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*Kenya**

– *Kwame Owino*†

Kenya[1] is located in East Africa, bordering Somalia to the East, Ethiopia and Sudan to the North, Uganda to the West, and Tanzania to the South. The country, a former British colony, has an Indian Ocean coastline of 536 km. The founding President, Jomo Kenyatta led Kenya from independence in 1963 and ruled the country until his death in 1978, when President Daniel Toroitich Arap Moi took power in a constitutional succession.

The country was a *de facto* one-party state from 1969 until 1982 under the ruling Kenya African National Union (KANU) party. President Moi acceded to internal and external pressure for political liberalisation in late 1991.

Having served the two-term limit after liberalisation, President Moi stepped down in December of 2002, following fair and peaceful elections. Mwai Kibaki, running as the candidate of the National Rainbow Coalition, defeated KANU candidate Uhuru Kenyatta and assumed the Presidency, following a campaign centred on an anti-corruption and constitutional reform platform.

Economy

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

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

PROFILE	
Population:	31.9 million***
GDP (Current US$):	13.8 billion***
Per Capita Income: (Current US$)	390 (Atlas method)*** 1020 (at PPP.)**
Surface Area:	580.4 thousand sq. km
Life Expectancy:	45.2 years**
Literacy (%):	84.3 (of ages 15 and above)**
HDI Rank:	148***

Sources:
- World Development Indicators Database, World Bank, 2004
- Human Development Report Statistics, UNDP, 2004

(**) For the year 2002
(***) For the year 2003

Despite the return of strong rains in 2001, weak commodity prices, endemic corruption, and low investment limited Kenya's economic growth to 1.2 percent. Growth lagged at 1.1 percent in 2002 because of erratic rains, low investor confidence, meagre donor support, and political infighting up to the elections. In the key December 27, 2002 elections, Daniel Arap Moi's 24-year-old reign ended, and a new opposition Government took on the formidable economic problems facing the nation. In 2003, progress was made in rooting out corruption, and encouraging donor support, with GDP growth edging up to 1.7 percent.

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

* Original paper submitted in August 2004

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

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

Competition Evolution and Environment

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

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

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

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

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

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

By the early 1980s, it was obvious that this strategy did not work because the majority of SoEs were not only providing poor services, but they were debt ridden and had high expenditures. It was clear that these were symptoms of inherent inefficiencies and poor management. Due to their dependence on public resources, the need to keep these institutions running had enormous budget implications. The Government made the decision that expenditure control was imperative.

Working Party on Government Expenditure (WPGE)

In 1982, the Government appointed the Working Party on Government Expenditure (WPGE) to study the performance of SoEs and to make recommendations on reducing Government expenditures related to the SoEs, in particular. Amongst the recommendations by the WPGE was that direct government involvement in the domestic economy ought to be reduced through progressive divestiture from some of the SoEs. It reiterated that the country would explore options for encouraging private sector involvement in the economy, so that the choice of products, investments and employment would be largely driven by the private sector.

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

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

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

Pursuant to the proposals in the report, recommendations in WPGE and policy intentions of the Session Papers, a Bill was drafted in 1987 and presented to the legislature. Subsequent to legislative debates and revisions, the Restrictive Trade Practices, Monopolies and Price Control Act (*Cap 504*) was passed into law in 1988, and became effective from February 01, 1989.

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

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

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

Competition Legislation and Institutions

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

Since the philosophy, that informed the old law, was based on Government participation, the Monopolies and Prices Commission (department) has had little flexibility in applying this law within the new policy dispensation. As SoEs have been privatised in Kenya, the Government created regulatory authorities for those industries, without allowing for an interface with the competition authority. The result has been that sectoral regulators tend to determine issues of competition law, as they emerge from their sectors, without recourse to the competition authority. It is obvious that this uncoordinated enforcement has led to the application of incompatible principles, in nearly similar cases, and created a fragmented and incoherent competition policy.

Amongst the regulatory agencies created, since formal liberalisation commenced, are the Communications Commission of Kenya (CCK), the Electricity Regulatory Board (ERB), the Capital Markets Authority (CMA) and the Retirement Benefits Authority (RBA). All these institutions operate under separate statutes that recognise extensive mandates but make no explicit reference to the existing competition law. However, implicit functions amongst some of them are such that they can work together with any institutions, *including the Monopolies and Prices Commission*, to attain their stated objectives.

Sectoral Regulation and Anticompetitive Business Practices

Communication Sector

The Communication sector includes telecommunications, postal and broadcasting services. Till 1999, the first two aspects of communication services were controlled by the, then, Kenya Posts and Telecommunication Corporation Ltd (KP&TC), a para-statal organisation established by an Act of Parliament in 1977. The role of the Corporation was to provide postal and telecommunication services in Kenya, and between Kenya and rest of the world; and to regulate and control radio communications operated from, and received in, Kenya.

In 1991, through the liberalisation of Telecommunication Wiring and Terminal Equipment Regulations (1991), an attempt was made to privatise certain aspects of the sector. The regulations allowed for certain companies to compete with the Corporation in the sale, installation and maintenance of telecommunication terminal equipment. In January 1999, the Kenya Communications Act (KCA) 1998 was enacted. The Act established three main organs within the communications sub-sector. The organs are the Communications Commission of Kenya (CCK), Telkom Kenya Ltd, and Postal Corporation of Kenya.

The *telecommunications sector* provides a very good example of anticompetitive practices, i.e. discriminatory dealings in Kenya. Only one fixed-line telephone operator, namely Telkom Kenya Limited, services consumers nationally. Even though Section 5(5) of the Kenya Communications Act (1998) clearly outlaws duopolies and monopolies in any sub-sector of the communications industry, it remains unclear, to date, as to why some other firms, that have applied to operate fixed-line phones in the country, have not been granted licences. "Telkom Kenya still enjoys a monopoly, in providing fixed telephony services".[2] This sort of arrangement is purely discriminatory.

Box 46.1: Collusive Price-fixing by ISPs and the Dual Authority Conundrum

Kenya's telecommunications industry is characterised by a monopoly provider of internet backbone services by the state owned corporation, Telkom Kenya Limited. This situation arose from the defined market structure in the Telecommunications Sector Policy Statement, published in 1999. On the other hand, the Communications Commission of Kenya (CCK) issued licenses to nearly 80 Internet Service Providers (ISPs), who would then distribute bandwidths to corporations and individuals, as consumers of internet services. Owing to cost, most Kenyans are only able to connect to the Internet through the cyber-cafes that receive the services from the ISPs.

Whilst the monopoly supplier provides low quality services, the number of cyber-cafes and internet connection points for consumers has increased. This has led to intense competition between the cyber-cafes, with the result that the costs of internet access at public places have kept falling.

In late March 2002, the Cyber-Cafes Operators Association of Kenya (CCOAK) announced that its members had agreed to charge a minimum price for connection to the Internet. The ostensible reason for this was that the number of cyber-cafe outlets had grown considerably, hence, some engaged in the unreasonable reduction of prices in the quest for customers. CCOAK reasoned that this had a damaging effect on all of them.

Following the newspaper reports of the meeting, the Monopolies and Prices Commission (MPC) announced that investigations were to be conducted into this overt attempt at price fixing. The Communications Commission of Kenya (CCK) also sent a formal letter warning the CCOAK against implementation of the price fixing agreement.

Besides the action by the MPC and CCK, the public outrage at the indiscreet attempt to fix prices appeared to have worked, since the agreement was not implemented. However, it is not easy to tell whether other restrictive trade practices, with adverse effects on consumers, have been discussed covertly. More importantly, the prompt action by the MPC illustrates the serious need for coordinated work with industry regulators.

Energy Sector

The thrust of the restructuring of the power sub-sector, which started in 1996, was to create arm's length commercial type-relationships between the sector entities, and to create legal and regulatory frameworks that facilitate the restructuring of the sub-sector and encourage private sector participation. Key steps in the restructuring process included:

- A restructuring study, to recommend an efficient industry structure, and an implementation and financial restructuring plan;
- A study of legal and regulatory frameworks; and
- A formulation of relevant action plans.

The power sector, in Kenya, is regulated by the Electricity Regulatory Board (ERB), which was established under the Electric Power Act of 1997. As opposed to the other regulators, which are established as fully autonomous and independent agencies by their respective Acts, ERB, owing to its nature of establishment, is not independent and is subject to the provisions of the State Corporations Act. In essence, the ERB operates under an 'anomalous legal regime', a situation, which has contributed to a major conflict of interest in its activities and functioning.

There are a number of anticompetitive practices in the Kenyan market. Kenya has witnessed different sorts of cartels or anti-competitive behaviour in many of the market sectors. In the electricity sub-sector, the ERB has been instrumental in the efforts to regulate the sector. The electricity sub-sector is dominated by the Kenya Power and Lighting Company (KPLC), which enjoys a monopoly in the transmission and distribution of electricity in the country. As a result of the lack of effective competition in the electricity supply, consumers are experiencing poor quality service, including unexplained power fluctuations, blackouts and huge increases in power tariffs.

Consumer Protection[3]

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

NGOs, like the Consumer Information Network (CIN) are also helping consumers, at another level, in protecting their interests. This is comparatively a new organisation, as a

2 *Competition and Consumer Protection in Kenya.* CUTS: C-CIER, Jaipur and CIN, Nairobi.
3 Consumer protection analysis contributed by the Consumer Information Network (CIN) Kenya.

successor to the Kenya Consumer Organisation (KCO). KCO was one of the first well-funded consumer groups established in Africa, but went into problems due to mismanagement and was wound up.

Consumer protection in Kenya is, however, still inadequate. The inadequacies that characterise consumer protection in Kenya are made worse by the lack of an effective institutional framework and support system. Deficiencies in the legislation can be addressed through the application of relevant sections of some of the existing laws through extrapolation, which are constitutionally legal in Kenya. Nevertheless, the relevant institutions are either lacking in resources, both human and capital, political will or being affected by other factors, like industry influence, corruption and lack of clear focus on consumer protection, all of which hamper their effective functioning as consumer protection agencies.

Concluding Observations and Future Scenario

Whilst Kenya was amongst the first countries in sub-Saharan Africa to enact a competition law, the failure to update this has hindered the development of domestic competition policy and limited the role of the competition authority. Yet, the ongoing liberalisation and expected growth does require that the competition law should be expeditiously reformed. A committee headed by the Commissioner, Monopolies & Prices Commission is currently examining the strengthening of the competition law.

Popular support for the reforms should be informed by the fact that enforcement of competition policy, based on rational principles, would ensure that Kenyan consumers would be able to exercise greater demand from their limited incomes. The enactment of a new comprehensive law, to replace the existing one, is critical for sustaining ongoing reforms, because an effective competition law and policy is an indispensable instrument for ensuring the ultimate success of economic reforms and expansion of economic freedom. The main areas that the new law must ensure are:

- securing operational and financial autonomy of the competition authority;
- empowering such authority to collaborate with competent institutions (both public and private); within and outside the country in furtherance of stated objectives;
- interface with sector regulators;
- infusion of competition into public procurement;
- revised merger and takeover policy;
- review and revision of current exemption clauses, as currently reflected in Cap 504 of the Laws of Kenya; and
- appointing an impartial and professional Tribunal to deal with complaints.

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