition Act 2010

Generally, the current Competition Act 2010 covers all generic issues of competition regulation and has also provided for the establishment of modern enforcement institutions. The Act promotes competition through regulation of RTPs; agreement on abuse of dominance and anticompetitive mergers. All mergers/acquisitions shall require the Authority's authorisation before they are consummated. This is aimed at ensuring that the transaction does not lead to concentrated market structures with ramifications on the competition process.

However, to create predictability and certainty to the business community, the merger evaluation process is time-bound. Also in case of disapproval, the Authority is expected to publish reasons for disapproval. The Act also provides timeframes for mergers and conditions for approval or rejection of mergers. The Act further provides provision on unwarranted concentration of powers, which powers the authority to tackle market structure in terms of cross directorship among competitors, which may hamper competition. It also provides for a consumer protection provision that seeks to prohibit misleading representations, unconscionable conduct and supply of safe goods.

In terms of implementation, the Government of Kenya has operationalised the Competition Act, by establishing the Competition Authority of Kenya. The Authority is mandated to regulate market conduct, both unilateral and concerted. This is aimed at ensuring, among others, that prices are determined by forces of supply and demand; dominant firms not to abuse their position of power for example by barring new entrants, pricing unfairly and refusing to deal, and; competitors not to undertake market sharing activities. In addition, the authority is mandated to prohibit: misleading/deceptive advertising and unconscionable conduct and ensure that consumers are compensated in regard to detriment, economic or physical, occasioned by condition of goods. The Authority is also expected to profile consumer lobby organisations in order to build coalitions to facilitate enforcement of the consumer protection provisions. The Authority has the primary jurisdiction in regard to competition and consumer welfare matters in the economy and is the government's advisor on competition matters. It shall also be studying government policies,

procedures and legislation to assess their effects on competition and consumer welfare.²²

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 it 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 Kenya Competition Authority institution has developed the strategic plan to advice on the future implementation activities. The immediate challenge to the operationalisation of the Act is to develop programmes which will facilitate the creation of a culture of competition and also motivate consumers to assume their vantage position, through minimisation of information asymmetries, among others.

In terms of independence, the Cabinet secretary in the line ministry has no powers to interfere with the decisions made by the Competition Authority. This is affirmed by Section 7(2), which provides that the Authority shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour.

Alignment of the Kenyan Competition Act 2010 with the EAC Competition Act 2006

The EAC Competition Act, 2006 provides for the establishment of an EAC Competition Authority, which is to address any cross-border competition concerns in the region with the support of the respective national competition authorities. A concerted effort with the goal of a fair competition regime without legal disputes will only be possible if the national competition legislation (if available) has been harmonised with the EAC Competition Act to eliminate any sources of contention through, for example, favouring domestic firms in procurement policy or the government giving unfair advantage to specific service providers. These alignments can either take place through amendments to the EAC Competition Act based upon consensus of the Council of Ministers or through amendments of the respective national legislation.

To create a fair competition regime in the EAC region, the harmonisation of the Kenyan Competition Act, 2010 with the regional competition laws is necessary for preventing discrimination against foreign firms and for counteracting favorable treatment to domestic firms within the EAC region. However, due to political

²² See http://www.cak.go.ke/index.php?option=com_content&view=article&id=99:launch-of-cak&catid=47:news&Itemid=19

undercurrents, political problems could arise within the country, if domestic firms are not given a free run by regulating the entry and operations of foreign firms. However, if the government has the political will, it should educate the domestic firms on the need for engendering competition, particularly *vis-à-vis* foreign firms. In other words, domestic firms need to gear up and compete with foreign firms; this will happen only if the quality of goods and services improve and innovation takes center stage in Kenya.

For the case of the Kenyan Competition Law, the Competition Authority of Kenya has stated that an audit has been undertaken by the authority to assess the alignment of the national competition law as it refers to the regional competition law and found that there are no contradictions. Hence, unless the Regional Competition Authority, which will be established in the year 2015, identifies any areas of mal-alignment, it will be unlikely to see any amendments to the Kenyan Competition Act, 2010. Similar audits will have to be taken up by the remaining national competition authorities in all five EAC member states to ensure that the alignment of each national legislation with the EAC Competition Act 2006 to ensure seamless cooperation between the regional and national competition authorities to combat anticompetitive practices that cut across multiple countries in the region.

5. Interface between Sector Regulation and Competition in Select Sectors

Competition Agency and Sector Regulators

Countries are adopting trade and economic liberalisation policies of their own volition, and the need to move towards a market economy. However, due to market distortions, the benefits of trade and economic liberalisation do not necessarily always accrue to the economy. Various economies are therefore adopting major economic and political reforms in the field of economic regulation to achieve better regulatory outcomes in the public interest. The government enacted laws that culminated in the establishment of a number of regulatory institutions given that the economy was previously dominated by state owned enterprises. The creation of various statutory regulatory frameworks was aimed at ensuring that the gains from liberalisation, commercialisation, privatisation, and the new investment were not lost to the new private monopoly/ dominated players in the newly liberalised economy. Competition agencies, on the other hand, have a vital role in ensuring that the regulatory structures put in place are pro-competitive and avoid competitive distortions.

The competition authorities and regulators often share a common goal of economic efficiency. These sectoral regulators achieve their objectives by being the ‘in-market’ regulators setting the ‘rule 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.

Competition laws seek to protect the process of competition, not the participants in the market, with a view to maximising productive and allocative efficiencies.²³ Moreover, institutional cooperation is important not only to avoid the duality of regulatory power, but also to ensure enforcement and credibility of regulation and to harmonise procedures and procedural rules as in the case of competition policy and consumer rights.

The major difference between sectoral and competition regulation is that sectoral regulators address the question of market power directly (for example, restraining the possibility of pricing a monopoly service below a certain threshold), while competition authorities restrain indirectly (for example, prohibiting a merger to

²³ Gupta, Ishita (2012), ‘Interface between Competition & Sector Regulators’, Research Report, Competition Commission of India, New Delhi, India

monopoly, or impeding the monopolisation of a neighboring market.) Simply put, competition regulation tells the participants in the market what they should not do, while sector regulation tells market participants what to do.²⁴

Competition Agency and Sector Regulator Interface: Experience in Kenya

Many new regulators have emerged in the last two decades. Some have done well, while others have struggled to deliver. To attract foreign investment and provide a level playing field to the new players and the incumbent, the government set up regulatory bodies in many sectors. In some countries like Kenya, there were no strong general pro-competition laws for a long time and thus sector regulators in those countries are more advanced than the sector regulators. For instance, the former Communications Commission of Kenya (CCK) was established in 1999 by the Kenya Communications Act (KCA) No. 2 of 1998.

The CCK's initial mandate was regulation of the telecommunications and postal/courier sub-sectors, and the management of the country's radiofrequency spectrum. The Energy Regulatory Commission (ERC) was established as an Energy Sector Regulator under the Energy Act, 2006 in July 2007 with responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors, including tariff setting and review, licencing, enforcement, dispute settlement and approval of power purchase and network service.

Other regulatory bodies include Insurance Regulatory Authority, the CCK and the Central Bank of Kenya. Various sector regulators, which were earlier established to monitor the performance of sectors, have the mandate to collaborate with the Competition Authority as no sectors are exempt from the application of the relevant law. For instance, Article 5(3): If a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of this Act within a particular sector, the Authority and that body shall:

- a) identify and establish procedures for management of areas of concurrent jurisdiction;
- b) promote cooperation;
- c) provide for the exchange of information and protection of confidential information; and
- d) ensure consistent application of the principles of this Act.

The Competition Act 2010 thus provides for the formulation of MoUs to establish an operational framework between sector regulators and the competition authority. The regulations informing the operation of the sector regulators also provides for the possible collaboration between the two regulators. For example, Section 5(d) of the Energy Act 2006 provides that the ERC should monitor, ensure implementation of, and the observance of the principles of fair competition in the energy sector, in coordination with other statutory authorities, which in this sense may include CAK.

Article 5(3) of the Kenya Communications Act also allows the Commission to enter into association with other bodies or organisations within or outside Kenya as the Commission may consider desirable or appropriate and in furtherance of its mandate. However, stakeholder consultation has shown that even though some sector regulators

²⁴ *Ibid*

have good relationships with the Competition Authority, there are no formal MoUs between CAK and sector regulators to date. Nevertheless, according to the CAK, draft MoUs have been developed between CAK and the Communication Authority (formerly Communication Commission of Kenya) and the Kenya Civil Aviation Authority. This is a step in the right direction to cement and should be formalised as soon as possible and replicated with other sector regulators.

Furthermore, there are conflicting regulations with the Competition Act 2010, which are part of the mandate of sector regulators. According to stakeholder consultation, these include: the Price Control Act 2010, in which the Minister may declare any good essential and set the prices; The Energy Act 2006, which also allows for the fixing of prices; and the regulations of the horticulture sub-sector which also provides for fixing of prices.

Even though there are provisions mandating various sector regulators to collaborate with the Competition Authority, there have been cases of conflict in the past between the competition agency and the sector regulators. There were concerns where some regulators had developed a culture of egotistical independence leading to regulatory competition. A recent example was on the disagreement between Competition Authority and the Law Society of Kenya (see Box 7).

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. Some stakeholders have deemed the

Box 7: Watchdog Stops Lawyers' Bid to Increase Legal Fees

A markets regulator has blocked lawyers' quest to increase legal fees arguing that the move amounts to price fixing, which needs special exemption to apply in a free market. The CAKnow says the Law Society of Kenya's (LSK) latest attempt to increase legal fees is illegal as it is in breach of the competitions law. Lawyers have been pushing for an increase in the fees charged for a wide range of legal services, including conveyance, filing of suits, registration of trademarks and debt collection arguing that failure to review the charges is hurting lawyers' finances and keeping them out of tune with the cost of living. But the competition regulator has put up a strong opposition to the move insisting that the fixing of fees by professional organisations is only allowed under special circumstances.

"All professional bodies, including Quantity Surveyors of Kenya and Architectural Association of Kenya among others must adhere to the Competition Act, 2010," said Wang'ombe Kariuki, Director General of the Competition Authority. The law demands that "a professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market may apply in writing...for an exemption". Kariuki said that the authority is only allowed to grant exemption in cases where the professional body seeking it has proven that failure to fix prices could negatively affect the quality of services.

The competitions regulator maintains that the law requires any professional body involved in fixing of rates, minimum or otherwise, to seek its approval. To amend the remuneration order, the LSK is required to submit its proposals to the competition authority for review and offer of immunity if the proposal meets certain conditions.

provision of the Competition Authority overriding the sector regulators inefficient. This is due to the allegedly more limited understanding of sectoral issues by the overall competition authority compared to the longer established sector regulators.

Furthermore, the coordination and administration roles of different authorities are perceived to be not very well defined by the law resulting in disconnect in the legal framework between the sectoral and overall competition regulator. Concerns have been raised that the Competition Authority has taken a micro rather than a macro-management role while working with sectoral regulatory authorities, which may influence operational efficiency.

Further, the Competition Law is not tailor-made to specific sectors and hence proves to be challenging in its interpretation by different sector regulators with each sector's different dynamics. Stakeholders stated that in some cases companies engaging in anticompetitive practices might exploit loopholes in the roles between the competition regulator and sector regulators and their differing interpretations of the respective laws. This can lead to delays and a diminished positive impact on the overall competition regime in the country. However, overall, no further concrete cases of disagreement have occurred between the CAK and the CCK, due to good consultation and a good working relationship between the sector and the competition regulator.

The stakeholder analysis confirmed the existence of various good working relationships between Competition Authority and some sector regulators. However, reports from the stakeholder consultations and the aforementioned conflicts confirmed that there is need to enhance formal structural process to inform the operation between the Competition Authority and sector regulators to avoid any future conflicts. The establishment of formal MoUs between the Competition Authority and sector regulators would be a step in the right direction for enhanced cooperation between various regulators.

6. Cases of Anticompetitive Practices in Kenya

The observation of media reporting 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 in the banking, breweries, mobile telephony, public transport, will be outlined in this section. These are selected examples, which have received heightened media attention in recent months, which does, however, not represent an exhaustive list of alleged anticompetitive practices in Kenya. The CAK is currently conducting market enquiries in over 20 different sub-sectors in order to assess and eliminate any anticompetitive practices in the country.

Allegedly, the Kenyan *banking sector* is characterised by high, almost uniform lending rates, large interest rate spreads at an average of between nine and 13 percentage points over the last five years, high switching costs between different banks and consumer unfriendly behaviour such as hidden fees in lending as well as opaque terms for financial products. The CAK is currently undertaking a survey to establish the level of competition in the banking sector by identifying barriers to competition in the sector and consumer protection concerns. Furthermore, the survey will look into the complex banking tariff structure, which makes prices for services not easily comparable for consumers and makes it difficult to switch to another bank with more competitive services.²⁵

An earlier report by the Central Bank of Kenya's Bank Supervision Report showed that six banks hold 54 percent of market share for loans and deposits.²⁶ Therefore, there have been complaints about concentration of market power in the banking sector, which will be assessed by the CAK study. The investigation of market practice in the sector could potentially lead to the Competition Authority recommending far-reaching reforms of the industry to promote fair pricing of financial products for consumers and a more consumer friendly and transparent financial sector.

The Kenyan *breweries sector* is dominated by one company with a market share of 90 percent in 2011.²⁷ The company has been accused of abuse of its dominant market position and has resulted in the exit of an international competitor. A survey undertaken by the MPC in 2010 has found the company to be a monopoly, which has a 'firm grasp on the entire value chain having exclusive arrangements with different players along the value chain, a position seen as locking out other players'. The Commission reported that vertical integration existed between East African Breweries Ltd., Kenya Maltings Ltd. and Central Glass Industries Ltd., which may have led to market foreclosure.²⁸

²⁵ <http://www.businessdailyafrica.com/Banks-face-probe-by-competition-watchdog/-/539552/2049072/-/k05drcz/-/index.html>

²⁶ <http://www.businessdailyafrica.com/Competition-watchdog-investigates-banks/-/539546/2263438/-/qcp9tx/-/index.html>

²⁷ Ellis, Singh, Ongolo 2010 'Assessing the Economic Impact of Competition in Kenya' <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6064.pdf>

²⁸ <http://www.standardmedia.co.ke/?articleID=2000025364&pageNo=1>

There was also evidence found that the incumbent beer monopolist provided coolers to bars, as long as they are only used for their own products. In fact, some sources suggest that bar owners faced automatic withdrawal of the facility any time they if they were found to put rival products in the coolers.²⁹

It has, however, been observed that in 2012, that beer manufacturers became increasingly competitive in their bid for volume share with an introduction of a handful new brands and increased presence of multinationals by controlling interest in local companies and others to open regional offices within the country to oversee brand distribution.³⁰ *Therefore, the CAK should monitor market developments closely and issue recommendations to diminish the negative effects of companies' market dominance on consumers.*

The *mobile telephony market* has been fairly highly concentrated until recently, resulting in relatively high prices for end consumers. The entrance of two new operators into the market has helped to increase competition and prices have dropped by about 50 percent between 2007 and 2008.³¹

However, the leading telecoms operator in Kenya still has a market share of 67 percent. Recently, the mobile telephony and mobile financial service provider has engaged in negotiations to buy another smaller mobile provider's assets, which would increase its market share to 75.3 percent raising questions of a monopolistic position of the company if the second buyer was to pull out of the deal.³²

The Communications Authority of Kenya (formerly Communications Commission of Kenya) has shown reluctance to support the deal and issued strict conditions on the deal to protect consumers in the transition period.³³ The takeover has been put on ice by the mobile telephony companies and the market concentration increasing deal has not taken place.

The Kenyan *public commuter transport* sector allegedly operates with cartel like structures especially with regard to matatu minibuses in Nairobi. After a missed attempt by the government in 2011 to eliminate matatu operators raising prices at will and parking public service vehicles upon their own decision under illegal gang control, it is alleged that the cartel structures are still operational.³⁴

Anecdotal evidence suggests that price fixing and market sharing are common practice in the public commuter transport, which is detrimental specifically for the lower income population. The government has issued plans to introduce more than 200 county busses for a mass bus transit system, which is to ease the congestion in the Nairobi Central Business District and to increase professionalism in the public transport system. This measure is also expected to reduce cartel power of matatu

²⁹ Supra Note 27

³⁰ <http://www.euromonitor.com/beer-in-kenya/report>

³¹ Supra Note 27

³² <http://www.tmcnet.com/usubmit/-regulator-stalls-safaricom-plan-buy-yumobile-assets-business-/2014/03/26/7746379.htm>

³³ <http://www.mobileworldlive.com/safaricom-airtel-get-go-ahead-yu-tough-conditions-attached-reports>

³⁴ <http://ntv.nation.co.ke/news2/topheadlines/matatu-cartels-back-in-business/>

operators, by offering additional alternative forms of public transport. It has been reported that cartel operators have attempted to halt the process by bribing relevant officials.³⁵

However, to address anticompetitive practices in the public transport sector comprehensively, the Competition Authority of Kenya and the National Transport and Safety Authority should take concerted action to tackle illegal cartel structures.

Stakeholder consultation has highlighted that further concerns of cases of anticompetitive practices have been raised concerning Kenya Port Authority's allocation of berths at the port of Mombasa, which is perceived as a monopoly that affects the quality of service at the port. Secondly, there have been issues raised that Nairobi Water Company services have displayed challenges in terms of quality, efficiency and pricing, which could be enhanced by stimulating a competitive environment. Thirdly, cases of a monopolistic market structure were also discussed in the case of Kenya Railway Company. Fourthly, in the sugar and maize industry, well-connected businessmen are believed to create barriers to entry in certain industries.

An example of this is the manipulation of the price of sugar and maize by influencing the approval of import licenses. As a result, Kenyans pay about twice the price for sugar as Europeans and in July 2011 the price of maize was 70 percent above the already high world market price. In mid-2014 the CAK is conducting a maize milling market enquiry study to assess the levels of competition in the industrial maize milling market sector, which is expected to shed some light on the alleged anticompetitive practices in the maize industry.

As mentioned above, this is by no means an exhaustive list of alleged anticompetitive practices in Kenya, which are yet to be sufficiently addressed by competition and sector regulators. Hence, even though good progress has been made in the implementation of the competition policy and law in Kenya, there is room for improvement to address among others the above outlined anticompetitive practices. This includes already privatised sub-sectoral activity as well as those sectors that are still dominated by state-owned monopolies. Ultimately, a level-paying field in the various sectors of the economy will result in increased efficiency and enhanced consumer benefits as evidence suggests.

³⁵ <http://nairobinews.nation.co.ke/matatu-cartels-wont-stop-city-buses-plan-official/>

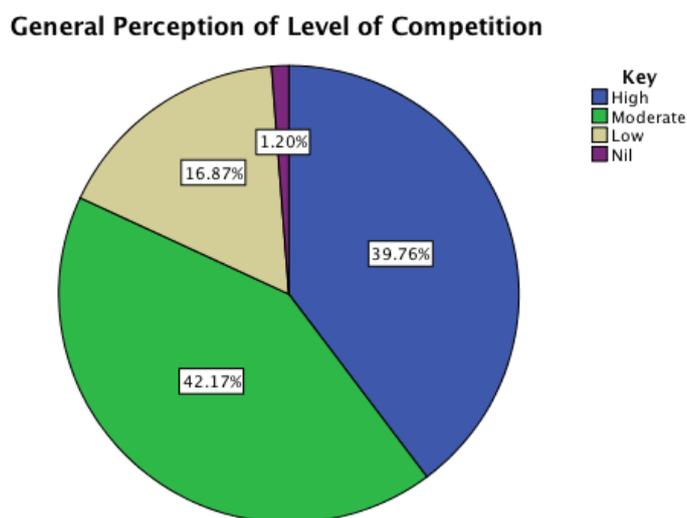
7. Cross-sectional Perceptions Regarding Competition Concerns

As part of the project ‘Accelerating the Implementation of EAC Competition Policy and Law, CUTS Nairobi has carried out a qualitative field study to assess the awareness and understanding of stakeholders (government, business, civil society and informed consumers) on competition issues in the Kenyan context. The study was conducted using a structured research questionnaire, which was analysed using statistical software packages and qualitative analysis of freely answerable questions. The findings of the study are presented below.

Perception of the Level of Competition in Kenya and Various Relevant Sectors

Among the study participants, majority of respondents rated their perception of the level of competition in Kenya as high or moderate with 40 percent and 42 percent respectively. Around 17 percent of respondents perceive the competition level in Kenya as low, while 1 percent perceive there not to be any competition (see Figure 2). This assessment was with the background that 64 percent of respondents believed competition levels to relevant and that the level of competition has a high impact on the daily lives of consumers especially when it comes to their retail consumer good choices, access to goods, pricing and quality of the goods available. None of the respondents believed that the level of competition does not have any significant impact on consumer’s lives and 31 percent perceived competition’s impact as moderate. This shows that the importance of competition for the consumer’s benefit is well understood and appreciated among the study participants, who are representing informed consumers, government representatives, business association representatives and civil society.

Figure 2: General Perception of Level of Competition



For the case of Kenya, the key stakeholders identified various sectors, which they regard as being characterised by monopolies. The five sectors with most responses by study participants were energy, telecommunication, transport, consumer goods and water. When asked to provide a view on the perceived level of competition in different sectors of telecom, power, retail (consumer goods) and commuter transport such as busses, matatus and taxis study participants provided their views on their perceived level of competition in the above mentioned sectors (see Figures 3 to 6). Notably, stakeholders perceive the level of competition in the retail sector for general consumer goods as highest, followed by the telecom sector and the commuter transport sector, while the power sector in Kenya was perceived as the least competitive sector by study participants. .

Figure 3: Perceived Level of Competition in the Telecom Sector

Perceived Level of competition in the Telecom Sector

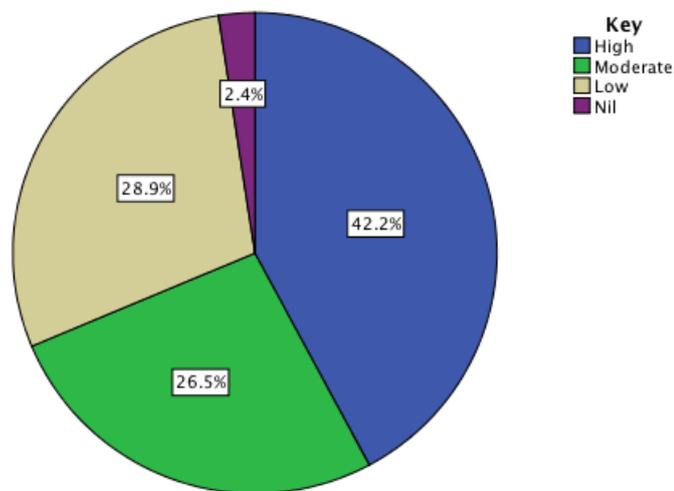


Figure 4: Perceived Level of Competition in the Power Sector

Perceived Level of competition in the Power Sector

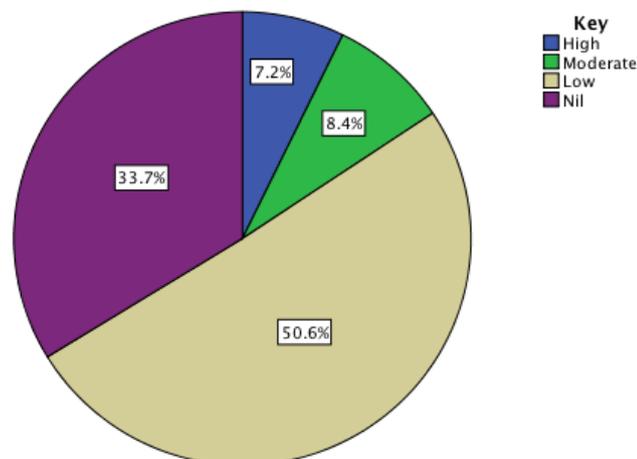


Figure 5: Perceived Level of Competition in the Retail Sector

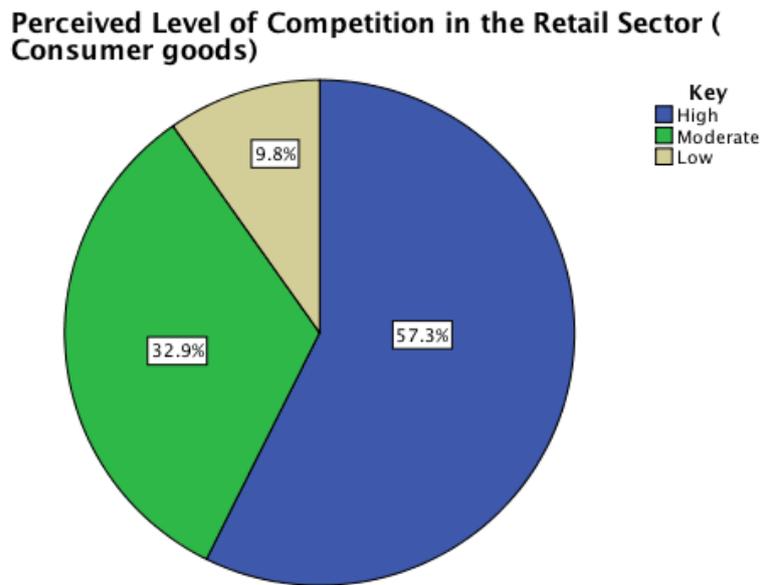
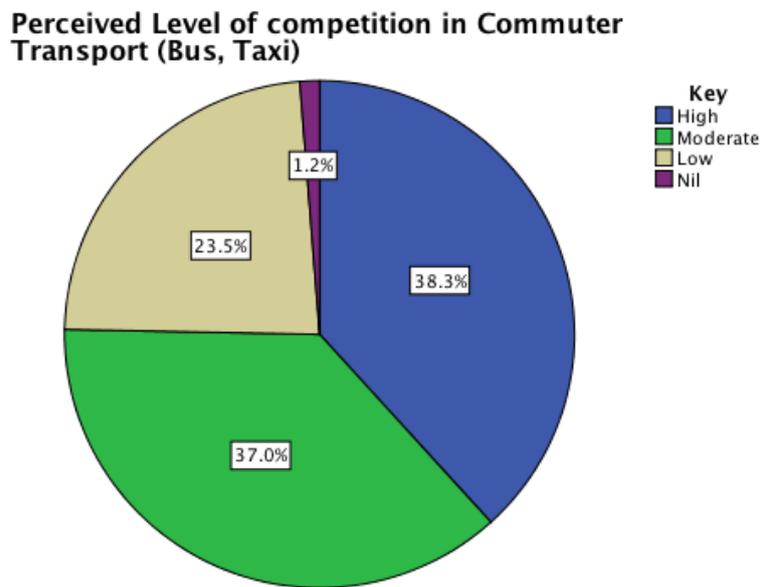


Figure 6: Perceived Level of Competition in Commuter Transport



Perception of Anticompetitive Practices Experienced in Kenya

The study participants were asked to rate how often anticompetitive practices (ACPs) (see Box 8) are encountered in Kenya. Overall, 26 percent of respondents perceived anticompetitive practices to occur very frequently, while the majority of 59 percent of respondents believe that any of the above mentioned practices occur quite frequently and minorities of respondents perceive the frequency of anticompetitive practices as infrequent or non-existent with 14 percent and 1 percent of respondents respectively. Therefore, it is evident that stakeholders perceive the level of anticompetitive practices in Kenya as relatively high.

Box 8: Anticompetitive practices

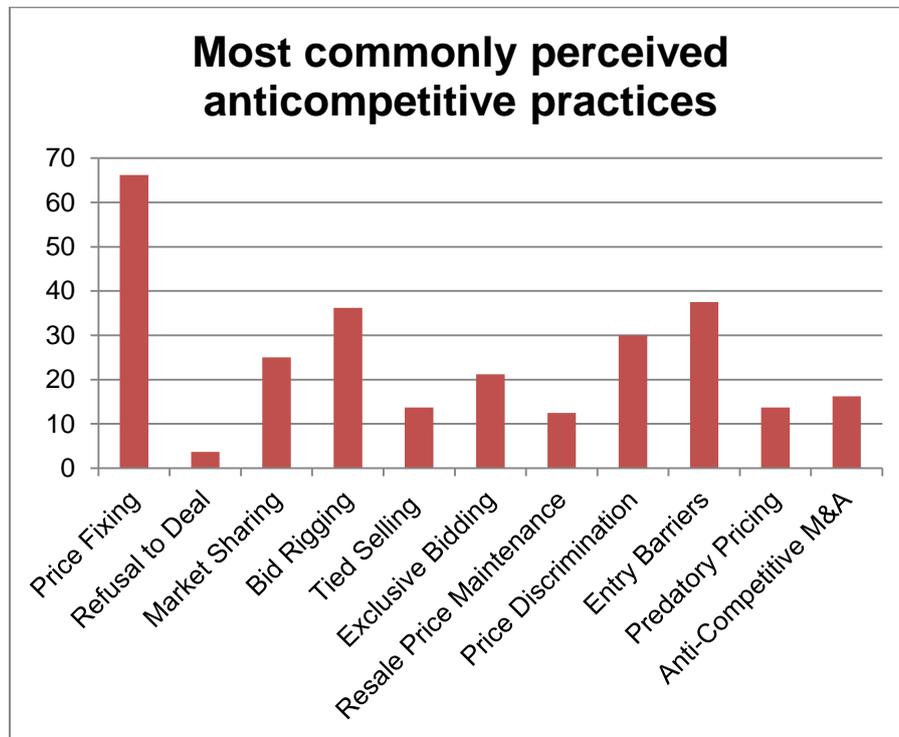
- Cartels:
 - Market Sharing
 - Bid Rigging
 - Price fixing
- Abuse of dominance:
 - Tied selling
 - Exclusive dealing
 - Concerted refusal to deal
 - Resale price maintenance
 - Price discrimination
 - Predatory pricing
 - Entry barriers
- Mergers and Acquisitions (resulting in monopolies or other types of market concentration)

Study participants rated *price fixing*, whereby competitors would enter into a process of a collusive agreement to form a cartel to then fix prices in agreement is perceived as the most frequently encountered anticompetitive practice perceived in Kenya. The second most commonly perceived anticompetitive practice outlined by the study participants are *barriers to entry*. A scenario of entry barriers occurs if the entry of new players into the market is hampered by existing players or in some cases government policy and regulations such as restricted or difficult business registration licensing. The third most frequently mentioned anticompetitive practice among respondents is *bid rigging* in which firms participating in a bid for a tender would either collude to arrange among themselves who will make the relatively best offer, while the other bidders come up with uninteresting ‘covered’ bids for the tender (see Figure 7).

From the analysis it becomes clear that the stakeholders assessed in this study most commonly perceive *cartels* distorting competition in the Kenyan market, since the two most relevant anticompetitive behaviors perceived are price-fixing and bid rigging, which can be categorised as practices engaged in by cartels. Cartels can be defined as agreements among competitors to maximise their revenues. By so doing the cartel collectively seeks to block entry of non-cartel members into the relevant market through fixed prices, bid rigging and market sharing. Cartels are very damaging to government project tender procedures, because they may cause rigging of bids where cartel members take actions to win bids in turns, thus stifling competition.

Furthermore, stakeholders in Kenya perceive *abuse of dominance*, which is depicted by entry barriers among other anticompetitive measures, as a very common anticompetitive practice. Abuse of dominance happens when a single firm is able to impose a series of restraints on its suppliers, distributors or consumers in order to increase their earnings abusively (see Box 8). This perception survey among informed stakeholders could be used to inform the Competition Authority’s agenda on market enquiries on anticompetitive practices.

Figure 7: Most Commonly Perceived Anticompetitive Practices



Domestic Competition Enforcement Issues

This study further aimed to assess the level of awareness on the legal and regulatory framework guiding the enforcement of competition principles in the country and keeping anticompetitive practices in check. Among the study respondents, the majority of 71 percent stated that they know there are rules, regulations or laws in place to check anticompetitive practices in the market. Around 26 percent of respondents were able to name the specific Consumer Protection Act, which governs competition principles in Kenya. Study participants identified the Consumer Protection Act and the Energy Act as such legal provisions. Even though this represents a positive outlook on the levels of awareness of legal and regulatory competition enforcement framework, there is still significant pockets among the stakeholders, who either do not know of any enforcement framework against anticompetitive practices (25 percent) or believe that there is no such framework in place in Kenya (4 percent) (see figure 8).

Given that the population assessed in this study consisted of stakeholders of the private sector, government, civil society such as consumer protection organisations and informed consumers, it is possible to conclude that the general population would

have much lower awareness levels on the issues of legal and institutional structures concerning the elimination of anticompetitive practices.

Figure 8: Awareness of Rules, Regulations or Laws to Check ACPs

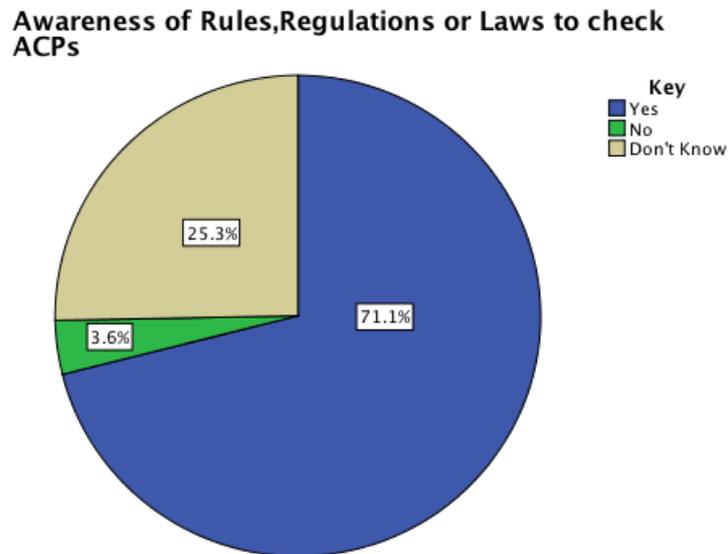
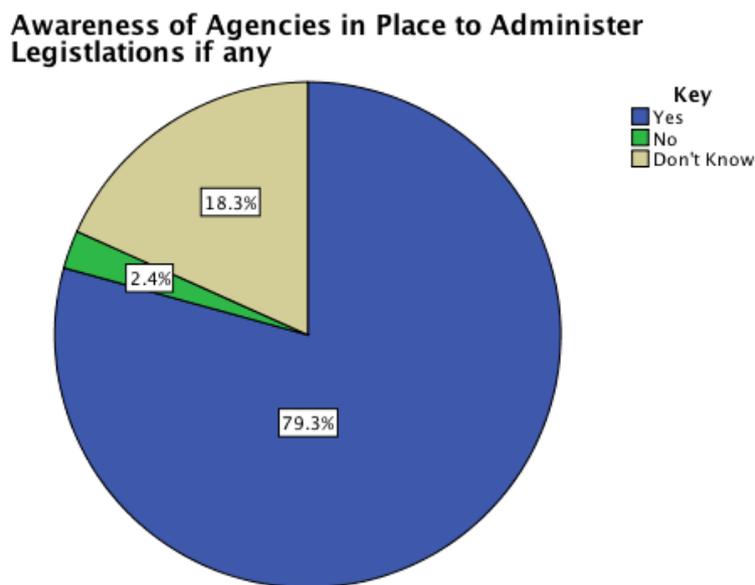


Figure 9: Awareness of Agencies in Place to Administer Legislations, if any

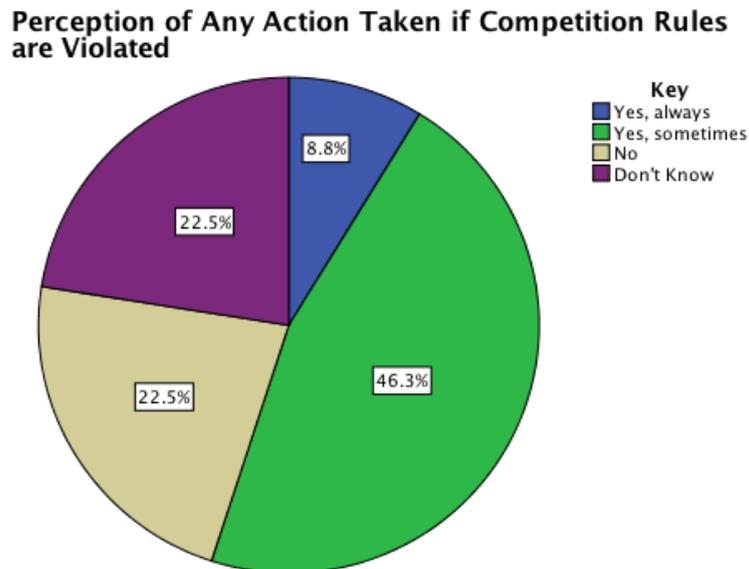


Similarly to the legal and institutional structures for the enforcement of competition policy, more than two thirds of the study respondents are stating that there are agencies in place to administer the competition legislations and rules in the Kenyan market (79 percent). A relatively small share of the study participants (18 percent) state that they are not aware of any institutions enforcing the legal framework to address anticompetitive practices, while 2 percent of the respondents believe that there is no such agencies in place (see Figure 9). Out of the total number of

respondents around a quarter (26 percent) of the respondents were able to name the specific agency that deals with the enforcement of competition policy and law in Kenya, the CAK. Other authorities that were named by respondents included the Communications Commission of Kenya (9 percent), the Energy Regulatory Commission (7 percent), Anticounterfeit Agency (6 percent) and Kenya Bureau of Standards (5 percent).

Even though the general awareness level of the existence of competition agencies is relatively high among the informed stakeholder survey, it should be a priority of the CAK to raise consumer, government and private sector awareness on the roles and mandate of the newly established authority in order to allow consumers as well as producers in the Kenyan market to approach the institution in the case of witnessing any anticompetitive market conduct. Comparatively low levels of awareness of the specific specialised institution CAK, indicates that more capacity building of stakeholders and awareness creation among consumers is required.

Figure 10: Perception of Any Action Taken if Competition Rules are violated

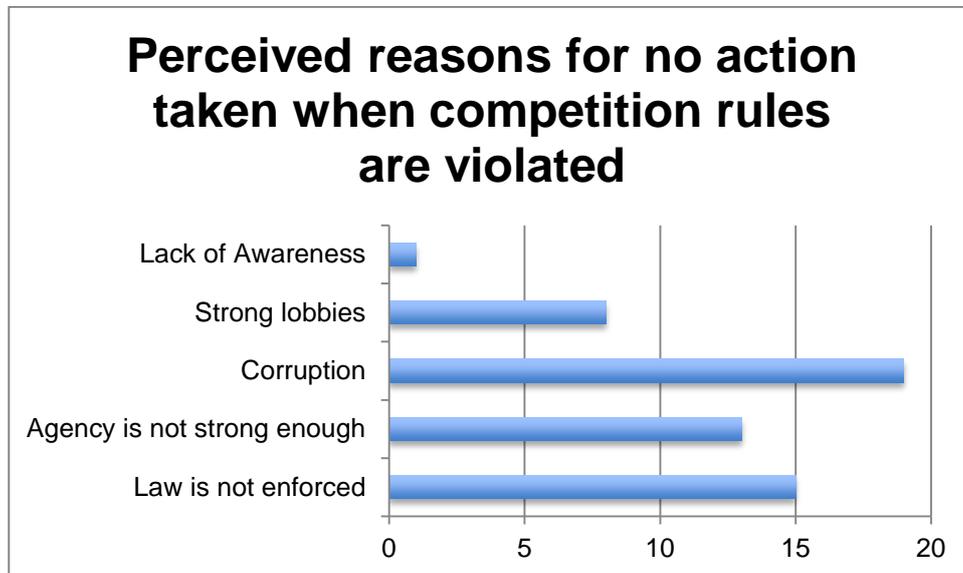


Currently, the perception on any actions taken by the relevant competition related agencies against anticompetitive practices are rather fragmented. Of the study respondents, 46 percent believe that action is taken only sometimes if competition rules and regulations are violated, while a minority of 9 percent of study respondent perceives that there is always action taken in case competition law and regulations are violated. Equal shares of 23 percent of the study participants stated that either they are not aware if any action is taken against anticompetitive practices or perceived that there is no action taken. This could either imply that stakeholders lack in awareness of the actions that the CAK is undertaking against anticompetitive practices or that the authority is not living up to the respondents' expectations of taking action.

The most commonly perceived determinants for the lack of action taken against violation of the competition law and regulation were: corruption followed a lack of law enforcement and a perceived weak competition agency (see Figure 10). *Hence, concerted action needs to be taken by the Competition Authority, sector regulators*

and other relevant government agencies to reduce the level of corruption in the competition law enforcement system to foster the effective implementation of competition law through taking action against breaching of the law.

Figure 11: Perceived Reasons for No Action Taken When Competition Rules are Violated



Consumer Protection and Competition

A significant aspect of competition policy is consumer protection legislation to protect consumer interest from unfair business practices. As mentioned in previous sections, Kenya has enacted the Consumer Protection Act in 2012, which is a standalone consumer protection law that is in the process of being implemented through a Commission. The law has been enacted in addition to the Competition Act 2010, which additionally contains specific elements of consumer protection. Of the study respondents, 73 percent are aware that a consumer protection law exists in Kenya, while 25 percent did not know if such a law existed or not, and 3 percent believed that there is no such law in place in Kenya (see Figure 12).

The most frequently mentioned law that was named for consumer protection in Kenya was the Consumer Protection Act 2012 with 25 percent of the study participants naming the law. The Competition Act 2010 was mentioned by 6 percent of the respondents who were able to name the law, and lastly, one respondent referred to the Kenyan Constitution. *Hence, among the key stakeholders the general awareness on the existence of a consumer protection law is high, while the knowledge of the specific laws protecting consumers is relatively lower. This would indicate that capacity building and awareness creation of consumer protection laws as part of competition frameworks is required.*

Figure 12: Awareness of Consumer Protection Law

Awareness of Consumer protection law

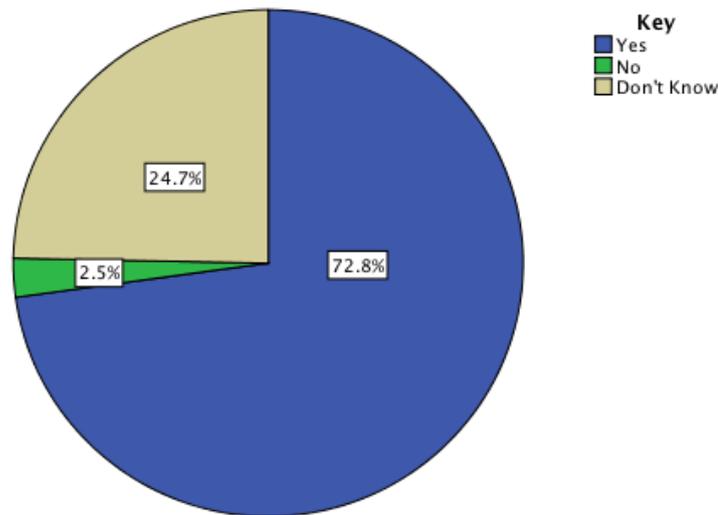
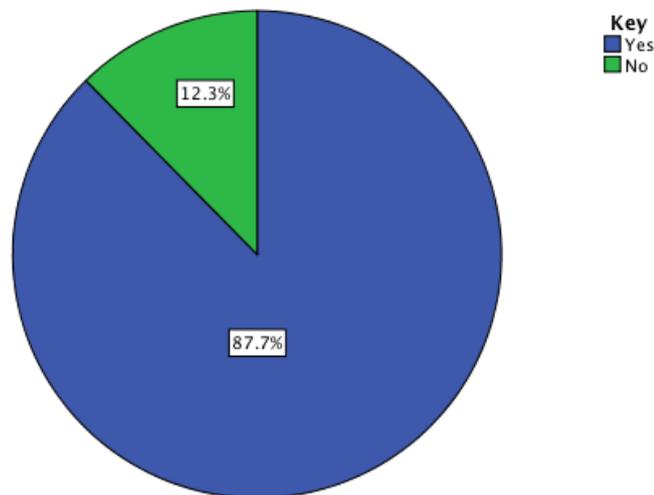


Figure 13: Awareness of any Agencies that Protect Consumer Interests

Awareness of Any Agencies that Protect Consumer Interests...



An even greater percentage of the study respondents of 88 percent were aware that consumer agencies exist in Kenya. The most commonly mentioned consumer focussed organisations were as follows: Consumer Federation of Kenya (COFEK), Competition Authority of Kenya (CAK), Kenya Bureau of Statistics (KEBS), Communications Commission of Kenya (CCK), Energy Regulatory Commission (ERC), Kenya Consumer Organisation (KCO), Consumer Information Network (CIN) and Consumer Unity & Trust Society (CUTS). The finding indicates that stakeholders are aware of the interface between competition and sector regulators such as the ERC and CCK and their relevance for consumer protection. Awareness among study participants is higher relating to the institutional structures and organisations for consumer protection than the legal framework underpinning consumer protection practice (see Figure 13).

The Role of Government in the Private Sector

Over the past decades the Kenyan economy has moved towards a more competitive business environment with efforts to privatise state-owned businesses. However, the key stakeholders consulted in this survey believed that there are state owned monopolies operating in Kenya. A great majority of 89 percent of respondents stated that they perceive that state owned monopolies do exist in Kenya. A small fraction of 6 percent of the respondents believed that there are no state owned monopolies and 5 percent were not sure (see Figure 12). The clear sentiment of the existence of monopolistic structures of government owned enterprises indicates that anticompetitive practices are engaged in by those enterprises with high visibility. According to the respondents, the majority of 62 percent perceived that state-owned monopolies indulge in anticompetitive practices in Kenya, hence compromising the competitive environment and private sector growth (see Figure 13). Respondents perceived that the most commonly engaged anticompetitive practices by state owned monopolies were *price discrimination*, *price fixing*, *exclusive dealing*, *re-sale price maintenance* and *entry barriers*.

Figure 14: Perception of Existence of State Owned Monopolies

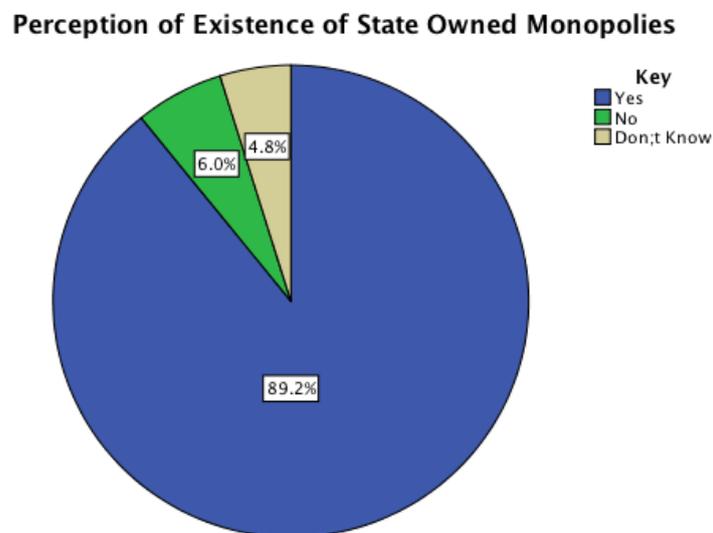
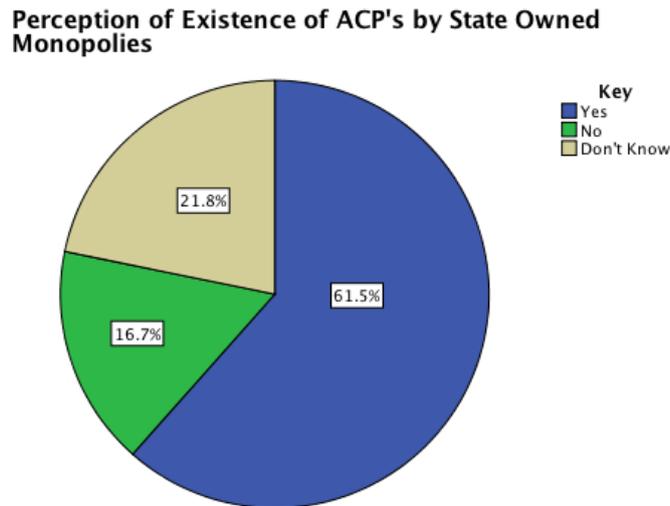


Figure 15: Perception of Existence of ACPs by State Owned Monopolies



With its mandate to address such issues, the CAK would be required to identify and eliminate such anticompetitive practices in the Kenyan market. *For the process to be undertaken successfully, stakeholders should be involved to guide the actions and sectoral enquiries of the authority. The majority of 85 percent of respondents recommended that the process of stakeholder consultation should be carried out by CAK in a structured process rather than in a random manner only if there is an immediate need for a specific case of market enquiry, which 12 percent perceived as the most effective way to involve stakeholders in the work of the authority.* A small fraction of three percent believed that a combined approach of a regular structured process with on-demand consultation for specific cases is the best strategy to engage key stakeholders to advance the competition agenda.

Competition Culture and Public Awareness

In order to achieve a successful operationalisation and implementation of competition and consumer protection legislation and policies, high levels of public (consumer) awareness and key stakeholder knowledge among private sector representatives, relevant government line ministries, sector regulators and civil society is necessary. However, 86 percent of the study participants perceived that competition issues are not well understood by the majority of the population in Kenya. The perception of awareness among key groups such as politicians, business people and consumers varied considerably. The study respondents perceived that within the three groups, the business community has the largest share of people who understand competition related issues well, while consumers were rated as the least aware and politicians occupied the middle field (see Figures 16 to 18).

Figure 16: Perceived Level of Awareness of Competition Issues among Politicians

Perceived Level of Awareness of Competition Issues Among Politicians

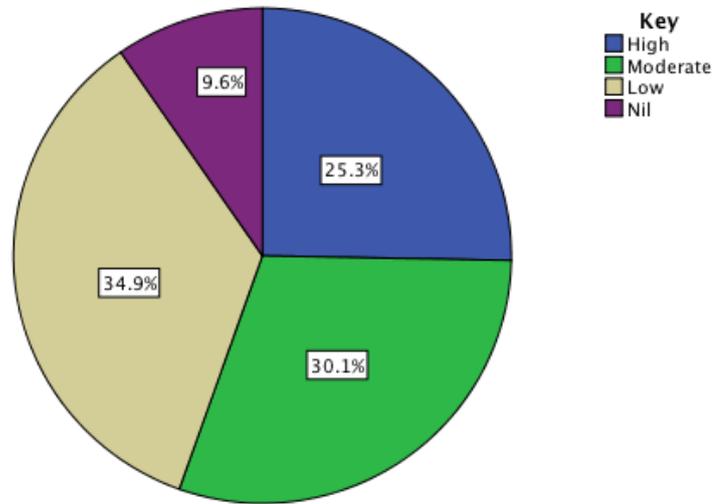


Figure 17: Perceived Level of Awareness of Competition Issues among Business People

Perceived Level of Awareness of Competition Issues Among Bussines People

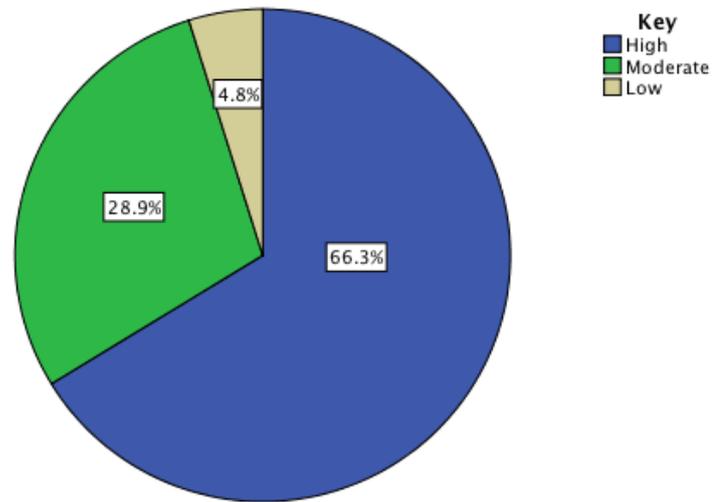
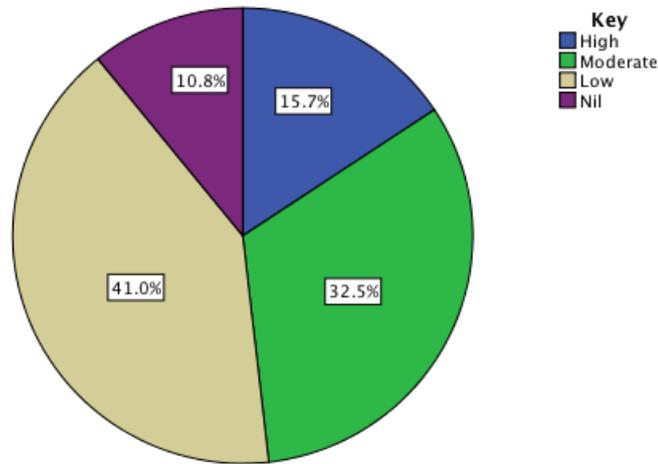


Figure 18: Perceived Levels of Awareness of Competition Issues among Consumers

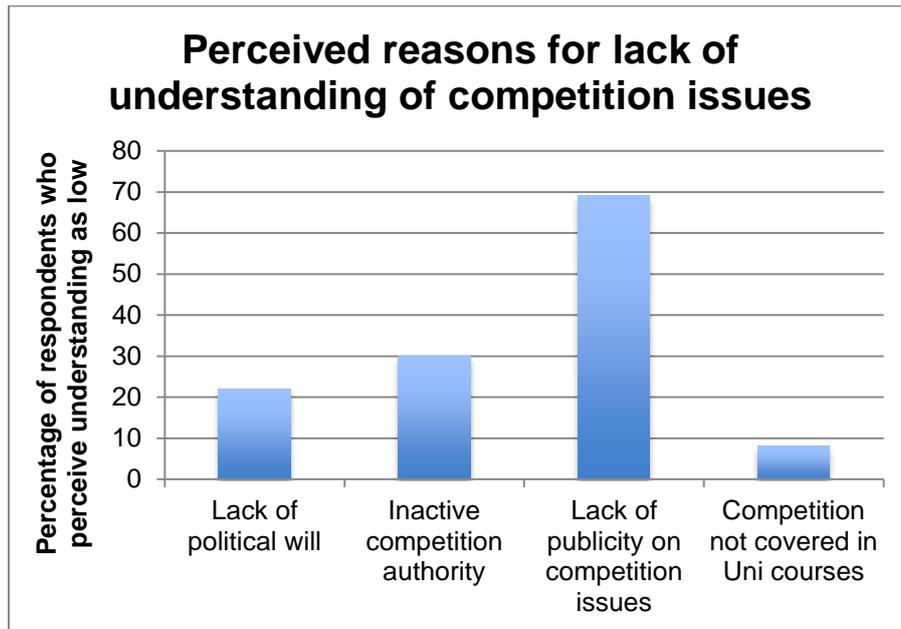
Perceived Level of Awareness of Competition Issues Among Consumers



Thus capacity building activities by the relevant authorities and civil society are most needed for the grassroots consumer segment as well as politicians. Through capacity building, consumers, politicians and the business community would appreciate the relevance of competition culture for their daily lives, enterprise operations and opportunities and political decision-making. All three stakeholder groups' capacity to identify and report anticompetitive practices in the Kenyan market to CAK is highly relevant for the effective implementation of Competition law. Overall, less than a quarter (14 percent) of the study respondents had the perception that the Kenyan population has a good understanding of competition issues. The great majority (86 percent) believed that there is a lack of understanding of the issues among Kenyans.

The most frequently cited reasons for the low level of understanding of competition concepts included that there is a lack of publicity and media reporting on competition issues such as anticompetitive practices with close to 70 percent of stakeholders, followed by the perception that the competition authority is inactive in informing consumers on the matter (30 percent) and a lack of political will by government stakeholders to inform the public (see Figure 19).

Figure 19: Perceived Reasons for Lack of Understanding of Competition Issues



In line with the most commonly cited reason for the lack of understanding of competition issues, 42 percent of the study respondents outlined that competition issues are reported only sometimes and an almost equal share of respondents stated that competition issues are reported rarely, while 7 percent perceived the issue never to be reported. However, the minority of 11 percent of respondents reported that the media addresses competition issues very often. *These findings show that the media could take more action in reporting competition related matters including anticompetitive practices that are occurring in Kenya.* As perceived by the study participants, reports on anticompetitive practices were most commonly found in newspapers, closely followed by television and comparatively rarely on radio shows.

Figure 20: Frequency of Competition Issues and Anticompetitive Practices being reported on in the media

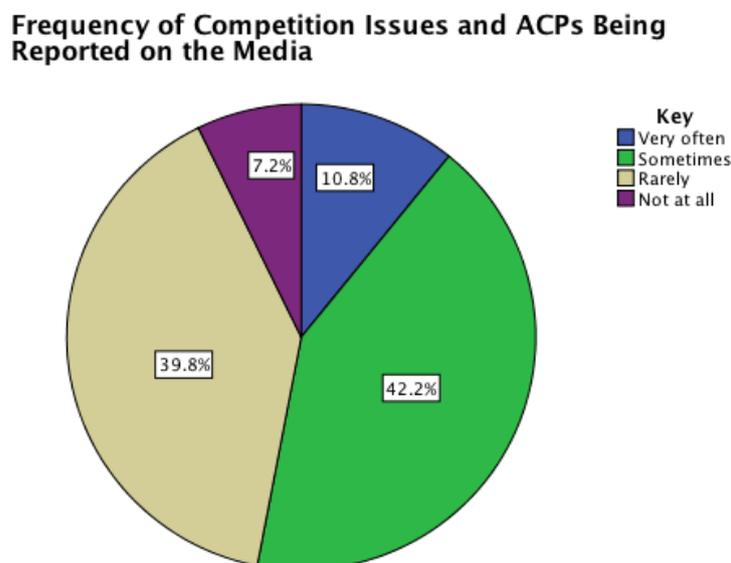
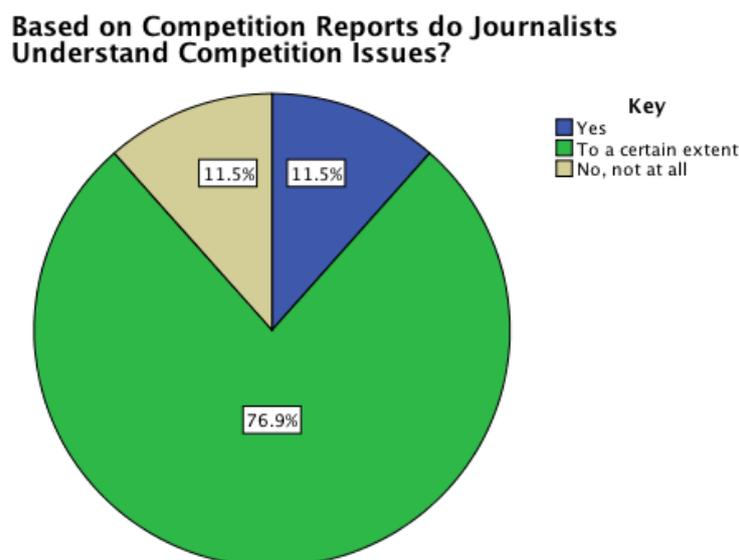


Figure 21: Based on Competition Reports, do Journalists understand Competition Issues?



Based on the media reports on competition issues, 77 percent of the study participants had the impression that journalists understand competition related matters and anticompetitive practices to a certain extent, while equal shares of 12 percent believed that journalists either do not understand the issues at all or that they understand the competition well (see Figure 21). *Given that the majority of stakeholders believe that there is room for improvement for journalists to understand competition and report appropriately, there should be a capacity building initiative to journalists and reporters. Capacity building will enhance the ability of journalists to identify and report anticompetitive practices to the Kenyan public more effectively, thus increasing consumer's awareness on competition issues.*

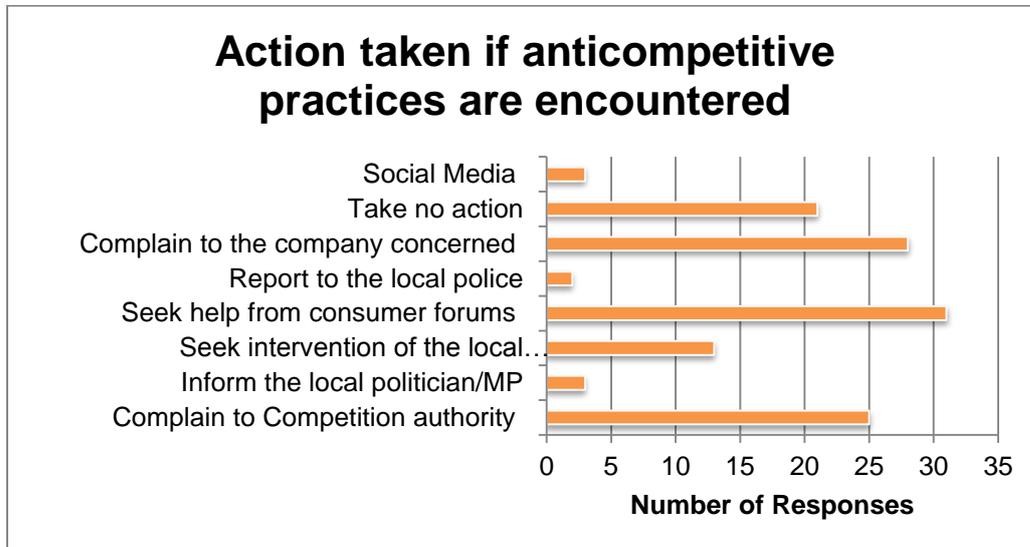
Over the medium and long term, increased consumer and stakeholder awareness will lead to the improved ability of consumers, politicians and other stakeholder's ability to identify anticompetitive practices in the Kenyan market as well as their knowledge and motivation to take action against various cases of anticompetitive behaviour.

Clear guidance through the media and capacity building workshops by the Competition Authority will be required to inform consumers of their options to file complaints and seek redress in case unfair business practice is observed, which negatively affects consumer welfare and wider economic growth of the country. Concerted efforts of stakeholders at all levels are required to effectively enforce the competition regime and to instill a competition culture in the society.

The study participants were asked which action they would take if they encountered anticompetitive practices, which impinge on their consumer rights and welfare or their business practices (for the case of private sector study participants). Most respondents would seek help from consumer forums, complain to the company concerned or complain to the Competition Authority. However, a relatively large number of stakeholders have stated that they would not take any action if they encountered

anticompetitive practices in the Kenyan market place (see Figure 22). This could either be caused by a lack of awareness of complaints avenues and the relevant authority to turn to or a generally low appreciation of competition principles and their benefits to the business environment and the consumer.

Figure 22: Action taken if Anticompetitive Practices are Encountered



Therefore, public awareness needs to be built to address this inability and unwillingness to take action if anticompetitive conduct is observed or encountered by every stakeholder group in the Kenyan market. Three areas should be highlighted in awareness campaigns: the importance and benefits of effective competition for consumers and the business environment, avenues for complaints to the relevant authorities and strategies for identifying possible anticompetitive practices that should be brought to the attention of regulators.

8. Conclusion and Recommendations

In conclusion, Kenya has made significant progress in implementing an effective competition regime through the enactment of the Competition Act, 2010, which addressed some of the major shortcomings of the previous Restrictive Trade Practices, Monopolies and Price Control Act. The establishment of the CAK as an independent overarching regulatory body for competition matters paved the way for the operationalisation of the newly enacted competition law.

As a provision of the Competition Act previously established sector regulators are expected to cooperate with the Competition Authority in order to achieve the common goal of an effective competition framework in Kenya. Even though there have been instances of conflict among sectoral regulators and the Competition Authority due to differing interpretations of legal provisions and non-aligned Competition and sectoral legislation, conflicts have been resolved and generally good working relationships among the different authorities have been established. However, no formal MoUs have been signed between the various sector regulators and the Competition Authority to date for which the Competition Act calls in order to formalise the cooperation framework.

The Competition Authority has been successful to prevent anticompetitive private sector practice in some cases in recent years. However, there are still a large number of alleged anticompetitive practices present in Kenya, which are yet to be addressed by the Competition Authority in cooperation with the relevant sector regulators. Allegations are found for example in the banking and insurance, breweries, mobile telephony, public transport, maize and sugar sub-sectors and logistics sector among others.

The Competition Authority is currently investigating practices in some of these sectors, notably the industrial maize milling and banking markets. Natural monopolistic structures such as in the postal and electricity sub-sectors are still de facto in place despite unbundling reform efforts in recent years. In addition, stakeholders' consultation in this study shows that *cartels* are most commonly perceived to be distorting competition in the Kenyan market, since the two most relevant anticompetitive behaviors perceived are price-fixing and bid rigging, which can be categorized as practices engaged in by cartels.

Furthermore, stakeholders in Kenya perceive *abuse of dominance*, which is depicted by entry barriers among other anticompetitive measures, as a very common anticompetitive practice still present in the Kenyan market. The above-mentioned anticompetitive practices are areas, which should be investigated and prevented by the Competition Authority and sector regulators.

The objectives of the Kenyan Competition Act 2010 include a mandate to protection consumers from unfair business practice, which seeks to further enhance the benefits of an effective competition regime to the average consumer through competitive pricing and increased market choice through free market entrants. This provision was

extended in the Kenyan context through the enactment of the Consumer Protection Act, 2012.

The Consumer Protection Act is in the early stages of its operationalisation, with the Kenya Consumer Advisory Committee being inaugurated in early 2014. The Committee is to extend the consumer protection role of the Competition Authority, the Energy Regulatory Commission, the Communication Commission and the Anticounterfeit agency, which previously were the bodies charged with issues of consumer protection as part of their mandate. Given the effective cooperation of the Competition Authority and sector regulators, the Consumer Protection Act is expected to further enhance consumer benefits within and beyond the competition framework.

Generally, although there is a legal and institutional framework in place for competition and consumer protection policy, Kenya still lacks a strong competition culture. Stakeholder consultation has shown that the general population is mostly unaware of the benefits and rights that are to be enjoyed by consumers and producers through the effective implementation of a competition regime. While the business community is perceived to have the greatest understanding of competition issues, consumers are perceived to have the lowest level of understanding of competition-related matters. Politicians are perceived to have a fair understanding of related issues. This relatively low level of awareness applies to both the legal framework for the Kenyan competition regime and the institutional structures in place to administer such laws.

The main reasons cited for this lack of understanding of competition issues and the lacking competition culture have been perceived low media publicity on competition issues as well as a perceived inactive Competition Authority. The low awareness levels have, according to study findings, led to either reluctance or inability of the general public and CSOs to take action to seek redress with the relevant authorities if anticompetitive practices are encountered.

In the wider regional perspective, Kenya is a signatory to EAC competition law, which as enacted in 2006 as the EAC Competition Act 2006. The Act seeks to promote and protect fair competition within the Community, to provide for consumer welfare, and to establish the EAC Competition Authority. If implemented effectively, evidence suggests that the Act would promote private sector development, economic growth and poverty reduction in the EAC integration process. However, there has been slow progress in implementing the regional competition policy and law despite the importance of the EAC competition regime.

As is the case with other EAC member states that have already enacted domestic competition acts, there is a need for clear coordination and alignment between the regional and national competition legislation and institutional structures to address regional anticompetitive practices especially in the EAC Common Market framework. However, some progress has been made through sustained negotiations among partner states on how to operationalise EAC competition policy and Kenya has participated in negotiations for the activities of the EAC Secretariat, which currently handles EAC competition issues under its Trade Directorate.

Based on the primary and secondary research findings of this report, CUTS Nairobi would like to provide following recommendations to advance the operationalisation and implementation of competition-related policy and legal reforms in the Kenyan context:

Public Awareness Creation and Capacity Building

One of the immediate challenges to the 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 vantage position, through minimisation of information asymmetries. High levels of public (consumer) awareness and key stakeholder knowledge among private sector representatives, relevant government line ministries, sector regulators and civil society is necessary to be able to advocate effectively for competition policy related reform implementation in Kenya. Awareness on the roles and mandate of the newly established Competition authority in order to allow consumers as well as producers in the Kenyan market to approach the institution in the case of witnessing any anticompetitive market conduct is imperative to keep anticompetitive practices in check.

Therefore, three areas should be highlighted in awareness campaigns: the importance and benefits of effective competition for consumers and the business environment; avenues for complaints to the relevant authorities; and strategies for identifying possible anticompetitive practices that should be brought to the attention of regulators.

Increased Competition Authority Engagement with the Media

The study findings have shown that awareness levels of the competition policy and law framework are rather low and that the general population has a low level of understanding of competition issues in Kenya. The main reason stated for low awareness levels among the population is the lack of media publicity of competition issues. These findings show that the media could take more action in reporting competition related matters including anticompetitive practices that are occurring in Kenya.

Therefore, clear information needs to be provided by the media through guidance and consultation with the Competition Authority to inform consumers of their options to file complaints and seek redress in case unfair business practice is observed. Concerted action of the media and the Competition Authority are required to effectively enforce the competition regime and to instill a competition culture in the society. Furthermore, given that the majority of stakeholders in this study believe that there is room for improvement for journalists to understand competition and report appropriately, there should be a capacity building initiative to journalists and reporters. Capacity building will enhance the ability of journalists to identify and report anticompetitive practices to the Kenyan public more effectively, thus increasing consumer's awareness on competition issues.

Formalise the Cooperation between Sector Regulators and CAK through MoUs

The Competition Act 2010 provides for the formulation of MoUs to establish an operational framework between the sector regulators and the competition authority. The regulations informing the operation of the sector regulators also provides for the

possible collaboration between the two regulators. However, stakeholder consultation has shown that even though some sector regulators have good relationships with the Competition Authority, there are no formal MoUs between CAK and sector regulators to date, even though draft MoUs have been prepared between CAK, the Communications Authority and the Kenya Civil Aviation Authority.

Therefore, there is a need to finalise the formal structural process to inform the operation between the Competition Authority and sector regulators to avoid any future conflicts. The establishment of formal MoUs between the Competition Authority and sector regulators would be a step in the right direction for enhanced cooperation between the various regulators. This type of formalised institutional cooperation is important not only to avoid the duality of regulatory power, but also to ensure enforcement and credibility of regulation and to harmonise procedures and procedural rules as in the case of competition policy and consumer rights.

Regular Stakeholder Consultation in Competition Authority's Market Enquiry Processes

With its mandate to address anticompetitive practices and market distortions in the Kenyan market, the CA K is required to both identify and eliminate such practices through its actions. For the process of identification of malpractice to be undertaken successfully through market enquiries, stakeholders should be involved to guide the actions and sectoral enquiries of the authority. The stakeholders consulted in this study recommended that the process of stakeholder consultation should be carried out by CAK in a structured, regular process rather than in a random manner if there is an immediate need for a specific case of market enquiry. This would ensure a consistent and more effective framework to involve stakeholders in the fulfillment of CAK's mandate through regular expert and observer information collection.

Maximise Competition Authority's Independence through Alternative Funding Sources

To ensure independence of the Competition Authority, financial dependence on the government should be reduced to a minimum to facilitate for 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 to enhance the authority's independent financial sustainability of its operations. This provision should be exploited by the Competition Authority through seeking funds from donors free of conflict of interest.

Alignment of Kenyan Competition Legal Framework to Other Domestic Legislation, COMESA and EAC Legislation

The legal and regulatory framework for competition in Kenya will need to be well aligned with both relevant domestic legislation that affects matters of competition and the wider regional legislative frameworks governing competition in order to be implemented effectively for the benefit of consumers, producers and the wider economy. Most notably, national competition acts in Kenya and other EAC countries have to be well aligned with the EAC Competition Act 2006 in order to facilitate seamless cooperation to address anticompetitive practices that cut across multiple countries in the region.

The regional economic communities like COMESA and EAC have provisions aimed to address cross-border related anticompetitive practices. For example domestic legislation such as the Price Control provision, which facilitates for the fixing of prices for essential goods may violate trade agreements with the EAC and COMESA, which Kenya is a signatory to, while also impinging on other domestic legislation. It is thus imperative to create a complementary framework between the national and regional legislation during the implementation process, to avoid any possible constrains in the implementation of the Competition Act and by extension affect the general performance of the private sector.

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