

**COMPETITION LAW AND POLICY IN ECONOMIC
RESTRUCTURING**

AN EVALUATION OF THE KENYAN EXPERIENCE

BY

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**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE
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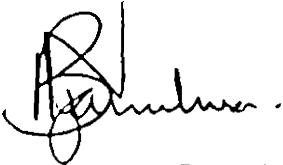


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DECLARATION

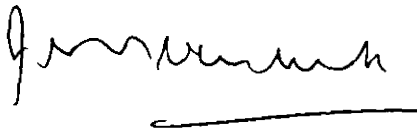
I BERNADETTE N NJOROGÉ, do declare that this thesis is my original work and has not been submitted and is not being currently submitted for a degree in any other university.



BERNADETTE N NJOROGÉ

This thesis has been submitted for examination with my approval as a university supervisor:

DR ALBERT MUMMA



dedication

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to all my children

ACKNOWLEDGEMENT

It is with gratitude that I finally put down the names of all those people who have been instrumental in the successful completion of this document.

Pamela Andanda without whose constant encouragement my determination would flag down.

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CHAPTER ONE

PROPOSAL TO THE STUDY

INTRODUCTION

Kenya introduced the Restrictive Trade Practices Monopolies and Price Control Act in 1988. The statute is supposed to enforce competition policy in Kenya. This is policy aimed at preserving and promoting competition by enforcing competition law against restrictive business practices by firms and by influencing of other governmental policies or measures affecting competition.

The objectives of the statute were given as :-

- (a) To optimize the use of scarce resources
- (b) Creating an enabling environment for small business to operate.
- (c) To increase the indigenisation of the economy.
- (d) To lead to trade and price liberalization.
- (e) To protect both producers and consumers
- (f) To aid economic growth
- (g) To lead to fair income distribution
- (h) To achieve price stability.¹

PROBLEM STATEMENT

Is competition as evinced by the Restrictive Trade Practices, Monopolies and Price Control Act evident in the restructured sectors of the economy, and have these sectors registered discernible growth and innovation since liberalization².

HYPOTHESIS

Competition law has not played the role it should in the economic restructuring process in Kenya. This is borne from the observed fact that competition policy and law wherever introduced is expected to shore up, static and dynamic efficiency which leads to overall economic development³.

THEORETICAL FRAMEWORK

Competition in the commercial world means a striving for business in the market place⁴. Countries that have followed the free market economic model value the notion of competition. Competition is analogous to a competitive market. Ideally the ingredients of a competitive market are :-

¹ A simplified guideline to Restrictive Trade Practices Monopolies and Price Control Act 1989-Monopolies and Prices Commission

² The East African August 17-23 1998 page 22 "The Economic Downturn after Liberalization".

³ UNCTAD. (1997). "Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development in order to attain Greater Efficiency in International Trade." UNCTAD TD/B/COM 21 EM 10 page

⁴ Whish, R, (1985). Competition, Law Butterworths London pg. 12

- (a) equality of bargaining power,
- (b) homogenous products,
- (c) free entry and exit from the market,
- (d) a large number of firms,
- (e) independence of decisions among firms and
- (f) perfect knowledge⁵

Perfect competition⁵ exists where all these ingredients are present and it is at that point when consumer welfare is maximized. This is because total output will be determined by what consumers will pay at that price. Price is set by the cost of producing that output by the lowest cost producers of that amount. If costs rise so will price (but output will fall) as long as everything else remains the same and vice versa. This means that economic resources are allocated between different goods and services in the quantities and prices which consumers wish⁷. In a perfectly competitive market the individual firm is merely a quantity adjuster. All firms sell at marginal costs and earn only a normal return on investment. Each firm takes price as set by the market. No firm can affect the price by adjusting output or adjust output by raising or lowering price. Each firm strives to maximize profits by adjusting its output. Here the consumer is sovereign. Firms in a competitive market respond to rather than dictate changes in market prices. The free market system coerces efficiency from individual firms and no firms realizes monopoly profits.

The theory of perfect competition hardly describes any market. It provides insights that illuminate how a competitive market works and the benefits it can confer. It also offers a standard for measuring market performance.

Competition policy seeks to promote workable competition. This is a compromise, which takes account of unremovable market imperfections, the nature of the market and the degree of attainable competition, which will satisfy public policy. This type of competition flows from the struggle between firms for market share, which promotes product development and price reductions⁸.

Workable competition allows markets to reward good performance and sanction poor performance by producers. It encourages entrepreneurial activity, market entry by new firms and greater efficiency on the part of enterprises. This leads to greater productivity of capital, labour, reduces costs of production and improves competitiveness of enterprises.

This in economic terms means competition promotes:-

⁵ Ibid. pg. 13

⁶ For a complete description of this concept see Posner, R. (1976). Antitrust law an Economic Perspective, University of Chicago Press, Chicago. Part 1 and 2.

⁷ Frazer, T. (1992) Monopoly competition and the Law, Harvester & Wheatsheaf, London. pg. 6

⁸ Commission of the European Communities. (1979). 19th Report on Competition Policy. Brussels.

- i) Static efficiency, which is the optimum utilization of existing resources at least cost.⁹ It includes production efficiency, which are the technical and non-technical operating efficiencies together with transaction cost and savings. It also includes allocative efficiency, which is the allocation of products through the price system in the optimum manner required to satisfy consumer demand.
- ii. Dynamic efficiency which is the optional introduction of new products, more efficient processes and superior organizational structures¹⁰.

Misallocation of resources leads to deadweight loss not recovered by either producers or consumers and is a loss to society as a whole¹¹. The precise magnitude of the deadweight loss is uncertain and disputed. Studies have concluded that deadweight welfare loss from monopolistic resource misallocation in the United States lies somewhere between 0.5 and 2 per cent of the GNP.¹² This is substantial; considering that the United States has the most stringent competition law and enforcement in the world. There is evidence to show that vigorous rivalry within industry helps in the creation and persistence of competitive advantage in the domestic and export industry.¹³ Therefore freeing up markets in the so-called strategic sectors such as telecommunications leads to technological innovation, extensive entry, growth and price decreases which leads to overall economic development.

Therefore competition has been found desirable in the market place and competition law has been designed to: -

- 1) Prevent agreements between individual firms which have the effect of restricting competition between them.
- 2) Deal with attempts by dominant firms to abuse their position and prevent new competition emerging.
- 3) Ensure that workable competition is maintained in oligopolistic industries.
- 4) Monitor mergers between independent firms whose effect is to concentrate the market and diminish competitive pressures within it.

Therefore the objectives of any designed competition law are:-

⁹ UNCTAD.(1997). "Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development." UNCTAD TD/B/COM2/EM10

¹⁰ Whish R, supra note 3, pg. 16

¹¹ Attorney General. (1955). Report the Attorney Generals National Committee to study Anti-Trust law. US Government Printing Office, Washington DC.

¹² Scherer, F.M. and Ross. (1994). "Industrial Market Structure and Economic Performance". Competition Law and Policy Cases and Materials and Commentaries, Harvester and Wheatsheaf, London. pg.667 1994.

¹³ Supra note 2 pg. 10.

- 1) To protect consumer welfare, by safeguarding against monopolies and anticompetitive business practices.¹⁴
- 2) Promote economic efficiency, which translates into individual freedom of choice and economic opportunity.¹⁵
- 3) Protection of the small business enterprise¹⁶.
- 4) Promotion of single market integration, where firms outgrow the national markets and operate in more efficient scales throughout the integrated market.¹⁷
- 5) It is used to dampen price inflation.¹⁸
- 6) It is used to make important business decisions, if it is interventionist bureaucratic decision making that guides the way business is done.¹⁹

OBJECTIVE OF THE STUDY

The study hopes to show that the objectives of the 1989 law have not been met due to various reasons which this study will expose. Secondly, used in a better manner competition law and policy can be used to effectively restore the vitality of various sectors of the economy so as to enhance economic growth.

JUSTIFICATION FOR THE STUDY

Competition law best provides the regulatory framework that guarantees efficiency. Economic efficiency is not only concerned with finding technically optimal solutions but is also a political process. There is the aspect of efficient resource allocation and the operational aspect of creating structures that maximize the value of output from the given level of input.

Since the law and policy of competition was introduced in Kenya to guarantee efficiency in all sectors of the economy, there is need to analyze and evaluate the overall performance of the economy, in order to see whether with the application of this concept, efficiency, growth and innovation (development) has been achieved.

Are all the sectors especially those termed strategic by the Policy Paper on Public Enterprise Reform and Privatization²⁰ now market driven or fired by competition in the interests of consumer welfare? Do monopolies still exist as they did during the time of a command economy or have there been established structurally efficient sectors? Has this manifested in robust economic growth?

¹⁴ Whish R. supra note 3. pg. 12.

¹⁵ Ibid. pg. 13.

¹⁶ Frazer T. supra note 5 pg. 6

¹⁷ Commission of the European Community (1979). 19th Report on Competition Policy. Brussels.

¹⁸ Whish R supra note 3. pg. 16.

¹⁹ Supra note 9.

²⁰ Government of Kenya (1996). Policy Paper on Public Enterprise Reform and Privatization . Ministry of Finance. Nairobi. pg.

THE SCOPE AND LIMITATIONS OF THE STUDY

The study will confine itself to analysis of competition law and policy and its evaluation in economic management of the economy.

It will culminate in providing recommendations on better provisions of the law and the improved use of competition in managing the economy.

This is a dynamic area of study as there are new developments almost every day in the restructuring process. Government keeps on reviewing and revisiting areas which it had previously made decisions upon. For this reason, examples in the study have been limited to the cut off year of 2001. Otherwise the work would never be complete.

Secondly, there is a dearth of material on the implementation of competition law in developing countries and how it has been used to restructure a developing economy. For this reason there are few if any supporting authorities for many of the statements that are drawn. These are based on the authors evaluation of the circumstances researched upon.

In chapter three, where there has been an analysis of the cases handled by the Monopolies and Prices Commission, there is no analysis of the reasoning advanced by the Commission in arriving at the decisions taken. This is because what is relied on is the annual reports given by the commission, and not the actual case reporting as this was not availed.

In chapter four, where there has been an analysis of the agricultural sector, due to non-availability of material on other sub-sectors in agriculture such as coffee and tea which were also liberalizing at that point in time ,they have not been the subject of this work.

RESEARCH METHODOLOGY

The methodology of evaluation research will be used. The economic policy papers, books and journals, the law of Restrictive Trade Practices Monopolies and Price Control Act will critically be examined with the aim of discovering how pro-competitive they are. Newspaper articles on the current local occurrences on this field will yield material on examples of economic restructuring in the economy and how it has been influenced by competition law and policy. The office of the monopolies commissioner is expected to yield cases on the practice of the law and policy of competition in the country. The libraries used are the Faculty of Law Parklands campus library, University of Nairobi, the African Economic Research Consortium library and the World Bank library.

LITERATURE REVIEW

Most of the text book material that has been found relevant to this study emanates from the developed countries and explores the European Union and United States of America experience in the application of competition law.

Letwin W. has written a book called "Law and Economic Policy in America: The Evolution of the Sherman Act." The author traces the history of the Sherman Act, which was the first law to touch on economic policy. The Act was a political response to predations of conspiratorial trusts in the USA during the last decade of the 19th century and it sought to regulate them. In this book the author also exposes the fact that law cannot solve fundamental economic problems in a society. His narration offers a useful insight in the development of competition law and is a useful parallel for the Kenyan situation as far as the evolution of the practice of the law is concerned.

Richard Posner's "Antitrust Law an Economic Perspective" puts forth the proposition that the only aim of a competition law should be to promote competition as the term is understood in economics. This theme is developed in chapter two of the book. In chapter three and four the author unravels the convoluted doctrine of antitrust in the US judicial system and states,

"..... If one could write a completely clean slate it would be best to substitute for the numerous substantive provisions of antitrust law a simple prohibition against agreements explicit or tacit that unreasonably restrict competition".

In reading this book one cannot help but draw comparisons between the numerous legal provisions found in Kenya and the judicial experience of the USA. There lies a potential problem locally, the Kenyan law is prolix in its substantive provisions, which do prove to be a problem in enforcement and thus be anti competitive. Further he provides a compelling case as to why competition law is not an antidote to other social economic problems that may pervade the market such as the promotion of small business enterprises.

"Competition Law" by Richard Whish is a text that in one volume describes in minute detail provisions of UK and EU competition law. The author highlights the differences between the two systems. He also offers a glimpse into the USA experience and compares it to the European models. (However the UK now has a new competition law in the competition law act 1998 which did not form the subject of his study.) He comprehensively covers reappraisals that were carried in the interpretation of competition law in the American judicial system that made the law more pro competitive. This text is relevant to the study because Kenya is involved in two schemes to integrate its markets. Lessons can be drawn from the EU on how to harness competition law to further market integration.

Alfred Grotti has a text on "Trading under EEC and US Antitrust Laws." The second part of the book is useful to the study because it covers the topics of mergers and acquisitions, joint ventures, use of patents and trademarks copyrights and licensing procedures. It gives a detailed rundown on the features and explores the competitive features working therein. The study draws from the incisive descriptions of these activities and the anticompetitive effects of these features as practised by investors.

"Competition Law and Policy Cases Materials and Commentaries", is a text incorporating all facets on competition from a comprehensive review of the economic rationale for competition to the substantive provisions of a competition law. It is packed with a fair amount of cases drawn from the EU, the UK and the USA. This text not only has rich contributions on economics and competition, but it outdoes itself in providing the different philosophical foundations of competition law in the three jurisdictions, which is a useful comparative basis to this study.

Further it provides the benefits of any law such as competition law having an extra territorial effect as the US law does in a world economy increasingly being run by multinational companies.

The international angle of competition law has not been widely written or researched upon. It is a recent phenomenon. Articles emanating from the Centre for Economic Policy and Research in London have proved useful. One reviewed is "Competition, Competition Policy and the GATT" by Hoekman and Mavroidis P. Therein, it is argued that further moves to liberalize and to implement existing GATT disciplines may have a greater impact on global competition than the pursuit of harmonized multilateral policy disciplines. It suggests that current GATT rules and case-law provide scope for both the application and non application on existing competition laws of contracting parties to be challenged in those instances where this leads to de-facto discrimination between domestic and foreign products. Little use has been made of the GATT in this connection suggesting that exploitation of existing indirect avenues to raise competition related disputes in GATT be pursued more actively.

Articles in the 1996 and 1997 editions of the International Business Lawyer touching on competition law have also been reviewed. These are series of about thirty articles all touching on international competition law, market access and the concept of free trade which was brought about by the GATT/WTO multilateral rounds. The Global Forum for Competition and Trade Policy has compiled them. (This is a group of experts representing the key interests of economists, lawyers, academics, practitioners and international policy makers who are committed to expanding the global discussion of the ramifications of competition policy for global trade and investment. It was founded in 1991).

In one of the articles titled "Slow Implementation of Competition Law" several salient issues are addressed. The most interesting being whether competition policy is conducive to industrial growth and international competitiveness. If the answer is affirmative, how have the various East Asian economies with weak or no specific competition law regimes developed rapidly. The next question is whether liberalization of trade and investment and deregulation of economic activity are not sufficient to are not sufficient to foster competition.

The United Nations Conference on Trade and Development (UNCTAD) also has an Inter Governmental Group of Experts on Restrictive Business Practices, which regularly releases briefs touching on competition law. The article "Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in order to Attain Greater Efficiency in International Trade and Development" gives statistics from the developing and developed world on the beneficial effects of application of a competition policy. It also notes that in all the countries, analyzed competition has been essential to ensuring the continuing development of industries especially the versatile electronics and telecommunications and computer industry. A notable example being the failure of European efforts to promote the above named sectors by having a few sheltered domestic producers instead of having them exposed to competition. This article makes a case for the use of competition policy to promote industrial development due to the possibility of dynamic efficiency.

The article "Liberalizing Trade between Developed and Developing Countries" raises the issues of disparity between the concerns that dominate trade in the south and the north. Whilst the north has a well organized policy making legal machinery as regards local and global trade – giving it an edge. The south is still trying to grapple with these issues and lay down the rudimentaries of these policies and laws. Therefore liberalization benefits the north. For example the north had incisive experience with competition policy. If that policy became global in nature the advantage would be gained by businesses in the north and not those of the south.

"Competition effects of dumping" gives a brief overview of the economic analysis of dumping. It gives the benefits to be reaped by the dumping country and the anti competitive effects that the dumped upon country suffers. It gives the effect that dumping has on the global economy, measures that can be used to curb dumping at the national level and global level are used. Dumping as a course of action pursued by a state has effects on the competition policies on the dumped upon state as the goods are introduced in the market of the country at less than fair value. A competition policy that does not address this issue especially in a developing country is not an adequate policy. This article hence provides a useful backup to the analytical review of the Kenyan law.

Government policy papers have also been analyzed to gauge government commitments to competition policy in economic management in the country. The most important ones are Sessional Paper number 10 of 1965 titled African Socialism and the Application to Planning in Kenya. This maps out the economic policy pursued by the country for the first two decades of independence. Sessional Paper number 1 of 1986 titled Economic Management for Renewed Economic Growth this maps out the introduction of competition policy in Kenya and expresses a change in the macroeconomic policies pursued by the government. Sessional Paper number 1 of 1994 titled Recovery and Sustainable Development to the year 2010 gives out the measures to be taken to liberalize the market and to restructure the economy. It also mentions the measures put in place by the introduction of a competition policy. In addition to these policy papers the National Development Plans since 1963 on the attainment of independence have been perused.

From the Office of the Monopolies Commissioner there are a number of reports which have been read. These are the Annual Reports from 1995 to 1998. This was the period in time which government was liberalizing most of the sectors. In the annual reports are summaries of the case laws which went before the commissioner for investigation. They do not offer a deep analysis as they are merely summarized reports. (In any case it was impossible to obtain the actual case reports from the Commissioner because he cited confidentiality). These summarized annual reports are useful because they detail the operations of the Office and the challenges the Office faced as it tried to be the vanguard of competition in the Kenyan market in the wake of liberalization.

Newspapers and the reports of various ministries and workshops have been used to trace and show the growth of the economy and the controversies generated in the economic scene as government moves on with its restructuring and privatization policy.

For the privatization process the World Bank has a useful text called "Bureaucrats and Business: the Economics and Politics of Government Ownership", which has offered useful insights as to the problems which are faced by governments who seek to divest themselves from the market place and merely play the facilitative role.

On the local scene the African Academy of Sciences has organized workshops geared to address problems of privatization in Kenya. P. Anyang Nyong has written a paper entitled " Privatization in Africa: the Kenyan Experience in a Comparative Perspective "where he identifies lack of political will as one of the hurdles which privatization faces. There is lack of political will because the impetus to privatize was not homegrown but came as a measure of the World Bank. Consequently privatization has not resulted in modernization and growth.

S. Mwale has paper entitled "Genesis and Evolution of Privatization Programmes in Kenya" which traces the policies that led to heavy government participation in the economy and the manner in which government has tried to rid itself of that wasteful legacy, by having an almost laissez faire attitude to privatization which is also detrimental to the economy.

CHAPTER TWO

HISTORICAL BACKGROUND TO THE KENYAN ECONOMIC RESTRUCTURING PROCESS

INTRODUCTION

This chapter is going to focus on the history of Kenya's economic planning and the reasons behind the installation of a command economy which is antithetical to competition, immediately after the onset of independence. Secondly, it is going to delve into the characteristics of the command economy and what led the government to eventually dismantle it. It will culminate in introducing the framework that replaced the command economy and the ideology behind it, whether it be local or global.

HISTORICAL BACKGROUND

When Kenyans attained independence expectations and aspirations were very clear. Kenyans expected to determine their destiny in terms of political processes and governance. Their aspirations also centered on better access to economic assets such as land and capital. The early parliamentary debates of parliament show that government had already decided that the best way to do this was through the creation of a democratic African socialist state so as to bridge the gap between the rich and the poor.²¹ The blue print that enunciated the features of African socialism is Sessional Paper Number 10 of 1965²². Some of its contents that influenced the management of the strategic sectors of the economy were

1. The use of controls, to ensure that property was used in the mutual interests of society and its members²³. Regulatory legislation was enacted by government to create public monopolies, which would not only provide utilities, but engage in commercial enterprise²⁴. The theme was Africanization and was representational through heavy government involvement in commercial activity.
2. In order to build-up a domestic industrial base, importation of goods was limited or prohibited through the use of import licensing and use of quantitative restrictions which was buttressed by foreign exchange controls²⁵, so that the value of the shilling was at a fixed ratio to the dollar to promote a surplus in the balance of trade payments. This created a manufacturing industry, which operated under a very protected environment.
3. Importantly for the agricultural sectors the government fixed prices on the food items²⁶ to benefit consumers, these prices were usually low and frequently discouraged producers.

²¹ Parliament 23rd June 1964 The Hansard pg 445

²² Government of Kenya 1965 African Socialism and its Application to Planning in Kenya Government Printer Nairobi.

²³ Supra paragraph 48 page 16

²⁴ Ibid paragraph 120 page 42

²⁵ Ibid paragraph 65 page 16

²⁶ Government of Kenya (1974) Development Plan 1974-1978 Government Printer, Nairobi paragraph 1.34 page 9.

4. The government laid the foundation for indigenisation of the economy, to correct the colonial imbalance it did this by de-facto restrictions on the repatriation of profits, dividends, licence fees and royalties and restrictions on local borrowing by foreign controlled firms.²⁷ The effect was to stultify entry into the market by foreign firms, which would have offered competition or increased competition in the economic arena to the domestic firms.

The legal framework that buttressed this manner of economic management was :-

- 1) The Price Control Act. This had been enacted in 1956.
- 2) The Trade Licensing Act. This legalized the takeover of non-citizen firms through denial of licenses to certain trades and businesses.
- 3) Imports Exports and Essential Supplies Act. Which imposed controls on supplies. This economic arrangement succeeded in the first decade of independence because Uganda and Tanzania sought their processed products from the heavily protected Kenya industry. By 1969 Kenya was exporting pounds 26 million worth of goods to these countries, which was about a 1/3 of all exports.²⁸ Even though the industries were monopolistic economies of scale were maintained due to the fact there was wider market outside the Kenyan border.

During this period, the statistics show that average per capita income for the years 1963-1973 stood at 2.6 percent. The Gross Domestic Product grew at an average of 6.6. percent. The growth of the manufacturing industry was 9.1 percent and the agricultural sector 4.1 percent²⁹.

Unfortunately this state of affairs was not to last. The saturation point was reached for the industries in the late 1970s after the collapse of the East African Community. The economies of scale were destroyed and the domestic industries found themselves with a very small domestic market. The protected industries produced low quality products, which could not compete internationally as exports due to their high prices, low quality, poor packaging, and poor design. The problems of a controlled economy became even more obvious with the onset of the second global oil crisis³⁰. Inflation rose, balance of payment deficits stifled the economy, and a recession hit. This pushed the prices of primary products down. Kenya thus experienced low declining real income, sluggish economic growth, mounting external debt, low investment and saving. Added on this were declining external competitiveness and growth in export volumes, a highly overvalued exchange rate, inward oriented trade strategies and policies and widespread inefficiencies in resource use due to the economic policies described above.

²⁷ Supra note 1 paragraph 67, 78, page 27

²⁸ Parliament 13th August 1969. The Hansard. . pg 3193

²⁹ The Government of Kenya. (1997). Development Plan 1997-2001, Government Printer, Nairobi. paragraph 1.

³⁰ Supra. paragraph 1-12

RESTRUCTURING OF THE ECONOMY

By this time it had been realized that government expenditure was way beyond its earnings. A Working Party on Government Expenditure was setup. One of its terms of reference to look for processes for monitoring implementation of policies and projects and programmes and for introducing remedial measures.

What the Working Party came up with was a report also called the Ndegwa Report. It stated the cause of the problems as :-

- 1) Government did not attempt to dispose off its holding in commercial enterprises to Kenyans so kenyanization was representational through government.
- 2) Most of those enterprises were operated inefficiently and unprofitably because government imposed public function on them and thus excessive unemployment.
- 3) Special measures had been taken to protect these enterprises from competition and these measures had precluded effective competition from developing.
- 4) Private investors abused government participation by diverting government funds to inappropriate projects and technologies. Thus revenues from the sale of shares did not materialize, dividends from investments had been insignificant, subsidies and continuing losses had escalated.³¹

Reform of the economy meant that the government based on the evidence by the Ndegwa Report had to discard its old policies. The Ndegwa Report recognized that decrease in the governmental role in the market place and an increased role of the private sector in the market place raised opportunities for abuses, favouritism and exploitation, which were not in the public interest.³²

The policy alternatives thus available to government in presiding over the increased role of the private sector in the market place were use of exchange rates and interest rates to stimulate exports and favour domestic production; specific tariff levels which would be adjusted to provide effective protection for domestic producers without resort to quantitative restrictions and import licensing which were cumbersome and open to corruption, high sales taxes to discourage import and manufacture of luxury goods hence free up resources for production of essential commodities.³³

The report elaborated that designing effective configuration of these policies and adjusting them in light of domestic and international economic circumstances was not a simple task but required the best professional talent. It was recommended that Cabinet Office should together with Ministry of Finance and the Central Bank review every 3 months the nations configuration of policies and

³¹ Government of Kenya (1982). Report and Recommendations on the Working Party on Government Expenditure. Government Printer Nairobi. pg. 13.

³² *Supra*, paragraph 82

³³ *Ibid*, par. 72

internal consistency in the light of current circumstances and advice ministries directly of improvements and adjustments which were to be considered.³⁴

It is also recommended importantly for competition that legislation in relation to unfair practices be enacted and that a Monopolies and Prices Commission be established to enforce it. The Commission was to be empowered to collect annually standardized financial information on all public companies to investigate complaints relating to unfair market prices and practices. Such a Commission was to have quasi-judicial powers analogous to those of the industrial court.³⁵ It was to be composed of economists and financial analysts.

Apart from its regulatory function this body would contribute to government policy formulation in matters affecting trade, production and prices.³⁶ No doubt in making these recommendations the members of the party were guided by the need to have efficient resource allocation.

The years between 1983 and 1985, a comprehensive cabinet memorandum was prepared and submitted proposing the enactment of the law that would prohibit restrictive trade practices. Cabinet approved the proposal and mandated the Ministry of Finance and Planning to consult widely with other relevant Ministries and draft a suitable Bill for debate.

This process was conducted against the evolving process of a changing economic scene as illustrated by Sessional paper Number 1 of 1986, which was titled "Economic Management for Renewed Growth". This paper advocated wide-ranging macroeconomic reforms, such as reduction on fiscal and external deficits and a contractionary monetary stance.

Globally, the World Bank was now advocating the move from controlled economies to those of a free market model. It particularly pushed for this under the Structural Adjustment Programmes³⁷ Therefore the Structural Adjustment Programmes (SAPs) were formally adopted as part of the country's economic policy.³⁸ Structural adjustment by borrowers meant adoption of macro-economic policies acceptable to the International Monetary Fund (IMF) and the World Bank designed to create free markets in developing countries. This set in motion the liberalization of prices and marketing systems, coupled with financial sector policy reforms, divestiture of the government from public enterprises and privatization as well as government budget rationalization. This coupled with the Sessional Paper of 1986 also set out the objectives of a competition law and policy which was seen as the effective regulator of a market economy. Competition law and policy

³⁴ Ibid. par. 86

³⁵ Ibid. par. 90

³⁶ Ibid. par. 91

³⁷ The World Bank (1982). The World Development Report. Oxford University Press Oxford. Chapter 8

³⁸ The World Bank (1981) Accelerated Development in Sub-Saharan Africa: An Agenda for Action. IBRD Washington D.C.

was to encourage competition in the domestic market by prohibiting restrictive trade practices, controlling monopolies and concentrations of unwarranted economic power

GLOBALIZATION AND THE ECONOMIC RESTRUCTURING PROCESS

The impetus in liberalization was also influenced by the global developments in international trading rules. Globalization is a process through which the world is adopting a unipolar outlook on trade, economics and politics. On the trading front especially, globalization has led to increased mobility of industry, capital and foreign direct investment as well as lower trade barriers across national and regional borders. This has been aided by multilateral agreements that have eventually culminated in the World Trade Organization Treaty in 1995.

The Uruguay Round was conceived in November 1982 at ministerial meeting of GATT members at Geneva. Although the ministers intended to launch a major new negotiation when meetings stalled on the issue of agriculture and was regarded as a failure. However the work program that the ministers agreed to, formed the basis for what was to become the Uruguay Round negotiating agenda.

Nevertheless it took four more years of exploring and clarifying issues and painstaking consensus building before ministers met again in September 1986 in Punta Del Este Uruguay to agree to launch the Uruguay Round. They were able to accept a negotiating agenda which covered virtually every trade policy issue. The conclusion of the Uruguay Round was on the 15th of December 1993 when every issue had been neatly tied up. On April 15 1994 ministers from the participating governments meeting in Marrakech Morocco signed the deal.

Notable in this new deal was that the World Trade Organization was established as a permanent institution in January 1 1995. An important aspect of the WTO's mandate is to cooperate with the International Monetary Fund, the World Bank and other multilateral institutions to achieve greater coherence in global economic policy making. A separate ministerial declaration was adopted at Marrakech ministerial meeting in April 1994 to underscore this objective.³⁹

The declaration recognized the contribution that trade liberalization makes to the growth and development of national economies. Thus it views such liberalization as an increasingly important component in the success of the economic adjustment programs which many WTO countries are undertaking even it may involve significant transitional costs.⁴⁰

Secondly WTO has the mandate to conduct surveillance of national trade policies under the trade policy review mechanism. (TRPM). The objectives of the TRPM are thorough monitoring to

³⁹ WTO (1995) Trading into the Future. World Trade Organization Publications. Geneva pg 17

increase the transparency and undertaking on trade policies and practices to improve the quality of public and intergovernmental debate on the issues and to enable a multilateral assessment of the effects of the policy on the world trading system⁴¹.

Thirdly and very importantly the WTO created other agreements which cover trade in a wide spectrum of areas. These are Trade Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement on Trade in Services (GATS), Agreement on the Rules of Origin as well as the Agreement on Trade Related Investment Measures (TRIMS) and many others.

Globally the World Bank and the International Monetary Fund have managed to coax most of the countries in the southern geo-economic hemisphere to restructure their economies towards the freemarket economic model. This has meant that many countries have had to liberalize their markets. This has led to the elimination of restrictions that cause distortions in the product and factor markets, trade and financial markets as well as removal of imperfections in the economy. That helps eliminate the inefficient allocation of resources that has been the hallmark of state controlled economies.

The Structural Adjustment Programs dished out by the IMF has meant for many countries reforms of policies and institutions aimed at achieving internal and external balances through improved resource allocation increased economic efficiency and expanded growth potential. It is at that point that globalization and competition policies meet and become one and the same thing.

ROLE OF COMPETITION LAW AND POLICY IN GLOBALIZATION⁴²

The free market economic model that has gained ascendancy globally believes in the ability of competitive markets to provide better incentives for efficiency, better services to customers and more rapid responses to technological change. Competition law has become important, increasing atmospheres for thriving competitive markets and for ensuring that markets remain competitive as well as bringing more areas of the economy into the operation of their ambit.

Globally then due to the integrated world economies and regional economies such as the East African Community, the multinational companies which exist, competition law has to become the vanguard of efficiency against greedy private predatory anti-competitive companies or industries or even countries. Where there has been privatization of the bloated state owned enterprises, competition law must come in to address issues of how the former monopolies and their competitors are to operate. It has to ensure efficiency in the face of better packaged foreign

⁴⁰ Ibid.

⁴¹ Article III of the 1995 WTO Treaty.

⁴² Most of the material of this section has been sourced from WTO. 8th December 1998. "Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council WTO. WT/WGTCP/2 8th. Geneva.

investors in what was an erst-while strategic service provider since a predatory multinational does not guarantee more efficient resource allocation than an inefficient state owned enterprise.

Under the aegis of WTO regional market integration⁴³ has become fashionable with the epitome of integration being the European Union. Competition law has been viewed as the instrument through which public institutions can create a level playing field and prevent private companies from reestablishing by contract or conspiracy the geographic barriers that member states have brought down. Competition law is also seen as a ready agent to deal with the problem of state aids i.e. government subsidies to national champions and other favored enterprises.⁴⁴

There has been remarkable growth of global trade in goods, services and intellectual property. Trade barriers have fallen and states have become more dependent on foreign suppliers for their markets and foreign outlets for their output. Competition law has become the tool for controlling these sources of competition and to prevent domestic disruption.

Competition policy and law have become necessary in a world dominated by international trade because it is clear that trade liberalization is a fundamental component of any policy that seeks to ensure that markets are competitive in outcome. Thus competition policy (which broadly includes all policies relevant to competition in the market including trade policy regulatory policy and policies adopted by government to address the anti-competitive policies of enterprises whether private or public) is used to compensate the anti competitive effects induced by the trade barriers that are maintained. Mere free trade is not sufficient, if foreign firms have global market power, foreign suppliers collude with each other against domestic producers or if relevant markets are locked and there are restrictions on inward foreign investment. Domestic competition laws will generally be required to complement free trade in order to ensure competitive conduct.

This is even more relevant given that there has been a significant increase in international mergers, strategic alliances, joint ventures and licensing arrangements. Witness the merger in the drugs industry between Smith Kline Beecham company limited and Sterling Health company limited⁴⁵ which entity has also recently merged with Glaxo Wellcome Company Limited⁴⁶ to form a huge pharmaceutical giant globally. There needs to be a uniformity of law in the way their conduct is perceived to avoid conflicting conclusions as to legality of behavior. Convergence of laws and cooperation between competition authorities reduces the likelihood of conflict.

⁴³ WTO –General Agreement on Trade and Tariffs Article 1.

⁴⁴ Fox E, Ordovery J.(1995) 'The Harmonization of Competition and Trade Law, the Case for Modest Linkages of Law and Limits to Parochial State Action.'19 World Competition 2

⁴⁵ Kenya Gazette 8th September 1995. Vol XCVIII. Gazette Notice 5427.

⁴⁶ Kenya Gazette 31st May 2001. Vol.CIII No.34. Gazette Notice 3507.

Secondly, anti competitive practices may have a cross border dimension and purely domestic rules lack the potency to deal with competitive practices with an international dimension.⁴⁷ This might be because information central to the investigation may be located outside the reach of their jurisdiction. A competition law that has incorporated this is a necessity.

The problem of export cartels has not been subject to competition law in exporting countries and for the importing countries export cartels have an effect on the market and so jurisdiction can be established. Yet the evidence needed to prove the existence of a cartel is located outside the importing countries jurisdiction. Therefore in a liberalized world competition policy must have an external dimension for it to be effective.

Anti-competitive practices affect the balance of access opportunities negotiated between WTO members. The application of competition law contributes to creating accessible markets and assuring the overall openness and stability of the trading system.⁴⁸ Competition policy is trade related and the application of competition law principles on export markets will help level the playing field and promote equal conditions of competition for firms competing on international markets. Further, the cutting out of duplication in investigative conduct in international business firms through greater cooperation by different competition authorities will support the competitiveness of industry and maximize consumer welfare.

CONCLUSION

It is clear that the move to restructure the economy was necessitated by the problems which had been created by the policies which had been followed by government involvement in the economy which had resulted in a huge deficit and shrinking income from its investment. The only cure was the one meted out by the World Bank. This meant that the social and political function that had been performed by the parastatals as well as government involvement in all sectors of the economy had to cease. The government knew that to qualify for further international credit it had to swallow the medicine.

The realization that economic survival was guaranteed by a move towards structurally efficient institutions and efficient resource allocation in all its institutions meant that government had to introduce competition law together with the alteration of the macro economic policies to provide the regulatory framework. The next chapter will analyze the law that was introduced and whether it was utilized in the best manner possible in the economic restructuring process. It is one thing to know what one is supposed to do, it is an altogether different matter to have the political will to

⁴⁷ Lowe A., 1995. "The Problem and Search for Extra-territorial jurisdiction: Economic Sovereignty and the Search for a Solution" 42 *International Comparative Law Quarterly* 724.

⁴⁸ Fox E., (1997) "Towards World Antitrust and Market Access" 91 *American Journal of International Law* 1.

implement it in the interests of general consumer welfare, given that the erstwhile command economy favoured and entrenched economic favours to certain cadres of people.

CHAPTER THREE

COMPETITION POLICY AND LAW IN KENYA

THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT

INTRODUCTION

This chapter will introduce the law and policy of competition applying in Kenya. It will do this by first introducing the parliamentary debates leading to the enactment of the law. This will show what role the law was expected to play by the representatives of the people, as well as the reasons the government gave for introducing the Bill. It further seeks to examine whether the members of parliament understood the potential of the law in restructuring the economy. It will have an overview of what the law includes, the institutions that have been set up by the law and the application of the law as practiced by the Commissioner. The hallmark of this chapter is the analysis of what the competition law can actually achieve if used to its optimum in the economic restructuring process. Lastly it will enunciate other avenues through which competition policy and law can be upheld or compromised in the economy.

PARLIAMENTARY PROCEEDINGS LEADING TO ENACTMENT OF THE LAW

When debate began on the Bill whose intention was to introduce efficient resource allocation through competition as the bedrock of future economic policy in this country, a total of 13 members of parliament contributed to the debate. In the two days 2nd and 3rd November 1988 that it was debated, it was afflicted thrice by lack of quorum, the first affliction being when the Attorney General was moving the Bill and explaining the philosophical foundations of the Bill.⁴⁹

The Attorney General traced the non-competitiveness of the Kenyan economy to the import substitution policy followed immediately after independence, he hoped that the statute would curb discriminatory actions which hindered small businesses from thriving. Key among the concerns he named were lack of competition in the tendering procedures and restrictive rules of the trade associations, which barred new entrants. He decried the concentration of economic power to the detriment of efficient resource allocation. He clarified that the statute would curtail economically inefficient mergers and takeovers so as to promote economies of scale.

From his speech it emerges that the provisions of the statute did not provide for a pro-active role of the law such as ordering mergers and takeovers. Further woven into this statute were the goals of indigenisation of commerce and industry, which are purely political and social concepts, while as competition policy and law aim at safeguarding efficient resource allocation, whether the producers are African or foreigners. Thirdly the Bill was of the view that labour intensive techniques were to

⁴⁹ Parliament. November (1988) Parliamentary Reports. Nairobi.

be promoted in the event of technological choice, no doubt to perpetuate employment creation, whether this was efficient or not.

The members' debates managed to shed light on the restrictive trade practices, which were practiced. Amongst these were tied sales where wholesalers and retailers sold roofing sheets and nails together or not at all. Provision of textiles was supplied to the retailer according to his relationship (racial) with the manufacturer, or where new lines were only available through one distributor authorized to distribute to a selected few thus cornering the market at the expense of other traders.⁵⁰ There was also predatory pricing as instanced where jua kali (informal sector) artisans had begun manufacturing metal window grills but big manufacturers had moved in lowered the prices for a year driven the jua kali artisans out of work and thereafter managed to raise the price unilaterally as monopolists.⁵¹

One criticism that was made was that the government would not have enough manpower to police every restrictive operation the trade industry.⁵² No suggestion was offered on how this could be ameliorated. The suggestion was offered of taking advantage of the then Preferential Trade Area (now the Common Market for East and Southern Africa) by urging indigenous companies to merge under the proposed bill, so as to promote efficiency.⁵³ This again brought out the need of the statute to be pro active.

Honorable Makau's contribution truculently brought out the issue of indigenisation of the economy. The Bill he said, "will be a salvation to the indigenisation programmes in this country as far as commerce and industry are concerned. We have had law governing business operations but many a time they have been abused by unscrupulous business men who have always tended to drive away indigenous Africans"⁵⁴ he mentioned goodwill as one of those unscrupulous practices. He urged that the statute balance the mix of races in the economy. The Bill was to make sure that Africans participated in the economic development and ownership of property.⁵⁵ What the member failed to appreciate was that the indigenous people might not have the skill or capital to participate in commerce and industry which was driven by efficiency dictates. How the statute would cross that hurdle he did not expound.

He had important criticisms to make. He advocated for the creation of the Office of Fair Trading, which would efficiently combat unfair trade practices. He characterized the activities of restrictive trade as economic sabotage. The gravity of such a crime deserved that a presidential appointee fill

⁵⁰ Ibid. Hon. Mwai Kibaki. p1-q2.

⁵¹ Ibid.

⁵² Ibid. Hon. Kibaki. q2.

⁵³ Ibid. r3.

⁵⁴ Ibid. s3.

⁵⁵ Ibid. t2.

the office so as to clothe it with sufficient power and prestige to intimidate economic saboteurs.⁵⁶ This was relevant. He pointed out that he did not understand why the chairman of the Restrictive Trade Practices Tribunal had to be an advocate of at least seven years standing to understand the running of the tribunal. He was of the view that "any body who had studied advanced accounting and marketing " could as well head the tribunal since in passing they must have studied law.⁵⁷ The better position was that in addition to law the chairperson of the tribunal ought to have studied economics.

Other members managed to raise the issue of lack of dynamic efficiency in the industrial sector, which was evidenced, by lack of new innovative products or industries.⁵⁸ They decried the irresponsible price hikes, which had become rampant after price decontrols they advocated for the breaking up of family syndicates as well as businesses which controlled manufacturing wholesaling and retailing. They called for continuous dissemination of information to business people on what constituted restrictive practices as well as the public by the proposed commissioner.⁵⁹ They maintained that price controls should remain to protect the consumer. They advocated for the dismantling of parastatals which they identified as monopolistic and observed that the commissioners body had an onerous duty and so should be competitively remunerated.⁶⁰

However it is clear that from the very brief period within which the statute was passed only few members had grasped the import of the statute economically. Further the Attorney General failed to step in and guide the members on the difference of purely economic goals and other social and political factors prevailing in the economy. So it is not surprising that at an honourable member could passionately declare that "monopoly means giving Africans preference".⁶¹

Nonetheless after exactly two brief sittings characterized by lacklustre debate due to an empty house the bill was passed on 15th November 1988 with only one amendment⁶².

COMPONENTS OF COMPETITION LAW

1) RESTRICTIVE TRADE PRACTICES

The statute defines a restrictive trade practice (rtp) as 'an activity performed by one party who engages in the production of goods and services or in their sale reduces or in offering those goods reduces and eliminates the opportunities to acquire those goods.' There are two types of rtps, these are horizontal agreements and vertical agreements.

⁵⁶ Ibid. u3.

⁵⁷ Ibid. v3.

⁵⁸ Ibid. vol. lxxv. Hon. Mangoli. v2.

⁵⁹ Ibid. vol. lxxvi. Hon. Gakurju. e2.

⁶⁰ Ibid. g2. Hon. M'mukindia.

⁶¹ Supra. Note 58. Hon Mangoli.

⁶² Clause 22 of the bill.

Horizontal agreements

Horizontal agreements are entered into by independent undertakings at the same level of production in order to limit output and to increase price and are devoid of any beneficial consequences to consumer welfare. The number of such agreements that fall within this category are provided for between sections 6 to 12 and are described briefly below.

Horizontal price fixing

Hereunder independent firms at the same level of production agree to set their prices at a particular level whereby each of them will reap certain profits. This is cartelization in its most blatant form. It is not surprising that the American, European Union laws are unanimous in prohibition of horizontal price fixing. There was a time that price fixing was thought to provide stability, to protect firms against cyclical depression and overseas competition and to facilitate orderly and rational marketing from which purchasers could expect to benefit.⁶³ That reasoning can also be found behind the enactment of such laws as the Price Control Act.

In the United States of America horizontal price fixing is subject to the per se rule of prohibition. This was established in the case of United States v Socony Vacuum Oil Company.⁶⁴ The court rejected the oil companies defenses based on the reasonableness of their prices and benefits of price stabilization holding that any combination which tampers with price structures is unlawful and that it was not the courts function to consider whether a particular price fixing scheme was wise or unwise healthy or destructive. It also held that the defendants market power was irrelevant. The illegal purpose of the price fixing agreement was sufficient to condemn it. Maximum price fixing is caught since maximum price could become minimum. Section 85 of the Treaty of Rome also outlaws this form of cartelization.

Horizontal market division

Independent firms at the same level of production apportion different geographic zones and agree not to poach on each other's territory or divide market according to classes of customers such as trade customers' retailers. This agreement is restrictive from a consumer point of view as it limits choice. Market sharing also serves to perpetuate the isolation of particular geographical markets and to retard the prices of single market integration since reduction of output leads to increase in price.

Quotas and other restrictions on production

Supra competitive profits are also earned by agreeing to restrict the output of a cartels members through quotas. If output is reduced price will rise. In the quota system each member supplies a specified proportion of the entire industry within any quota period.

⁶³ Posner R. (1976). Antitrust Law an Economic Perspective University of Chicago Press Chicago .

Collusive tendering

This is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. This is common in engineering and construction industries where firms compete for very large contracts. The tenderer will have a powerful bargaining position and the contractors feel the need to concert their power. Section 11 prohibits collusive tendering and outlaws prearranged quotations between suppliers, manufacturers, wholesalers, retailers, and contractors when applying for a tender. Section 12 outlaws collusive bidding at auctions, sales or agreements to abstain from bidding. For all the offence committed in relation to 'rtps' the punitive measures are similar, a fine of one hundred thousand shillings or imprisonment for a term exceeding three years or both.

Other horizontal arrangements are information agreements, research and development agreements, agreements improving efficient production and standardization agreements.

Vertical agreements

A restraint is vertical when it is accepted between firms, which operate at different levels in market that is it is an arrangement that a producer makes for the distribution of his goods to the ultimate consumer. The task of competition policy is to distinguish between harmless or beneficial restrictions from those, which should be prohibited. The process is complicated by inter and intra brand competition. Vertical restraints can be discerned in distribution agreements, exclusive purchasing terms, exclusive supply terms, resale price maintenance and selective distribution systems, exclusive dealing and purchasing, tie ins and full line forcing, refusal to supply. Sections 8 and 9 expand on these discriminatory practices.

Price discrimination

This is the sale or purchase of different units of a good or services at prices not directly corresponding to differences in supplying them. Section 8 deals with refusal or discrimination in supply whereby a party for example a manufacturer supplies to one wholesaler in terms less favorable than to other wholesalers. Less favourable circumstances are defined as goods being supplied after a very long time after an order was received or goods being supplied at a higher price.

Predatory pricing

This is an aspect of modern monopolization by dominant firms in the market. Predatory pricing is pricing a product below the average variable cost. It is usually deemed to be unlawful until the defendant can justify such pricing by showing it was promotional. Section 10(3) (a) of the Act

⁶⁴ 310 US 150.S.Ct.811 (1940).

describes this practice. However the Act goes further than what is in the ambit of modern competition law by including predatory trade practices which include threats of bodily harm and harm to property should a person continue to deal. This is the ambit of criminal law not competition law, as it is obviously a crime to so threaten a person. The effect is to load competition law with provisions that are not amenable to competition law analysis.

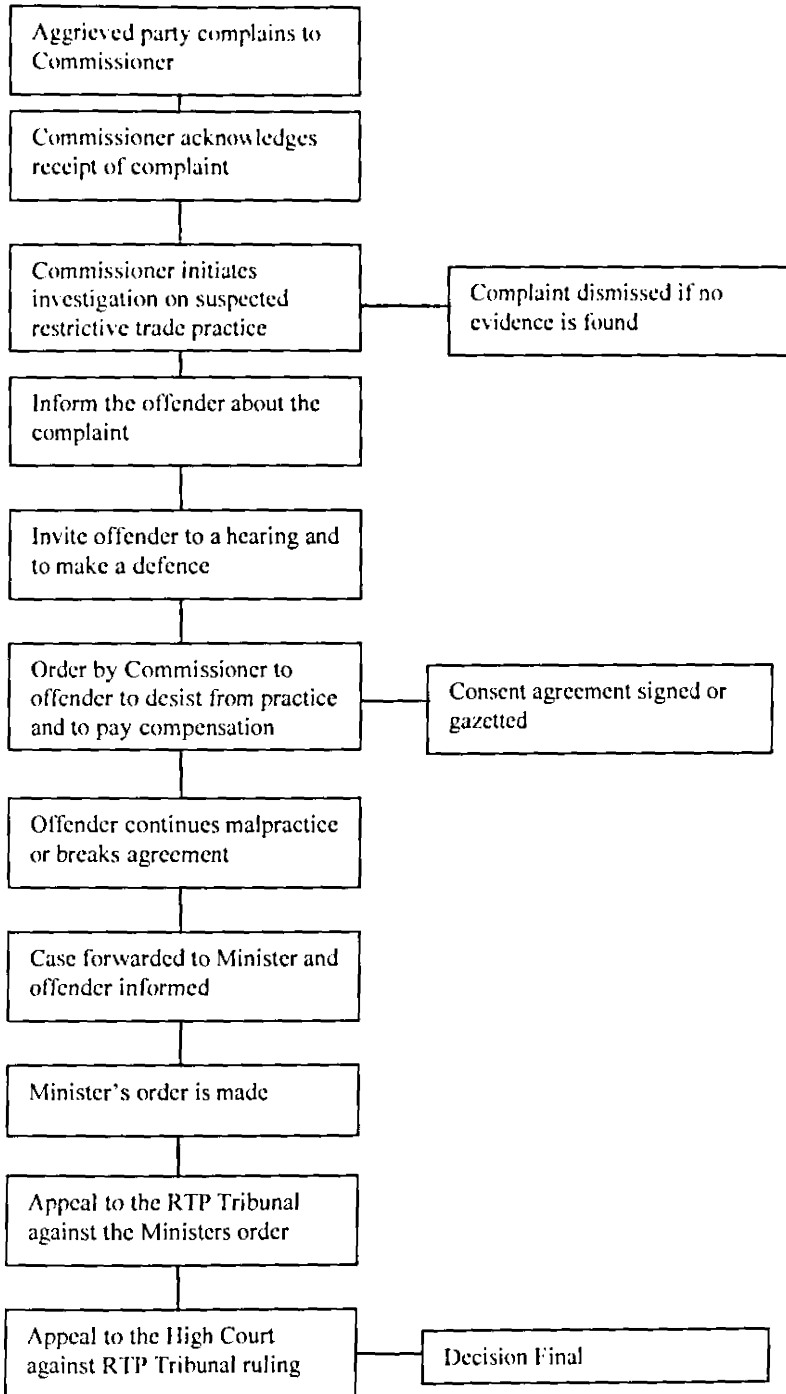
Experienced jurisdictions have distinguished between the effect of blatant cartelization as evidenced by horizontal arrangements and the more benign forms of attempts at market control as evidenced by vertical agreements.⁶⁵ The former is strictly viewed and is approached by the courts as per se violations of the law. The latter are amenable to the rule of reason approach.⁶⁶ This means that the effect of such a conduct on the market, the market behind the conduct, how much market presence or clout the offender has and the state of mind accompanying such behavior are taken into consideration; so that the question is, 'does that rtp substantially lessen competition?' Thus the important rule of reason approach seems to be excluded in the Kenyan statute.

Where 'rtps' are concerned the act does have glaring disabilities in relation to its expansiveness of the definitions offered. Brevity is to be preferred. Moreover, the rtp need not even have the effect of restraining, restricting or substantially lessening competition. Under section 4 it only needs to reduce the opportunity of certain would be entrants into the markets. Thus any efficient entrepreneurial activity will almost by necessity qualify as a rtp. This is because all entrepreneurial activity will have the effect of reducing the opportunities that would have existed for would be entrants in the absence of efficient competitors. The act thus penalizes the efficiency it seeks to promote.

⁶⁵ Bork R. (1965). "The rule of reason and the per se concept of price fixing and market division" 74 Yale Law Journal 775.

⁶⁶ Posner R. (1981). "The next step in the antitrust treatment of restricted distribution and per se illegality". 48 University of Chicago Law Review. Page 234.

Procedures for restrictive trade practice complaints



Sections 13 to 17 outline the procedure on inquiries and investigations into 'rtps'. A person who feels aggrieved by a 'rtp' may submit a complaint to the Minister through the Commissioner, or the commissioner may initiate an investigation purely on his own volition.⁶⁷ He can demand documents in relation to any 'rtp' and pose any question, which he deems relevant, and demand a response within a reasonable time. He can demand access to any records and persons involved in the transaction he may enter any premises to verify specification of any goods, their movement and inspect those premises.⁶⁸

In so acting the Commissioner may inform the alleged offender of the allegations and the specific evidence tendered to that effect. He may order the person to make a response to the allegations by a certain date or to take corrective steps against, discontinue the rtp as well as compensate for the past effects and taking positive to assist suppliers.⁶⁹

If such corrective steps are not taken then the Commissioner causes a person to negotiate a consent agreement satisfactory to the commissioner stating that the person will desist from further rtp activity and will take specific measures to compensate. The agreement is then published in the gazette. Failure to follow these measures enables the Commissioner to recommend that the minister make an order in respect to the practices in question and that a hearing on the contents of the order be made. The offender is invited to attend the hearing with an advocate of his own choice and the commissioner may authorize any person in writing to conduct the hearing.⁷⁰ Upon the conclusion of this procedure the Commissioner presents his report to the Minister including the recommendations.⁷¹

Once the Minister makes an order, if the offender is aggrieved by the order of the minister then (the orders similar to those mandated to be made by the Commissioner) she may appeal to the restrictive trade practices tribunal within 28 days of making the order.⁷² It is not clear from the statute whether the Minister must make the order, which the Commissioner has recommended. The words are couched in the discretionary terms of "may". What would happen if the Minister failed to act as per recommendation? Which remedy does the Commissioner have? If still dissatisfied with the ruling of the tribunal he may appeal to the high court within 30 days of the decision being made, whose decision on the matter shall be final⁷³.

⁶⁷ Section 13.

⁶⁸ Section 14.

⁶⁹ Section 15.

⁷⁰ Section 16.

⁷¹ Section 17.

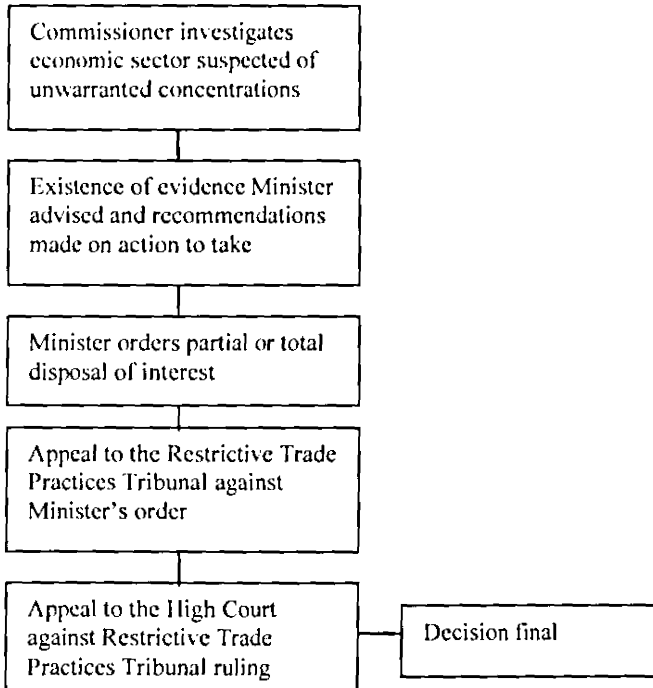
⁷² Section 20.

⁷³ Section 20(2).

If a person contravenes an order or fails to comply with it but has not lodged an appeal with the relevant appellate body, that person is guilty of an offence and is liable to imprisonment to a term not exceeding two years and to a fine not exceeding one hundred thousand shillings or both⁷⁴.

2) MONOPOLIES AND CONCENTRATIONS OF ECONOMIC POWER

Procedures of investigation



This deals with monopolies and concentrations of economic power. Section 22 gives the interpretations of the part by defining the key terms. This includes terms such as "control" which deals with the power to make major decisions in respect of conduct of affairs of an enterprise. This definition is deficient in that control should have substantial market implications of lessening competition in respect of a particular entrepreneurial activity. The terms "mergers", "takeovers", "market", are also defined. Though the definition of a merger is too broad most of the permutations described boil down to acquisitions of majority ownership of the shares, equity, capital or the assets of a company or business. This in essence covers the privatization and government divestiture process.

The purpose of the part is to enable the Minister in charge of finance to keep the structure of production and distribution of goods and services in Kenya under review. This is in order to

⁷⁴ Section 21.

determine where there exist concentrations of economic power whose detrimental impact on the economy outweighs the efficiency advantages if any of the integration in production and distribution. Thus this section intends to rein in monopolies and unbeneficial oligopolistic structures.

In keeping his eyes on these inefficient structures the following factors guide the Minister: -

- a. The control by a person over a chain of distributing units that hold more than one third of a regional urban or the national market for the category of goods sold by the chain.
- b. The control by a person of two or more units manufacturing substantially similar products and holding more than one third of the domestic product for that category of goods.
- c. An interest in excess of 20 per cent in a manufacturing enterprise combined with any interest however small in a wholesale or retail distributor.
- d. An interest exceeding 20 percent in a wholesale distributor combined with any interest however small in a retail distributor dealing in goods supplied by the wholesaler.⁷⁵

After noting an economic sector, which features any of the above factors and has reason to relate to unwarranted concentrations of economic power, the Minister may direct the Commissioner to investigate that sector.⁷⁶

The better method would be the Commissioner of his own volition to be charged with the duty of keeping an eye on the economic sector. In the Kenyan system of governance, the Minister is a Member of Parliament in addition to his executive functions as a member of the executive. The Minister is extremely busy, with the Treasury to oversee in addition to his political duties. It is hardly prudent that a politician who is not a technocrat should be charged with the duty of analyzing the structural efficiency of the market. Yet this provision provides the evidence of the lack of coherence between the stated policy objectives in the Ndegwa Report and the law as implemented, which created a lame-duck Commissioner, especially in this area of market structure.

In fixing market share thresholds, inflexibility is created. A market share in excess of one third of a market can have divergent implications for the power of the company holding that share. The analysis requires consideration of other market factors such as ease of entry or concentrations of similar players in the market. However this is balanced by the fact that giving a definite number halts the Ministers discretion in that he cannot interfere with economic well being of businesses or corporations.

The section also fails to appreciate that market share does not connote market power. Thus market power should be added as an independent threshold and it should be defined as the ability

⁷⁵ Section 23(1).

of those units to profitably raise prices or restrict output. In addition the minister should consider ease of entry of competitors. The absence of barriers of entry such as restrictive licensing eliminates the concerns arising from a higher market share and would require finding of no unwarranted concentration. This is because if a sector is profitable, other competitors will invariably join the party

In addition section 23 neglects to enunciate the criteria for determining relevant product and geographic markets in which market shares should be determined and market power would be gauged. With respect to the relevant market, substitutability should be prescribed so that a relevant product market is deemed to encompass all alike products perceived by consumers to be substitutable for the one at issue. To illustrate, if an increase in the price of u by all manufacturers or distributors of u would instead of generating profits for these manufacturers cause consumers to switch to product v and w, the relevant product market would consist of products u, v and w. The result would be that in this case the market share of the manufacturers would be in reference to the market share of all these substitutable products and only then would market power be computed.

As regards sections 23 (1) (c) and (d) no market share threshold is prescribed and an unwarranted concentration may be found merely because a person holds 20 per cent in a manufacture and has another interest in distributor retailer, regardless of the market shares of the latter. It neglects to recognize that a person can hold shares in all these entities for investment purposes only.

The combined effects of section 23 and 24 are that the Minister will order divestiture where an unwarranted concentration of economic power would: -

- a) Increase unreasonably the production supply, distribution of goods or service;
- b) Would increase unreasonably the price at which goods are sold;
- c) Would reduce or limit competition; and
- d) Would result in the deterioration in the quality of any goods.

The requirement of prejudiciability is commendable in that it preempts hasty convoluted disadvantageous and prolix procedures or outcomes. Whereby the Minister jumps at every perceived "unwarranted concentration".

Once a divestiture order is made and a person is aggrieved she can appeal to the Restrictive Trade Practices Tribunal and finally to the High Court. Failure to comply with an order or to contravene it in the absence of an appeal within the requisite time allotted is an offence, however the penalty is not given.⁷⁷

⁷⁶ Section 23(2)

⁷⁷ Section 26.

Sections 27 to 32 deal with the control of mergers and takeovers. Approval from the Minister in charge of Finance is required in consummating a merger between independent enterprises engaged in a similar line of business. The absence of such an authorizing order renders the merger or takeover legally void and such a transaction is an offence.⁷⁸ The appropriate procedure is an application to be made to the Minister through the Commissioner who investigates the application by accessing records relating to the patterns of ownership and percentages of sales accounted for by the participants in the sector.⁷⁹

In evaluating the application so as to propose an appropriate recommendation to the Minister the Commissioner uses the criteria that the: -

1) Transaction will be advantageous in that the participants' goods or service entering the international trade and the transaction will have allocative and productive efficiency thus having competitively priced exports, which in turn expands international market share and creates domestic employment.

2) Transaction will not be anti competitive and lead to creation of oligopolies.

3) Transaction will not lead to reliance and encouragement of capital intensive production.⁸⁰

This particular provision places the minister in charge of takeovers. This means that as far as privatization of state owned corporations is concerned he is in charge of approval of the process. However since he is clothed with so much discretion the privatization process which is key to creating a structurally competitive economy with competitively run enterprises is premised on the ad hoc commitments of the minister to favourably exercise his discretion. Privatization could have been better run through clearly created identified institutions which would have had active representation of an empowered monopolies commissioner.⁸¹

Instead of an application for approval of a takeover or merger, there should be a pre merger notification to the commissioner, so that if the Commissioner is uncomfortable, he can request further information within a specified limited time. Failure to do so would mean that the merger or the takeover would have to go ahead. This is because the application as it now appears in the statute is an administrative barrier to business practice. Decisions to merge are usually made after precise deliberations as to their use and profitability. To have the power to enjoin them, unless they are really anti competitive is deterrent to investment. Further the provision of illegality of unauthorized mergers and takeovers penalizes bona fide third parties.

Section 30(c) is misplaced and anachronistic. Competition law is designed to enhance static and dynamic efficiency. Whether that efficiency is best effectuated by a labor practice is strictly a matter of business not law. In addition the labor sector is also supposed to be liberalized, as it is one

⁷⁸ Section 27(1).

⁷⁹ Section 29.

⁸⁰ Section 30

hindrance to the much-awaited industrialization. It is still restricted through the regulations in wages and employment provisions. To refuse a merger or a takeover on account of the method of labor makes nonsense of the much-louted concept of a liberalized and a competitive market where decisions are made by the businessman based on market forces.

A party aggrieved by the decision of the Minister under this section has recourse to the Restrictive Trade Practices Tribunal and a final appeal lies with the High Court, provided all the procedures are taken within the prescribed period⁶²

3) INSTITUTIONS CREATED BY THE LAW

The Office of the Monopolies Commissioner

There is appointed a Monopoly Commissioner who is subject to the control of the Minister of Finance and is responsible for the control and management of the Monopolies and Prices Department of the Treasury⁶³. He has the power to delegate any of his duties under the act.⁶⁴ The wording used for his appointment is curious. His is not an autonomous office but a department within the ministry. Thus his office is overshadowed by other occurrences within Treasury, such as budgetary control and sourcing external aid. He cannot make independent decisions, as he is a department. He cannot authoritatively stand on his own podium and fashion competition policy or encourage it he is led he is not a leader. His voice is subsumed by other more pressing concerns and it is no wonder that his office is not in evidence in the formulation of divestiture and privatization policy. Since any contribution he might make is wont to be overshadowed by the contributions of the other departments in the Ministry of Finance. This as will be shown in the next chapter has led to many mistakes in the economic restructuring process.

To clothe this office with more authority the office should have been created as an autonomous governmental organ and clothed with sufficient trappings of power to oversee the whole marketplace, leaving the office free of the power games that bedevil other rank and file civil servants.⁶⁵ In the United States of America, the Anti-trust Division is headed by an Assistant Attorney General who is nominated by the President and confirmed by the Senate.

In addition Kenya was a largely centralized economy, once the macro economic policies were in the process of being rectified the early introduction of competition law should have focused on the autonomous commissioner doing the following in the order of importance. He should have been a public advocate for competition against public policies that offended this tenet. This would have

⁶¹ Supra note 36

⁶² Section 32

⁶³ Section 3

⁶⁴ Section 47

⁶⁵ supra note 56

raised awareness to the new policy that had an interface with the proper management of different sectors that were the subject of liberalization. This would also have provided a base of support and understanding from the public and private sectors. Then the rule-based approach of the law should have found ready support and acceptance in the private and liberalizing and restructuring public sectors.

The statute should have stipulated his term of office and so should have been his qualifications and duties. His officers should have been enumerated, and their qualifications named in the statute. As it is now the office does not have legal counsel who are necessary in an office of this nature. He is supposed to acquire counsel seconded from the Office of the Attorney General yet this has never happened and there are no signs that it will happen in the near future, since every year's budget reading is silent on this important office.

The only time there was a legal counsel was in 1997, but she was only a temporary assignment. After 9 months she was transferred to the Nairobi City Council as the Town Clerk⁸⁶. This does compromise any decisions that the office of the Commissioner arrives at. Competition law is a unique mix of law and economics. Indeed the quote,

"One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to be a public enemy."⁸⁷

is true for the Commissioner and his officers, they too need the analysis that legal officers can bring to their work otherwise their work is lopsided.

The issue of remuneration also needs amendment. The nature of the work expected by this office is of special interest to businessmen. While huge pay packets are not a guarantee against influence that can easily be bought by monetary inducements from business corporations, a good salary goes a long way in attracting qualified and intelligent personnel and keeping them there in the commissioner's office and is a deterrence to influence. At present the office is dogged by high turnover of the economists who are posted there. Not only do they resign in search of greener pastures, but since this office is a mere department in a ministry they are transferred to other departments, which are deemed more important.⁸⁸

All these structural deficiencies in that institution show that the effective policing of the market place is already compromised even before the commissioner gets off the block.

⁸⁶ Monopolies and Prices Commission. (1997) Annual Report of the Monopolies Commissioner. Nairobi Page 7

⁸⁷ Brandeis L.D. (1934). The Living Laws. The Curse of Bigness (Osmond K.Frankel) ed. 316, 325.

Restrictive Trade Practices Tribunal

A specialized court, the Restrictive Trade Practices Tribunal is set up.⁸⁹ It has exclusive jurisdiction in the first level of appeal from the ministerial orders under sections 18(restrictive trade practices), 24 (concentrations of power) and 31 (mergers and takeovers). The tribunal consists of a chairman who shall be an advocate of the High Court of Kenya of not less than seven years standing and shall include four other members who are all ministerial appointees.⁹⁰

Each member holds office for a maximum period of five years unless he resigns or becomes unfit by reason of mental or physical infirmity or fails to attend three meetings in a row. In this case the minister revokes the appointment⁹¹. The quorum of a meeting is the chairman and two other members.⁹² The tribunal is funded at terms that are at the minister's discretion.⁹³ The Minister has also made rules in the manner and procedure of appeal,⁹⁴ from decisions of the tribunal.

The provision of an adjudicatory body is commendable as it helps concentrate competition law practice in one place. This avoids taking competition law cases at first instance to the already crowded civil or commercial courts. Also difficult competition analysis is not taken to the judiciary but to people who ideally should be experts in commerce, economics and law. Competence in competition law requires a working knowledge of traditional economic concepts of competition, monopoly monopolistic competition and oligopoly as well as a grasp of newer theories dealing with information transaction costs game theory and contestable markets.⁹⁵

For the tribunal to be effective in the enforcement of the act it should be mandatory that it be de-linked from the executive branch of government and it be an autonomous body with its own budgetary allocation and it should also be independent from the commissioner and his staff. This independence should be safeguarded at statutory level.

To build up this body of expertise, the statute should give the substantive qualifications for the tribunal's members and staff other than the seven-year requirement for the chairman. The tribunal should be invested with procedural safeguards than the administrative process leading to the issuance of the minister's orders. The tribunal should review appeals *de novo* so that the order being reviewed is not given *res Judicata* or any other special legal status. It is commendable that under section 67 the tribunal has control over its hearing in that it can order part of the hearing be conducted in camera and may also order the prohibition of any publication of any report to the proceedings. Further the tribunal can refer back appeals to the minister for reconsideration.

⁸⁸ *Supra*. Note 84 page 9

⁸⁹ Section 64.(1)

⁹⁰ Section 64(2)

⁹¹ section 64(3)

⁹² Section 64(4)

⁹³ Section 64(5)

⁹⁴ Section 64(6)

However admirable as that may be, it can be an obstacle to due process. Due process requires transparency and accountability. Undue authority over its proceedings by the Minister and the lack of benchmarks as to when it may order proceedings to be in camera does not auger well for due process.

Another requirement of due process is that appeals over decisions of the competition authority must lie to an independent body. The tribunal is not independent. The minister from whom it must hear appeals and from whom it derives its budget, appoints it, by rules made by the minister who in the statute is the competition authority. The important requirement of due process is not guaranteed by the implementation and enforcement institutions of this law.

Unfortunately, ever since its establishment, the Tribunal has never sat to determine any matter so there is nothing by way of data to offer a glimpse as to its *modus operandi* or the efficacy with which it performs its work. If it is the body which is supposed to be the repository of all competition law then its members should be vested with continuity and not the five year appointments, especially if competition law was to be given its right role as the regulator to the economic restructuring process. Furthermore, effective implementation of competition law requires a high level of expertise and requisite knowledge it is doubtful whether the ad hoc appointees who sit at the Tribunal possess such capability. In 1991 the chairman of the tribunal was Prof. Onesmus Mutungi⁹⁶. In 1996 the new chairman was Mathew Emukule.⁹⁷

Residual price control

It deals with the control and display of prices and was included since it adopted the pre existing Price Control Act⁹⁸. The part has ceased to have any relevance. Prices in all the sectors have been decontrolled and the last bulwark of price control was dismantled in 1994 when the petroleum industry was liberalized⁹⁹. Nevertheless the sections continue to exist, and the minister enjoys absolute discretion to set price or service charges for goods and services produced by monopoly undertakings. Section 35 provides that he can set the maximum price or the manner in which the maximum price shall be ascertained. In respect of goods not produced by monopoly undertakings the minister may still set prices but his discretion is limited by the cost of such goods to the producer plus the percentage of profit in addition to any other costs such as transport charges

While there does not exist price setting by administrative fiat since 1994, the needs of markets that are dominated by monopolies such as the telecommunications and the electricity supply sector

⁹⁵ Gellhorn, E, Kovacic, W. (1994). *Antitrust law and Economics*, West Publishing Company, St. Paul. pg.120.

⁹⁶ Kenya gazette vol. xcii no 6 8 February 1991

⁹⁷ Kenya gazette vol. xcvi no 14 of March 1 1996

⁹⁸ Repealed.

⁹⁹ L.N. No.382.28th October 1994

should still have their prices controlled. Indeed the new statutes¹⁰⁰ in charge of telecommunications and power sectors give the regulatory bodies which they have created the power to review and approve the tariffs charged by these two sectors. The Monopolies Commissioner is not involved at all. This provision needs to be married and related to the new statutes, which have no recognition of the role of the Monopolies Commissioner. These provisions should not exist in the competition law but separately and be enforced by line ministries. This part has had the effect of bogging down competition law with non-competition administrative issues.

WHAT THE LAW CAN DO

The Restrictive Trade Practices Monopolies and Price Control Act was enacted to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices. The presumption is that it was supposed to:-

- a) preside over the liberalization process;
- b) regulate the liberalized sectors; and
- c) provide the rules of the game to all sectors of the economy.

Kenya chose to restructure her public sector without the help of a privatization law. Other countries such as Uganda have the Public Enterprises Reform and Divestiture Statute. However there was the competition law, which because of its concern with the structural efficiency of the market place should have dictated the creation of structurally efficient sectors.¹⁰¹ However as the next chapter will illustrate the law has not been used. In most of the restructured sectors and parastatals, monopolies were either perpetuated or duopolies created. There has never been invocation of the law to remedy this deliberate disregard of the competition law.

It is the expectation that once a competition law is introduced to regulate the market forces unleashed by liberalizing an economy, all sectors of the economy are supposed to fall under its ambit. This is to ensure coherence in the manner in which things are run and to enhance the effectiveness of the liberalization process. Unfortunately this wasn't the case with the statute. Section 5 of the statute exempts: -

- (a) trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading practices conferred on any person by an Act of parliament or by an agency or the government acting in accordance with authority conferred on it by an Act of parliament; and
- (b) Trade practices which are directly and necessarily associated with the licensing of participants of certain trades and professions by agencies of the government acting in accordance with authority conferred on them by an Act of parliament.

¹⁰⁰ Electric Power Act, 1998. Kenya Communications Act.

¹⁰¹ The Restrictive Trade Practices Monopolies and Price Control Act. Sections 22-32.

The statute gave blanket exemptions. This provision created confusion, for in interpretation it can mean that competition law as enacted was not applicable to the agricultural boards established by statute which had regulatory powers in the production and marketing of their crops and there are provisions that gave them exclusivity over the said activities. They were monopolies. Yet the statute seemed to expressly efface its own authority in the face of this anti competitive state of affairs. Such bodies include Coffee Board of Kenya, Kenya Dairy Board and the Tea Board of Kenya.¹⁰² The perceived continued exemption from the statute worked against the creation and maintenance of a structurally competitive economy to the detriment of the whole agricultural sector, for in the nineties they remained untouched monopolies.

In any case when the agricultural sector was fully liberalized there was no input from the Monopolies Commissioner for the simple reason that any useful observations he might have had to make were locked out and he had no role to play. This is also the case in the power sector and the telecommunication sectors. Where the Electric Power Act and the Kenya Communications Act have created licensing bodies in the Electricity Regulatory Board (ERB) and the Communications Commission of Kenya (CCK). The process would have benefited immensely from the authoritative input of a pro-competition voice¹⁰³. The benefits that would have been reaped by the whole economy by adherence to competition precepts in the restructuring process, have been lost, at least during that period of time. These benefits are illustrated as the outcome of adherence to competition. These are the promotion of static and dynamic efficiency in the sectors where competition has been introduced.¹⁰⁴

The concept that had initially been promulgated by the Ndegwa Report was not implemented.¹⁰⁵ Who were the beneficiaries of the ensuing exemption of all the restructuring parastatals from the investigative and guiding eye of the monopoly commissioner? Who benefited from the status quo? The answer is in the political function which these state bodies had began to perform. They were used to employ people perceived to be sympathetic to the government of the day. Hence as long as they were exempt from the enforcement of competition in their structure and function they could continue in their structurally inefficient and unsound business practices. The exemption was definitely not in the interests of consumer welfare. In the parliamentary debates members were of the opinion that the new law once enacted would be used to competitively restructure and liberalize these sectors¹⁰⁶. This never happened.

This exemption also meant that the licensing bodies were free from the scrutiny of the law. Licensing powers couched in discretionary terms usually pose entry barriers and promote skewed

¹⁰² Monopolies Commission (1997). "Trade Practices Exempted from the Kenyan Competition Law and their Implications". Policy Law Enforcement Analysis and Techniques Course held at KIA. Monopolies Commission, Ministry of Finance Nairobi.

¹⁰³ World Trade Organisation. (2000). Kenya Trade Policy Review Report. WTO Publications Geneva Pg 79.

¹⁰⁴ Supra page 2- 4

¹⁰⁶ Supra note 32

entry of firms into the market without a cogent analysis of the effects random issuing of licensing would have on competitiveness of the sector. Licensing bodies are rarely transparent and neither are they supposed to adduce reasons for their decisions. A pro-active Commissioner clothed with the power to investigate anti competitive licensing decisions is surely a threat to the beneficiaries of the prevailing status quo.

It also meant that any liberalization of these sectors would be done without the input of the competition law institutions that were set up. This is because the law of competition was set up in a policy vacuum. There was no policy paper or sessional paper specifically addressing and guiding how competition was going to be introduced to guide the whole economy since it was envisaged that government involvement in the market would cease. Therefore due to lack of this guiding policy the Commissioner was not in evidence when the privatization institutions were set up. The conclusion to be drawn is that government did not have the political will to entrench competition in all the strategic sectors of the economy.

Lack of political will is discerned by entrenched interests, conflicts of interest, inappropriate political culture and weak institutional prerequisites for ensuring the success of parastatal reform and privatization measures needed to privatize, not passing useful legislation, not having requisite institutions and using inappropriate methods and techniques to privatize.¹⁰⁷ This lack of political will is seen in the statute provisions especially section 73 which upholds section 5. The Commissioner also shows interesting interpretation of the law, as is illustrated below.

THE PRACTICE OF THE COMMISSIONER - CASE LAW HANDLED BY THE MONOPOLIES COMMISSIONER 1994 – 1998

The reasons of reviewing the practice of the Commissioner in the stated years is important for three reasons. Firstly these are the only cases availed by the Commissioner. Secondly this is the period during which the government was laying down the framework for restructuring the public sector and it is worthwhile to see whether at that time, from what can be gleaned from the reports, the Commissioner was involved in laying down the policy. Lastly it is important to see what calibre of cases the Commissioner handles and what effect they have on the market structure.

In 1994 the commissioner evaluated nine merger and takeover proposals and thirteen cases relating to 'rtps', this was an increase of 28.6 per cent for mergers and takeover proposals and 85.7 increase for cases relating to 'rtps'.¹⁰⁸ the upward trend was attributed to: -

- 1) Increased momentum in the liberalization process undertaken by the government; and

¹⁰⁸ Supra note 60

¹⁰⁷ World Bank (1995) *Bureaucrats and Business*, the Economics and Politics of Government Ownership. Oxford University Press Oxford.

2) Awareness by the market operators of the existence of competition law and policy.

Of the merger and takeover proposals the Commission based approval on the share of market power that a merger would produce. If the merger did not raise competition concerns, by the fact that the company would not become dominant by controlling the market or the merger was beneficial to the industry it was approved.¹⁰⁹ Mergers included horizontal acquisitions whereby industries engaged in the same kind of production became one entity or vertical, where a manufacturer merged or took-over a distributor as in the case of Refrigeration Distributors and Premier Refrigeration and Engineering Limited.¹¹⁰

The 'rtps' for the same year show that the commission initiated investigations on newspaper reports, such as the one alleging that a cement company had cancelled sales to certain distributors or on the basis of complaints from other competitors. (Commissioner Vs Kenya Company Portland Cement).¹¹¹ Complaints against local authorities were also investigated where they denied licenses and licensing bodies such as the Kenya Dairy Board that refused to license other milk processors.¹¹²

Foreign embassies were also investigated as they issued directives on their citizens on where to shop for curios.¹¹³ The issue of dumping was also raised by some of the complainants for example imported shoes were sold at less than fair value thus ruining the business of the complainant¹¹⁴. For most of the restrictive practices complained of, investigations were not completed within one year.

After full liberalization of the economy in 1995 the Commission felt the need to strengthen its operation and identified the need for more officers to strengthen its operations as regards continuity and consistency in research, investigation and data analysis. Initially the commissioner, assisted by a senior assistant commissioner (administration) and deputy chief economist manned the commission.¹¹⁵ In 1995, the office of the deputy commissioner was created and the tentacles of the commission were spread throughout the country. This was to ensure that efficiency and effectiveness in handling of competition case throughout the country. Nairobi got ten monopolies officers, Coast province got four, Eastern province got three, Rift Valley got five, Central got four, Nyanza got three, Western got three and North Eastern got none.¹¹⁶

¹⁰⁸ Monopolies and Prices Commission. (1994). Annual Report Ministry of Finance, Nairobi Page 2

¹⁰⁹ supra. page 3

¹¹⁰ ibid. page 4

¹¹¹ ibid. page 4

¹¹² ibid. page 5

¹¹³ ibid. page 5

¹¹⁴ ibid. page 6

¹¹⁵ Monopolies and Prices Commission (1995.) Annual Report Ministry of Finance, Nairobi Page 2

¹¹⁶ supra. page 3

Of the cases investigated in that year, the ones with wide felt economic ramifications was the Mwea Rice Millers Vs National Irrigation Board (NIB).¹¹⁷ The NIB is established by an Act of Parliament. It enjoys monopoly, which extends from production to milling and marketing of rice grown in the Mwea irrigation scheme. Incensed rice farmers in the region accused the NIB in being an impediment to liberalization by barring private potential millers from milling and farmers from selling their produce to the highest bidder. The Mwea private small-scale miller was unhappy that the board was using the provincial administration to frustrate competition. The Monopolies Commission did not resolve the case in that year, but four years down the road in 1999 there was a huge conflict in this region with the farmers refusing to deliver their rice to NIB. The government used its enforcement arm to force them to deliver to NIB and forcefully closing down the private mills¹¹⁸. The matter was serious and passionate to occasion fatalities in the confrontation. Obviously whatever the Commissioner's decision was way back in 1995, either his recommendations were not listened to or he did not really address the problem. The latter suggestion is credible given that the statute exempts bodies established by statutes such as the NIB from the scrutiny of the competition law.

The issue of geographical markets allotted by the Mount Kenya Bottlers was also investigated.¹¹⁹ The Bottlers also recommended the maximum retail price; the case was not completed in that year. The Kenya Posts and Telecommunications Corporation was also the issue of investigation in that year¹²⁰. The Kenya Association of Hotelkeepers and Caterers complained about its abuse of a dominant position through: -

- 1) Unjustifiable conditions of payments whose effect was an increase in production costs to clients by ordering them to settle their bills by bankers cheques and not cash.
- 2) The increase of prices of postage stamps by a margin of 133 per cent.

In the same year KPTC were arraigned in court by an independent organization on its steep hike in tariff rates.

The Commissioner did not finalize the matters and it would have been the expectation that dominant undertaking such as this would be recommended to raise its prices according to a pricing formula worked out by the commissioner. It is curious that this case was lodged with the commissioner despite the fact that KPTC was a statutory body and thus was exempt from the provisions of competition law according to section 5 of the Act.

In that year fourteen merger and takeover proposals were considered and ten were approved by the Commissioner, such as the take over of Sterling Health by Smith Kline Beecham Consumer Health Care Company. The Doshi Group of companies merging to form one company with Doshi

¹¹⁷ *ibid.* page 7

¹¹⁸ National Irrigation Board. (1999). Board Report of National Irrigation Board. Ministry of Agriculture Nairobi

¹¹⁹ *supra* note 115 page 7

Holdings; even though their combined market share was 50 percent'.¹²⁰ This is in direct contravention of the provisions of section 23 of the statute. Of the 'rtps' there were 15 complaints and four were resolved.

In 1996 the Commission provincial officers initiated 7 cases. These cases traversed all sectors of the economy. Primary, secondary and tertiary. However they did not handle mergers and takeovers due to capacity constraints. The Commission at headquarters handled eleven RTPs, eleven merger and takeover proposals and six were finalized.¹²¹

One of the outstanding cases was the Commissioner Vs Matatu Transport Operators.¹²² This was a survey conducted all over by the commissioner after news in the press alleged that certain groups of 'matatu' operators demanded monetary payments from intending new operators who wanted to start offering passenger transport in certain routes. This was a cartel arrangement which posed as an entry barrier to a party wishing to offer competition to the 'matatus' already existing on that route. The commission was to issue a policy recommendation by the end of 1996.

Nothing was heard of in this matter until three years down the road when the transport licensing board rules were enacted. The effect was to remove route allocation and license to ferry passengers from the shadowy and nebulous 'matatu' organization to the transport licensing board¹²⁴. Whether this new arrangement will curb the cartel arrangements of this sector only time will tell. Whether the commissioner had anything to do with this decision is not clear either.

The other case that elicits interest that year is Africa Online Vs Kenya Posts and Telecommunications.¹²⁵ Africa Online a pioneer internet service provider, complained that KPTC had refused to provide it with more telephone and communication lines that they needed for their everyday operations. Chapter 411 of the laws of Kenya mandated KPTC to provide these lines. The Commission prevailed and KPTC had to provide those lines. This case is interesting in that it raised the issue of the role of competition in promoting the use of information technology in the country. The case managed to show that the monopoly then enjoyed by KPTC meant that -

- 1) Services offered by the monopoly were below par, as the monopoly could not afford to bring in new technology.
- 2) The cost of mobile telephone was far too high due to the monopoly in granting licenses
- 3) Due to the monopoly, developments in the information technology arena that would open up business, such as access to the information super highway would be slower and more expensive, which would work out as a loss to the whole economy.

¹²⁰ *ibid.* page 8

¹²¹ *ibid.* pages 10 & 11

¹²² Monopolies and Prices Commission. (1996). Annual Report. Ministry of Finance. Nairobi. page 5

¹²³ *ibid.* page 5

¹²⁴ Daily Nation, April 15 1999. "Trouble with proposed TLB Act" Nairobi

Further the case was successfully handled by the commissioner despite the fact that KPTC was a parastatal created by parliament with exclusive right of providing the country with telephone lines. This raises questions over the inactivity of the commissioner where other statutory bodies have abused their monopolistic positions and the commissioner has failed to act. Three years down the line this prediction is proved true.¹²⁶

In 1997 the Commission handled 11 merger cases, 10 restrictive trade practice cases.¹²⁷ Of particular interest is the African Mercantile Bank Limited and National Industrial Credit Limited.¹²⁸ This case involved the takeover of Ambank by National Industrial Credit. As of December 1998 there were 53 domestic and foreign owned commercial banks, 14 non-bank financial institutions, 2 mortgage finance companies and 4 building societies. From 1998, Three banks hold 50 percent of total assets of the banking industry, nine banks controlled 70 per cent of the market share of total net assets, and 69 per cent of total deposits, while only 5 banks account for the branches outside main urban centers. About 30 institutions have failed since 1987 and 5 are under central bank statutory management.¹²⁹ The sector has thus evolved into an oligopolistic structure with a few banks dominating the market. One of the reasons given for weakness is under capitalization and a narrow shareholder base. Central Bank has lately recommended to this small banks mergers so that they can overcome the capitalization problem.

Small banks by virtue of their size cannot attract credible strategic partners. The fear that these small banks have is the fear of the few shareholders of losing control. However the future of banking is technology driven, which requires substantial capital outlay. The small banks are indeed set to collapse if they are not encouraged to merge. Ideally this role of ensuring the structural efficiency of this economic sector should lie not only with the Central Bank, but the Competition Commissioner as well. This means his office should be pro-active and preempt problems before they crop up, especially in the financial sector this should be done in collaboration with the Central Bank and it would be a boon to the economy. Every time a bank is placed under statutory management, the government loses money it can ill afford, billions of shillings are locked out of the economy, and the financial sector undergoes an upheaval, which is detrimental to the whole economy.

In 1998 the Commission handled 12 merger and takeover cases and 15 restrictive trade practice cases, 8 of these were carried over from other years¹³⁰.

¹²⁵ supra note 122 page 6.

¹²⁶ Daily Nation, May 25 1999. "Radical changes as KPTC ends term." Business week page 1. Comparing liberalization in telecommunication sectors of the three East African nations. Kenya was still the most restricted.

¹²⁷ Monopolies and Prices Commission (1997). Annual Report, Ministry of Finance. Nairobi. pg22.

¹²⁸ supra. page 34

¹²⁷ WTO March(2000). Kenya Trade Policy Review Report. WTO Publications Geneva. Pg. 74-75.

¹³⁰ Monopolies Commission. (1998). Annual Report Ministry of Finance Nairobi. Pg 21.

ADMINISTRATIVE ORDERS AND COMPETITION POLICY

Orders emanating from the executive which are based on the authority given to the executive by statutes in order to give effect to the better running of the certain sectors of the economic are termed as administrative orders. The effect of these orders from a competition policy perspective is either to restrict the movement of certain goods from one geographical zone to another or to make orders revoking, reducing or increasing duties on imported products such as wheat, maize, sugar or flour. This translates in case of the former, to maintaining price levels at a certain desired level in a particular zone, while as one other zone might have higher price levels, which are a result of the scarcity, posed by the administrative order. The reason behind such powers is to protect the producers or the suppliers of the particular product. In case of the latter, the effect is to encourage the importation of the affected good or to make its cost so high that local consumers will use the local equivalent.

An example of this practice is found in the agricultural sector whereby the minister is statutorily empowered to make orders to restrict the movement of certain crops. In the Maize Marketing Act maize may be imported in such quantities as the minister may from time to time direct.¹³¹ In the Agriculture Act the minister also has the power to control the purchase, collection, storage and marketing of crops and has the power to make rules for the regulating and controlling the purchase, collection, storage and disposal; whether by way of marketing the crops.¹³² Obviously such powers when exercised do have competition (efficiency concerns). Prices are kept either artificially low or are kept artificially high to the detriment of the consumer who has to pay a price that is distorted.

COMPETITION POLICY AND THE LAW ON CONTRACTS IN RESTRAINT OF TRADE

One of the received laws from the common law tradition courtesy of the Contract Act, 1872 of India is restraint of trade doctrine in the law of contract. What it means is that courts will not enforce a contract, which is an unreasonable restraint of trade as to do so, would be contrary to public policy. The earliest case recorded to that effect is the Dyers case 1414. The next landmark case was Mitchel v Reynolds 1711. Where Lord Parker distinguished between good restraints and bad restraints. Bad restraints were termed as Mephistophelean as they were of no benefit to either party. Restraints were termed as good if they were supported by consideration and were upheld if they were limited in time and space.

In 1932 the Contracts in Restraint of Trade Act was enacted thus repealing the application of the Contract Act, 1872 of India. Section 2 of the Act states that any agreement of contract in which a party is restrained from exercising any lawful profession trade business or occupation shall be void where the court is satisfied that :-

¹³¹ Section 26(1) Chapter 338 Laws of Kenya.

- 1) Having regard to the nature of the profession, trade, business or occupation concerned,
- 2) The period of time;
- 3) The area within which it is expressed to apply; and
- 4) To all circumstances of the case:
 - a) The provision is not reasonable either in the interests of the parties as it affords more than adequate protection to the party on whose favour it is imposed.
 - b) Or is not in the public interest in as much as the provision is injurious to the public interest.

Courts will only uphold a restriction to the extent that it is needed to protect some legitimate interest of the covenantee. A simple clause not to compete with the covenantee would not be valid as no one is entitled out of the competitive process without justification, but an employer is justified in restraining his former employees from soliciting his customers and divulging know-how acquired in the course of his employment yet the restriction must be no more than is reasonable to protect the interest of the parties and the restriction must be reasonable in the public interest.

Clearly this contractual doctrine does aid the advancement of competition as it protects the concept of freedom of trade between the parties. It's utility in the cause of competition has been somewhat restrained in controlling anticompetitive behavior this is because: -

- 1) There has always been uncertainty as to the range and scope of its application. There must be some limitation upon the categories of contract within the doctrine. It is difficult to articulate what those limitations are. This is because there is no theoretically convincing explanation of the method by which the courts set about selecting these contracts.¹³³

Agreements of exclusive purchase or any contract possessing novel or unusual characteristics would be subject to the doctrine or where there is inequality of bargaining power. The doctrine has been most useful where it has been used to invalidate situations where types of organizations, which exercise de facto monopoly, power over entry into a trade or a profession.

- 2) Judges when considering the validity of any particular restraint have tended to concentrate their attention much more on the issue of reasonableness between the parties than in the effect it might have on the public interest. Judges exhibit reluctance to be drawn into public interest issues such as proper allocation of resources or the effects of solus agreements upon inflation. Such matters are the domains of competition. So that the approach of the judges emasculates the doctrine of its potency.

The doctrine can only be invoked by actual parties to the agreement. If one is not party to the agreement the remedy cannot be invoked. Where courts have been willing to grant remedies

¹³² Section 13 Chapter 318 Laws of Kenya.

to third parties the plaintiff has been an individual whose opportunity to work has been affected by the quasi-monopolistic power of some trade associations or trade union. The courts have yet to grant relief to a plaintiff whose commercial interests were harmed by a contract in restraint of trade.

In Kenya very few cases have been brought to the courts on this particular law. However as it is in the statutes, there is hope that as the economy becomes more commercially based it will be used robustly.

INTELLECTUAL PROPERTY LAW AND ENFORCEMENT OF COMPETITION

In a way patent and competition laws are complementary as both are aimed at encouraging innovation, industry and competition. Intellectual property rights are government sanctioned property rights which government grants to artists by way of copyright ownership, entrepreneurs by way of trademarks and inventors by way of patents. Others are excluded from using these properties until they pay the owner for use by the grant of a license otherwise they incur the wrath of the law.

Licensing is done for royalty, or cross-licensing, which then expands the use of the invention in case of a patent and dispenses technology thus encouraging improvement. However increasingly the use of intellectual property law to protect inventions has brought in the issue of what the United States courts refer to as "patent monopoly"¹³⁴. This is of special concern to a developing country like Kenya because for some of these products they are necessary and essential for the entire survival of the population and there are no substitutes available to counter the monopoly. Neither does the owner of the patent allow for a license or only allows for one at very exorbitant prices which are way out of reach for developing countries.

The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) recognizes that varying standards in the protection and enforcement of intellectual property rights and the lack of multilateral disciplines dealing with international trade in counterfeit goods has been a growing source of tension in international economic relations. The Agreement addresses the applicability of basic GATT principles and those of relevant intellectual property law agreements.

Part I of the Agreement sets out general provisions and basic principles such as national treatment commitment and most favoured nation status. Part 2 addresses different kinds of intellectual property rights by taking as a starting point the substantive obligations of the main pre-existing

¹³³ Whish R.,(1985). Competition Law Butterworths London pg. 180

conventions of the World Intellectual Property Organization, namely the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.

Recent developments in the pharmaceutical industry as relates to AIDS drugs and certain essential drugs for diseases which are rampant in the developing world show that it is immoral for multinational companies to restrict their marketing on the basis of who has a patent or who has a license from the company because of the prescriptive norms of the TRIPS Agreement and the local intellectual property law. In the Seattle WTO Conference, African countries were of the view that such products should be subject to automatic compulsory licensing to make them cheaper for their populations¹³⁵. The issue can be approached at the moral level and the competition law level.

The TRIPS Agreement at article 27.3 stipulates the compulsory patenting of microorganisms and microbiological processes yet these are nature's processes and no one can claim ownership to their invention. The inclusion of this clause in the Agreement was to benefit the multinational pharmaceutical industries, which are fast building on these processes to find cures that afflict human, animal and plant life¹³⁶. Kenya has already drafted an Industrial Property Act incorporating these provisions in it at sections 26 and 29. This is despite the fact that this provision and the lack of recognition of traditional knowledge are in direct contravention to the provisions of the Convention on Biological Diversity to which Kenya is a signatory. The competition effects of the that particular clause of the TRIPS Agreement are daunting. Should they be effected seeds and genes will one day be patented creating monopolies run by profit motivated multi-national corporations which will indeed manage to control the manner of agriculture and health in developing countries.¹³⁷

On a local level increasingly traders are resorting to intellectual property law to hit out at their competitors. They accuse them of passing off their new brands as related to the older established brands. In this way they ride on the success of these brands and cut a niche in the markets for themselves. The case to point is between Cut Tobacco Limited which introduced a cigarette with the trade mark name of Horseman and British American Tobacco which has for a long time marketed cigarettes with the Sportsman trademark¹³⁸

In 1999, the High Court granted a temporary restraint against Cut Tobacco which had been prayed for by BAT pending the hearing of a suit which had been filed by BAT seeking a permanent

¹³⁴ *Zenith Radio Corp. v. Hazeltine Research Inc.* 1395 US 61, 89 S.Ct. 1562 (1969).

¹³⁵ WTO. (1999) A Briefing Note. Africa and the Seattle World Trade Organization Ministerial Conference part III.

¹³⁶ Mae Wan Ho (2001). "Why Bio-Tech Patents are patently Absurd: A Scientific Briefing on TRIPS and Related Issues". Third World Network Penang.

¹³⁷ Tawolde Egziaber (2001). "The Inappropriateness of the Patent System for Life forms and Process" Third World Network Penang

injunction against Cut Tobacco to stop it from infringing the Sportsman mark by offering for sale Cut Tobaccos Horseman brand. It also wanted Cut Tobacco stopped from manufacturing, importing, distributing, selling or offering for sale any products bearing the horseman mark due to the products similarity with the BATs sportsman brand. BAT submitted that the sale of Horseman with a jockey on a brown horse in a maroon color background was an infringement on their Sportsman trademark that bore similar features. The Horseman brand posed unfair competition in that stratum or class of cigarette which Sportsman had for years carved for itself in the population. However in the year 2002, the High Court dismissed the suit and lifted the temporary restraint, allowing Cut Tobacco to continue with the sale of the Horseman brand.

It would appear that the Kenyan scene is set for a vibrant use of intellectual property law to deal with competition issues. Hopefully it will develop to the level where Kenyan competition law will adopt a per se approach to price restricted patent licenses and monitor patent acquisition activities by a single firm as this raises concerns of unilateral control of market power by one entity.

CONCLUSION

The first conclusion to be made was that the grasp of the import and potential of competition law and policy by the members of the august house was not satisfactory. They seemed to think that the law could only net down the retailers who were unfair in their trading practices. They did not seem to notice that this law if applied to all sectors could have been an effective regulatory tool to police the whole economic sector. Hence they did advocate for the creation of stronger and independent institutions to implement the law.

Importantly they allowed for a blanket exemption without any parameters of either reasonableness or transparency under section 5. It would appear the law as framed was eager to exclude totally aspects of particular corporations from scrutiny even if they were active in the market place and their behavior was totally anticompetitive.

From the fore-mentioned it emerges that even with the best of intentions and a fortuitous will the impact the Monopolies Commissioner would have made to the liberalization process would have been minimal due to the wording of the law this is evidenced by the next chapter. The provisions of the law were prolix, the definitions stultified the relevance of the law because they even defined economic terms. Concepts such as oligopolistic interdependence were laboriously defined. The effect of this is to make the law itself anti-competitive in application because it is too complex to lend itself to simple interpretation.

¹³⁸ Milimani Commercial Courts. HCCC 354 of 1999. .

In the important area of enforcement the law lacked innovation in penalties prescribed. Monetary penalties, imprisonment and divestiture are the ones used. These are very few and ineffective tools if infractions of the law are to be deterred.

The lack of autonomy means that there will always be a high turnover where the staff is concerned and the thinness of legal officers will continue to dog this office.

Due to budgetary constraints, the office cannot market itself adequately and the role it has to play in the market. When government exited from the market this office should have been empowered to step in and be the vanguard of fair play or competition in the market. It has not been enabled to do so. It is difficult to know whether the manner in which parastatals are being privatized is competitive, transparent and accountable and adhere to the tenets of competition law.

Indeed what the policy documents had postulated as the role of the commissioners office, what the legislature had intended from what is gleaned from the debates and what is in the law and the practice of it are two different things. Other than in small time cases between small time companies the law failed to protect consumer welfare where it has been needed most in this era of liberalization.

It is time that this office was allowed the importance and the independence it requires. Competition law by its very nature has connections to other policies and it is essential to buttress and complement these policies if only to enhance the efficiency and national welfare of the country; this is even more important when viewed in the context of an increasingly globalizing economy.

CHAPTER FOUR

IMPLEMENTATION OF COMPETITION POLICY AND LAW IN ECONOMIC MANAGEMENT – POST 1992 TO PRESENT

INTRODUCTION

This chapter deals with the economic restructuring process and how adherence to competition policy and law were used to facilitate the process. Due to breadth of the economic sector, it will confine itself to examination of a few of the sectors termed as strategic. The use of competition law and policy, as analyzed in the last chapter, can be used to set up a transparent regulatory process by introducing the competition policy perspective into government regulations and industries. It can also do this by focusing on setting up structurally efficient sectors from those inherited from the monopolies of the command economy. The provisions of competition law can also be effectively be used to curb monopolistic practices where they occur in the economy so as to promote efficiency by the provisions of the law on horizontal restraints, vertical restraints and predatory pricing.

PRIVATIZATION

One of the areas, which are key in the analysis of implementation of the tenets Competition law and policy, is the Public Enterprise Reform Programme. Herein state enterprises such as the Kenya Broadcasting Corporation, Kenya Posts and Telecommunications Corporation, Kenya Power Company limited, Kenya Power and Lighting, Kenya Seed Company were set to be privatized or restructured. As of 1994 there were two hundred and forty commercially oriented public enterprises with direct or indirect government ownership.

Thirty-three were termed as strategic and government intended to retain ownership and active board participation although it would offload some shareholding. They were termed as strategic because they provided essential services and were considered to play a key role from the point of view of national security, health and protection of the environment.¹³⁹ The Department of Government Investment and Public Enterprises (DGIPE) in the Ministry of Finance was to be responsible for the reform of the parastatals, which were to remain in stable hands of government¹⁴⁰.

The other none strategic parastatals were slotted directly for privatization. Privatization was not to be an end but to be a progressive effort to promote productive efficiency, to strengthen competitive forces in the economy and to support entrepreneurial development.¹⁴¹ One of the goals of public enterprise reform was to enhance the efficiency and performance of the public sector. Data between 1986-1990 show that the productivity of parastatals worsened by 2 per cent annually

¹³⁹ Government of Kenya (1996). Policy Paper on Public Enterprise Reform and Privatization Ministry of Finance Nairobi.

¹⁴⁰ Supra.

¹⁴¹ Ibid. para. 4

while productivity of the private sector improved by 5per cent annually. In the financial year 1991 the net outflows from the central government budget to parastatals were equivalent to one percent of GDP.¹⁴²

This was to be guided by inter alia the move to market pricing to promote competition, through the break-up of monopolies, reduction of trade barriers and elimination of barriers to private entry¹⁴³. Where there were monopolies whether in public sector or private sector they would be regulated to protect public interest (read consumer welfare) through review and approval of tariffs, maintenance and replenishment of all kinds of capital resources and cost containment.¹⁴⁴

The regulation would be implemented through independent specialized bodies free from political interference. Lastly, the law would be called upon to provide a level playing field that would facilitate an equitable and fair basis for the efficient functioning of private and public sector enterprises under market conditions. The law referred to here is competition law, which was introduced in 1989.

According to the World Bank and International Monetary Fund Privatization Guidelines, government is considered to have privatized a parastatal, if reduces its shareholding to a minority of 25 percent. It is recommended that this be done to promote macroeconomic stability.

THE POWER SECTOR

This was liberalized so as to provide power efficiently and at fair terms. The minister in charge of energy in tabling the Electric Power Bill for the second reading stated that the

"Important thing... is to ensure that we get the cheapest electricity possible as we move from the controlled regime to an open and liberal one".¹⁴⁵

Government in generation, distribution and supply to the consumers controlled the power sector in the following manner. Kenya Power and Lighting Company was a public company limited by shares, incorporated on 6th January 1922. Government of Kenya owned 58.8% of the shares.

The Kenya Power Company Limited was a public company limited by shares. Government wholly owned it. Its date of incorporation was February 1st 1954. The Tana River Development Company a private company limited by shares was incorporated on July 10 1964.

Reforms were undertaken to enable the Power Industry to be financially viable, attract private investment, and improve operational efficiency and reliability of electricity supply. . There was also

¹⁴² World Bank November (1992). Memorandum of the President of the IDA to the Executive Directors of proposed IDA Credit Number P-5832 KE. To Kenya.

¹⁴³ Supra note 139 page 5

¹⁴⁴ Ibid. page 6

¹⁴⁵ Parliament September 10 (1997).Hansard pg. 2322 .

the aim of separating generation from the transmission and distribution functions. The intention was to create a competitive environment to enable improvement of efficiency through private sector participation in power generation investments and provision of services to the restructured power industry.

It was the intention of the Electric Power Act 1997 to enact these ambitions. Its date of Commencement was 9th January 1998. Part II of the Act provides for licensing of investors in power generation and supply. This business is open to public bodies and private companies provided the Minister licenses them. It is necessary to scrutinize the licensing provisions to discover whether they promote economic efficiency and economic development by adherence to due process and pose no entry barriers to investment, by allowing for structural efficiency.

The procedure for obtaining a license begins from section 5, which states that an intending applicant must notify the public by advertising his intention 60 days before his intended application. This advertisement must be in the Kenya Gazette for two weeks successively and one newspaper circulating in the area. The advert must contain particulars of the name, address and description of the applicant, the proposed area of supply, the names of the streets or routes where it is proposed that electric supply lines be installed, and any land to be compulsorily acquired. The applicant is also supposed to serve this notice to any local authority in the area.

The object of this is to notify the public so that if they have any objection either of health, safety or environmental nature they can make representations to the Minister. Under section 6 the applicant is supposed to prepare a draft license which gives in details his project and its operation. Therein he must include inter alia a statement of the maximum prices, which may be charged, conditions, which the applicant has entered into with a local authority, and mode of settling differences with any local authority. Section 7 expands on the items needed to be deposited with the draft license and includes the amount of money required by the undertaking, how the financing will be done, the rateable value of a local authority, a detailed estimate of the cost showing a definite scheme for the purposes of the license being applied for has been prepared and considered by the public and local authority.

The prescribed fee must accompany every application under section 8. Under section 9, the application is submitted to the Electricity Regulatory Board, which gives recommendations to the Minister. The Board is not given a time frame upon which to arrive at their decision but the license applications must be processed within one hundred and eighty days after the Board confirms to the Minister that the application is materially complete in all respects.

In considering the license, the board is supposed to consider protection of the environment and conservation of natural resources, energy needs of the community, the technical and financial capacity of the applicant to render the service and any other issue which may have a bearing on the operation of the proposed service. Thereafter the Minister may upon the recommendation of the Board grant a local generating license to generate and distribute electrical energy in the area covered by the Act. Licenses to electric power producers shall be issued for a minimum term of fifteen years and licenses to public electricity supplies shall be issued for a minimum of thirty years.

Liberalization is supposed to be guided by the tenets of competition especially where an essential service is being provided against the perspective of the need to industrialize. Competition should be adhered to in licensing of entities to supply and generate electricity; it should be adhered to in the policy that guides nationally the provision of this utility. Power has been generated by a public monopoly for 30 years and demand far outstrips the supply as witnessed by the needs to ration power¹⁴⁶ Only 10 percent of the country is supplied with electricity¹⁴⁷. There is need, to invite the private sector on very competitive terms to provide/generate electricity so as to provide power at a cheaper rate. This can be approached at three levels.

- 1) Having investor friendly licensing procedures that are transparent, prompt and certain so that long bureaucratic procedures, which are anti competitive and open to rent seeking, are eliminated
- 2) Provision of assistance by government in form of incentives and concise policy procedures, which will enable large and small investors to invest in other sources of power.
- 3) Deliberate creation of a structurally efficient sector by eliminating any monopoly.

The legislative requirements of licensing as enumerated in Part II of the statute show that

- 1) The requirement of advertisement at the expense of the investor, twice over is onerous. In efficiency terms, it means that once an investor has decided to invest his money in this sector, he has to wait for at least 2 months and expend money in advertising and waiting for the results of the advertisement. When his project becomes operational, he will factor this extra cost to that of producing power and the cost of the power produced will be more expensive.
- 2) The intending investor has to prepare his own draft license. He has to incur costs and expend time choosing within the jurisdiction (which is probably alien) a lawyer to perform this function. There is no provision made that a draft license shall not be rejected due to some disability of form. There is uncertainty in such a provision. The preferable option is to have a sample form of the license in the statute, which then shortens the time and energy and cost spent by an investor, all he and his legal advisor would have to do is copy from the precedent. This is efficient and lessens the costs that have to be factored in when producing power.
- 3) The statute as read has not prescribed the fee that is to be charged in the subsidiary legislation, leaving this area under the grey uncertain area of discretion of the licensor. This

¹⁴⁶ Supra. pg. 2325 – Hon Mathias Keah

exposes the licensor to the possibility of corruption. Since discretion can be moved to either lower or increase the fee and since there is no benchmark upon which to question the amount of the fee. The transparent and efficient alternative is to categorise licensing fees according to the amount of power that is to be generated and the area upon which it is to be distributed. This method ensures that the investor can calculate the cost of the licensing fee, neither will he have the need to distort the prices he will charge when selling his output. These provisions could appear in the subsidiary legislation.

- 4) In submitting the draft license to the Board for considerations, the board is not given a specific time frame upon which it is supposed to arrive to its decision. Hence, should an investor feel aggrieved by the time frame upon which the Board has mulled over his application, he has no concise wherewithal upon which to seek redress. The efficient and transparent alternative is to allocate a period within which the Board is supposed peruse the application and arrive at a decision. This is possible once the items, which are supposed to be considered by the Board, are clearly enumerated in the statute. It then becomes a matter of course for the Board to arrange its sittings in a methodical manner which ensures that after a particular number of months all the items put up for consideration have already gone through the agenda.

However, a reading of the statute shows that the Board shall also consider any other issue which may have a bearing on the operation of the proposed "service."¹⁴⁷ This leads again to the grey area. Which areas are peculiar to one applicant and are not to another? What parameters are used to determine what has a bearing or not on the proposed service? Is it not possible to influence the board to ignore any issue, which may have a bearing? An investor will be drawn to invest in an area that is clear of lacunae and grey areas of discretionary decision making as there are less chances of corruption/bureaucratic delay.

It is commendable that the statute gives a specific time frame upon which the Minister has to process the license once the recommendation to do so has been issued by the Board. It is unfortunate that his duty to do so is couched in discretionary language thus making it a power. "The Minister may upon the recommendations grant a local generating license."¹⁴⁸ It is not mandatory for the Minister to act upon the recommendations of the Board. Indeed he can disregard them, since the board's decision is never to be made public only the Minister's, notwithstanding the dire need for electricity. As was pointed out by an honourable member of parliament during the second reading of the Bill, one of the reasons that government adduced in the move towards liberalization of key sectors in the economy was to remove direct government

¹⁴⁷ibid. pg. 2325-Hon.Mathias Keah.

¹⁴⁸ Electric Power Act 1997 section 9 (3) (f).

¹⁴⁹ibid. section 11 (3).

involvement in the running/ management of the electric power sector.¹⁵⁰ Government role was to be confined to formulating policy. This policy statement is voided by the Minister having to have the discretionary/administrative power to issue licenses. The statute still makes provision for a licensing officer or committee whose function is to deputize the Minister in matters of licensing.¹⁵¹ This increases the length of the bureaucratic process of issuing licenses. Indeed one of the competition issues that arise is that legal provisions can of themselves be anticompetitive and promote inefficiency, increasing the cost of investing, creating an atmosphere of uncertainty, which is unattractive to investors.¹⁵²

The Electricity Regulatory Board is established under the statute to perform the function of regulating the generation transmission and distribution of electric power.¹⁵³ One of its functions is to ensure that there is genuine competition where this is expected¹⁵⁴. It is also supposed to approve power purchase contracts, transmission, and distribution service contracts between electric power producers, public electricity suppliers and large retail customers. It is supposed to ensure that nobody is given undue preference or subjected to undue disadvantages¹⁵⁵.

The membership of the Board comprises of persons of university education and a minimum of 15 years practical experience in matters related to industry, finance economics, engineering, energy or law¹⁵⁶. There is a representative from the Ministry of Energy, appointees of the Minister comprising of two members from the private sector, three members nominated from a list submitted by national bodies which represent workers employees and manufacturers who are consumers of electricity¹⁵⁷.

From a competition law and policy perspective, the above provisions could be improved upon. The Office of the Monopolies Commissioner should have permanent representation in the Board. This is to provide guidance on matters relating to competition. When Kenya Power and Lighting is given a distribution license for 30 years and there is no active pursuit of another distributor or indeed a strategic partner to enhance efficiency, that is a serious setback to structural efficiency. The status of a monopoly is perpetuated and Kenyans encounter .The problem associated with monopolies, like arbitrary setting of connection fees and the payment of exorbitant fuel adjustment costs. These are factored into the electricity bills to pay for the choice made by the monopoly to distribute power generated from expensive sources such as diesel.

¹⁵⁰ Parliament September 16th 1997 Hansard Nairobi .Hon Oyondi pg. 2354

¹⁵¹ Electric Power Act section 125.

¹⁵² Khemani, R., Rowley J., Waverman L., (1997) 'South and South East Asia : Slow Implementation of Competition Law'. 25 *International Business Lawyer* 445.

¹⁵³ Supra note 151 Part IV section 120..

¹⁵⁴ Electric Power Act section 121(1) (e).

¹⁵⁵ *ibid.* (f).

¹⁵⁶ *ibid.* schedule 5(1) (1).

¹⁵⁷ *ibid.*

Further down the years should another distributor be licensed, he is already unduly disadvantaged by the fact that KPLC had an undue advantage for a number of years and has been enabled to entrench itself far a field. The new investor may even find it uneconomical to venture in distribution due to lack of economies of scale.

In the issue of purchase contracts and distribution service contracts, there are bound to be competition law issues such as tied sales and exclusive distributorship issues. The input of the Monopolies Commissioner is paramount. However, no mention is made of involving him in vetting these procedures.

The Electricity Regulatory Board as the body mandated to ensure that there is genuine and effective competition in the sector is hamstrung because it does not have the final word on the issue of a license. The Minister has, so in essence he is the regulator. Issue of a license could pose competition issues, in effect, yet there is no provision for the board or Minister liaising with the Monopolies Commissioner to ensure that once a license is issued, other players will not be heard to complain that entry of another applicant has distorted the market.

Only 10% of the country is supplied with electricity. Grid supply is expensive. To ensure that the cheapest power is availed to the country, there should have been a policy enunciated which gave an incentive scheme to investors of alternative sources of electric power, to provide alternative sources of electricity to consumers. This might have been because of the lack of correlation between the liberalization of the powers sector and industrialization. To industrialize, huge amounts of power are needed. Providing incentives to providers of solar energy equipment, windmill energy and small generation facilities in rural settlements, provides a cheap source of energy and promotes structural efficiency of the power sector and thus provides competition albeit in a small way to grid supply. The Act and the policy of liberalizing the power sector are silent on this.

TELECOMMUNICATIONS SECTOR

This sector was straddled by a monopoly the Kenya Posts and Telecommunications Corporation¹⁵⁸, which was dismantled by the Kenya Communications Act 1998 and the Postal Corporation Act 1998.

In reading the Kenya Communication Bill for the second time, the Minister in charge of Transport and Communication recognized that telecommunications is a tool of dissemination of information,

¹⁵⁸The Kenya Posts and Telecommunications Corporation Act. Chapter 411 Laws of Kenya (Repealed)

education and communication to people hence its liberalization would only enhance this aspect by attracting more investors.¹⁵⁹

The Kenya Communications Act established the Communications Commission of Kenya (CCK)¹⁶⁰ and the Postal Corporation of Kenya. CCK's object was to license and regulate telecommunication, radio communications and postal services. It is supposed to, in performance of its duties to be guided by "any policy guidelines of general nature relating to the provisions of this Act and notified to it by the Minister and published in the Gazette"¹⁶¹. The policy guidelines are contained in section 23(2). Where communications are concerned the CCK is supposed to ensure "so far as reasonably practicable there are provided throughout Kenya, such telecommunication services as are reasonably necessary to satisfy the public demand."¹⁶²

In doing this it is supposed to protect the interests of consumers of telecommunication services by having lower prices and good quality of such services¹⁶³. It is supposed to promote effective competition between providers of telecommunication services so as to promote static and dynamic efficiency¹⁶⁴, and it is supposed to encourage private investment in this sector.

The management of CCK is vested in the Board of Directors. A chairman, who is a presidential appointee, a Director-General who is appointed by the Minister in charge of Communications, a representative from the Ministry of Communications, a representative from the Ministry of Finance, a representative from the department of internal security, a representative in charge of information and broadcasting and five other persons who are from the private sector who are appointees of the Minister. Their appointment is based on the knowledge and experience in matters relating to postal services, telecommunications, radio communications, commerce or related consumer interests. The minister is supposed to have due regard to registered societies representing such interests.¹⁶⁵

According to section 25(1) the Commission may upon application in the prescribed manner and subject to such condition as it may deem necessary grant licenses for the operation of a telecommunications system and provision of the telecommunication services as may be specified in the license. In the third schedule of the statute the exclusive privilege granted upon the Kenya

¹⁵⁹ Hansard (3rd July 1998) pg. 1140.

¹⁶⁰ Section 3 Kenya Communications Act 1998.

¹⁶¹ *Ibid.* section 8.

¹⁶² *Ibid.* section 5 (4) (a).

¹⁶³ *Ibid.* section 23 (1).

¹⁶⁴ *Ibid.* section 23 (2) (a).

¹⁶⁵ *Ibid.* section 23 (2) (b).

Posts Telecommunications for providing telephone services, constructing, maintenance and operating telephone apparatus as well as telegraph services is revoked¹⁶⁶, thus creating the anticipation of competition.

It has been four years since the date of assent to this new law. The operationalisation of its provisions with regard to the stated objectives of promoting competition stand to be analyzed.

Fixed line telephones

Currently, the telephone penetration in the rural areas is 0.16 lines per 100people. In the urban areas it is 4 lines per 100 people. The stated policy is to raise this to 1 line per 100 people for the former and to 20 lines per 100 people to the latter by the year 2015¹⁶⁷. To perform this feat 5.4 billion U.S. dollars is needed which translates to 270 million US dollars per year.¹⁶⁸

The benefits of a higher telephone density are obvious. Faster communication leads to more efficient businesses, telephone lines are a link to the world of electronic commerce which would open up more business opportunities in the service sector. Education is promoted through use of the information superhighway increasing opportunities for innovation¹⁶⁹.

Telkom Kenya, the telephone company created from the KPTC was given the exclusive right to provide telephone lines in Nairobi, where there is a huge waiting list of subscribers of telephone lines. Automatically granting it a monopoly status. It has the exclusive right for cross-switching and providing connectivity locally and internationally.¹⁷⁰

The reason given by the government for this decision was that "Telkom needs a little bit of protection so that it is able to take off and do lucrative business, as well as brace itself for competition"¹⁷¹. Automatically by this provision government created an entry barrier to other competitors in this market. This is against the overall stated government policy of promoting competition. It is also against the competition law as it is an unwarranted concentration of economic power.

Given the bottlenecks posed to the growth of business by an inefficient monopoly provider of telephone services and having regard to the stated Tele-density needs of the economy against the backdrop of stated objective of achieving the status of a newly industrialized economy/country by

¹⁶⁶ *ibid.* section 6.

¹⁶⁷ Government of Kenya (1999). Postal and Telecommunication Sector Policy Statement Ministry of Transport and Communications Nairobi pg 2.

¹⁶⁸ *ibid.*

¹⁶⁹ Otto P (1995). *Information Super Highway*. Macmillan Publishing House Que Books, Indianaapolis.

¹⁷⁰ Parliament 9th July 1998. Hansard . Nairobi. pg. 1142. Hon minister Ntimama.

¹⁷¹ *ibid.* pg.1142.

the year 2025. The most prudent choice would have been to license another national provider of telephone services immediately who would offer competition to Telkom Kenya and which would have translated to a more dynamic sector.

Granting Telkom a monopoly status misunderstood the very essence of one of the objectives of the Public Enterprise Reform Programme which is

“to enhance the role of the private sector in the economy....to create a more level playing field by eliminating preferential treatment including monopoly rights, and to enable the private sector to enter the areas of activity of the Public Enterprises on an equitable basis.”¹⁷²

Kenya Power and Lighting Company requested CCK to grant it a licence to provide telephone and data transmission service. CCK refused. Kenya Power and Lighting would have done this by using its network of 15,036 kilometres of electricity distribution lines which only needed laying overhead fibre optics cables to carry telephone messages and data. Were it done telephone charges would drop by as much as 50 per cent. Telkom is cash strapped and will need a fortune to overhaul its obsolete land line system. The decision was against the overall stated policy guidelines in section 5(4)(a) in the Kenya Communications Act, it was also against consumer welfare and flew in the face of the stated needs of the economy and was anticompetitive¹⁷³.

As stated by an honourable member of parliament in the debates leading to the enactment of the statute, the provisions were an exercise in “Cosmetic liberalization”.¹⁷⁴ They would not translate into more telephone lines for the consumer, neither would it mean the provision of efficiency priced tariffs as Telkom was assured of a market, and it did not have the resources to provide the needs of a country starved of telephone lines. Furthermore the CCK only allowed the licensing of a single regional operator to provide fixed telephone in each region in the country thus creating more regional monopolies. Telkom had the exclusive privilege to provide the land lines in Nairobi and Mombasa, thus automatically getting the most lucrative demand area for its development. The regional companies cannot compete with Telkom on an even footing because they have to use Telkom facilities to avail trunk services to their customers. Telkom still have a monopoly on cross-switching and the regional telephone operators have no license to provide satellite assisted phones due to the fact that Telkom has a monopoly over the use of V-SAT¹⁷⁵.

The search for a strategic investor in Telkom has been on for a long time. The stakes for the foreign investor having been raised from 26 percent ownership to 39 percent ownership and finally to 49 percent. There were no takers in the international market when the percentage was too low. The governments insistence on remaining majority shareholder is to have a national telephone

¹⁷² supra note 139. Principle 11(d) (e) pg. 5.

¹⁷³ Sunday Nation July 8th 2001. “Rejection of phone scheme upsets clientele.” Pg 20 Nairobi.

¹⁷⁴ Parliament 23rd July 1998. Hansard Nairobi 1395 Hon R. Odinga.

company with indigenous ownership¹⁷⁶. Telephone services are an essential service and the needs of indigenisation of the economy are a legitimate nationalistic instinct. Where indigene do not have the capital nor the wherewithal to provide an essential service at a cheaper price which will translate to more efficient services and more business opportunities for the same population, it is an economically suicidal policy to pursue.

Mobile telephone

The provision of mobile telephone services is also interesting. The years between 1996 and 1999 the only licensed mobile telephone company was a subsidiary of Telkom.¹⁷⁷ Thus Telkom had monopoly rights in both cellular and line telephone sector. A contradiction of stated policy objectives, in the privatization reform programme. At this point in time connection for mobile telephone ranged between 100,000 to 200,000 Kenya shillings¹⁷⁸.

The reason for this anti competitive state of affairs then was hard to find. The criteria for licensing mobile telephone providers was not known then as this was before the creation of the Communications Commission of Kenya in the Kenya Communications Act. A Member of Parliament alluded to corruption, so that only well connected political individuals are to be granted licenses.

Safaricom the GSM subsidiary of Telkom has already invited on board Vodafone¹⁷⁹. Vodafone has a shareholding agreement for 40 percent in line with the revised sector policy paper of April 1999. Vodafone recently merged with American firm Air touch an American Company creating the world's largest mobile phone Company. Why Vodafone was invited on board and not any other mobile telephone provider through competitive bidding is a mystery.

The licensing of the other mobile telephone company was mired in controversy¹⁸⁰. The CCK made it a requirement that it must have sixty percent local shareholding and only forty percent foreign ownership. This set the stage for powerful lobby groups to jostle in, and the World Bank demanded transparency after rival groups alleged that unsuccessful bidders were in the pre-qualified list. CCK has ruled out the licensing of a third mobile telephone operator in the future, stating this was to be done after the new entrant had settled. This move has succeeded at least for the time being in creating a duopoly where mobile telephony is concerned (which is contrary to stated law) Once Kencell began its operations the prices of connection to mobile telephone has plummeted. Connection currently stands at an average of 3000 shillings.(38 US dollars) and cost per spoken minute keeps lowering. Since beginning of operations in 2000, Kencell had acquired 160,000

¹⁷⁵ Supra note 167

¹⁷⁶ Supra note 159.

¹⁷⁷ A second one was licensed towards the end of 1999. Kencell was established on 28th May 2000.

¹⁷⁸ Own interview with staff at Safaricom Extelcoms House Nairobi.

¹⁷⁹ Supra note 127 pg.78.

subscribers by April 2001, in April 2002 the number had leapt to 400,000.¹⁸¹ Safaricom which is the market leader by a small margin had about 420,000 at about the same time. Competition has greatly lowered the price of mobile telephone, making it accessible to a great number of consumers.

Internet services

Telkom Kenya has the monopoly of providing satellite connection through its server provider Jambo-net.¹⁸² Internet Service Providers (ISPs) have to apply to Telkom Kenya to have line connection according to preferred bandwidth. Private firms have already applied to the CCK to run their own Internet transmission Satellites through the V-SAT (Very Small Aperture Terminal)¹⁸³ but the market is yet to be liberalized since Telkom has a monopoly of use of V-SAT. Of the ISP's in the country less than four have their own lease lines, (lines dedicated exclusively to the transmission of data) and for this they have to pay Telkom Kenya \$8000-16,000 per year for connectivity. The other firms go through Jambo-net which is far from reliable and pay \$4000. An average user of the Internet locally pays between shillings 2,000-9,000, 90% of which caters for the charges paid to Telkom. In the United States of America the average user rate is \$10-20 (Shillings 750-1500). Currently the cost of a 64 kilobit highway is 359,100 a month while a 1 megabit bandwidth costs shillings 1.2 million.

Telkom pays Intelsat \$3,000 per year and rents it out at the \$8000-16000 figure to the local providers.¹⁸⁴ (INTELSAT is an intergovernmental organisation which has satellites which countries like Kenya rely on for all international connection in transmission of telephone and video data on the Internet.) This translates to high operating costs for the ISPs and prohibitive costs to the consumer. The competitive option which promotes structural efficiency would be to allow local ISP's to have their own satellite links which would result in lower monthly charges.

This anomaly illustrates that information technology is one area in which the policy contradictions that straddle the management of the liberalization process by official dom. Internet access has become the preserve of the up-market clientele, locking out schools all over the country and the increased prospect of E-commerce which is one of the promising areas of global commerce. In contrast South Korea is busy creating an information based economy. It has created a conducive policy atmosphere necessary to the establishment of information technology infrastructure by inviting foreign companies such as Cannon of Japan, Hitachi of Japan Lucent Technologies (USA) to invest in this sector.

¹⁸⁰ Daily Nation November 16, 1999. Business Week 'Government loses out in mobile phone deal' pg 1.

¹⁸¹ Own interviews with Safaricom and Kencell marketing departments April 2001.

¹⁸² Telecommunications Sector Policy Document. 1999.

¹⁸³ Ibid. pg. 8

¹⁸⁴ Daily Nation November 2, 1999. Business Week "Internet Users in for a very long wait" page 2.

The speed of access to the Internet is high due to installation of broadband width cables, which deliver higher volumes of data than the conventional telephone lines. This has made Internet access in South Korea ridiculously cheap.¹⁸⁵ The policy contradiction in Kenya is ironic given that studies have shown that Africa is the only continent where demand for communication services is growing exponentially.¹⁸⁶ Currently the ISP sector hardly controls one percent of the sector market potential estimated at 10 per cent of the population.

The licensing provisions of telecommunications are contained in section 25(1) of the Kenya Communications Act. The Commission is given licensing power couched in discretionary terms. "The Commission may upon application necessary grant licenses under this section authorizing all persons to operate telecommunication systems or provide telecommunication services."

The Commission may grant the license for any period of time for which it deems fit. The fact that there are no clear cut conditions specified in the statute as to what criteria the commission will use in considering the application of a license leaves the process open to abuse and uncertainty over the future of any intended or projected investment, which would satisfy the demands of telecommunication sector. This gives the reason for the anticompetitive state of the subsectors. Where structural efficiency of these sectors has not been the overriding concern in granting the licence.

For example the licensing of the second mobile telephone operator does raise some competition issues. One of the condition government put down was that the operator must be owned 60 per cent locally.¹⁸⁷ Given the enormous investment needed for the telecommunications sector, most Kenyans were locked out. Eventually the firm that won the bid was an agglomeration of big business in the region. The effect of this is to have a lack of multiplicity of tongues competing in the economic and political market place, which in itself stultifies competition. This conglomerate which is an agglomeration of many business enterprises, now even has a more decisive voice in decisions in the political corridors, what advocacy requirements get support and which should be killed.¹⁸⁸ It should be borne in mind that one of the reasons why competition law was borne was to bust the big agglomerations of business (trusts) which had formed in the United States in the latter part of the 19th century and the beginning of the 20th century. They were seen as a threat to the democratic political process and the need for a multiplicity of different firms in the different sectors in the market place.¹⁸⁹

¹⁸⁵ Sunday Standard November 21, 1999. 'The digital divide – Africa has a long way to catch up'

¹⁸⁶ African Research Bulletin 16May-June(1999).

¹⁸⁷ Prequalification Notice, May 25 1999, The Communications Commission of Kenya.

¹⁸⁸ Sameer Investment Limited. Owns more than 50 percent of Firestone Limited, 50 percent of Commercial Bank of Africa,

Eveready Batteries, First American Bank and Sasini Tea and Coffee limited

¹⁸⁹ Pitofsky R.(1979) "The political content of antitrust." 127 University of Pennsylvania Law Review 1051.

Further it does not mean that when a conglomerate such as this wins a bid it is necessarily the most efficient of the bidders. Due to the hugeness of its agglomeration, "it can outbid and outspend and even outlose"¹⁹⁰ the other bidders who are not as well known by lobbyists and power brokers and who might have provided a better service. Indeed government rejected a higher bid of \$ 94 million from GTE/ORASCOM partnership and settled for \$54 million by Vivendi/Sameer, leaving baffling questions in its wake. Egypt sold a similar license to Vivendi for \$510 million.

Strangely the Monopolies Commissioner has not investigated the CCK and the monopolies it has created even though practice and the law do show that he has the power to. No reasons have been adduced for this lack of action read together with section 5(5) of the Kenya Communications Act, where it states that the CCKs should not grant a monopoly or a duopoly licence to operate a telecommunication system.

Section 27(1) gives provision for the Minister to make regulations for inter-alia the issue of licenses and the manner in which telecommunication services are to be offered and performed. Such a provision gives opportunity for the entrenchment competition provisions in the issue of licenses. However, this has not been done and no regulations have been issued as yet. It has unequivocally stated that where an essential service is being liberalized, it has to be done in a manner that will boost static and dynamic efficiency and goes in detail to show how this can be done, then there can be a guarantee that telephone services can be provided cheaply and investors have a guarantee of fast returns on their investment.

Radio Communications

Part IV of the Kenya Communication Act deals with the grant of licenses for radio communication stations or apparatus. The license is issued subject to terms and conditions and limitations, which the Commission may think fit¹⁹¹. The bogeyman of discretionary provision is allowed in giving the Commission no benchmark upon which to arrive at its decision. Any aggrieved intending licensee does not have any specific conditions to fall upon when dissatisfied with the commissions licensing decision.

The Commission may grant the license to operate a radio station by giving conditions on:-

- i. Position and nature of the station
- ii. Purposes which the station is to be established
- iii. Circumstances in which the station is to be established
- iii. Persons by whom the station may be used ¹⁹²

¹⁹⁰ Posner, Easterbrook. "Legislative issues in Antitrust Policy" Anti trust cases, economic notes and other materials 2nd edition pg 931.

¹⁹¹ Kenya Communications Act section 36.

¹⁹² Ibid. section 36 (a).

The conditions stated above are unnecessarily and unconscionably create entry barriers. Radio barriers. Radio frequencies are a natural resource and the government has the duty to manage those resources for the benefit of the whole public in education, information and communication. The management of this natural resource ought to be liberalized so as to achieve maximum gains. In the United States of America the allocation of national frequencies nets in 13 billion dollars annually¹⁹³. The appropriate manner to attract investment is to eliminate entry barriers that are raised by matters such as the position and nature of a station, the purposes for which the station may be used, the circumstances upon which and the persons by whom the station may be used, or even the equipment which is to be installed and used in the station, all these based on the discretion of CCK.

It is necessary that licensing should be performed with a national outlook in mind. So far of the radio stations that were quickly licensed none of them have seriously challenged the monopoly enjoyed by Kenya Broadcasting Corporation, which still enjoys a nationwide monopoly. This is because none have been granted the AM frequency. Therefore none of the new FM stations have a national outlook, as none of them have been granted the frequencies to enable them operate nationwide. Most of them broadcast to the area around Nairobi, leaving the rural areas which need more education out in the cold. Licensing fees can also be categorized according to the type of broadcast station that is to be created.

Secondly, the media policy, which is yet to be promulgated, must be clear on what is expected of the programme content in keeping with the expressed desire of the honourable Minister as he introduced the Bill that liberalization of the telecommunication sector must be harnessed as a tool for education, information and communication, and this is done most efficiently if competition is fostered in this sector.

The only radio station that had the financial background to offer serious competition to KBC's national hegemony over the airwaves had to slug it out with the government to obtain a frequency¹⁹⁴, This was Nation Radio which is backed by the Nation Media Group. The reasons as to why government was very reluctant to grant the license and frequency are still a mystery. Recently the Chief Executive Officer of the Group was in quoted as saying:

"Governments should stop looking at the corporate sector as cash cows, political leaders should see themselves as stakeholders in the corporate enterprises with the interest and commitment to help those enterprises grow. Nation Media Group the company pays millions of shillings in taxes annually but government has refused to give it nationwide television and radio broadcasting licenses while its competitors are being facilitated to expand."¹⁹⁵

¹⁹³ Parliament 23rd July 1998. Hansard Nairobi. pg. 1488-Hon R. Odinga.

¹⁹⁴ Nairobi HCCC 662 of 1998.

¹⁹⁵ Daily Nation Friday July 26 2002. "Nation Boss cites Hurdles to Growth" pg 20.

Overall licensing procedure of the telecommunications is provided under part IV of the Act. The powers of the Commission are provided in discretionary terms as follows.

Section 77(2) states that the Commission may require the applicant to supply such additional information as it may consider necessary. Section 79 states the Commission may grant a license to the applicant if satisfied that the applicant should be licensed subject to such conditions. However these conditions are not specified or linked to those provided for under previous sections. Section 82 states that the Commission may from time to time modify any conditions attached to a license especially where matters of public interest are concerned. The Commission is to maintain separate registers for the licences issued and enter into them such particulars as may be prescribed.

When this particular bill was being debated amidst calls of leveling the playing field as Telkom and Postal Corporation were already monopolies which had years of experience behind them, there was a proposal by the Honourable member Anyang Nyongo

“that the Commission shall cause to be published in the gazette a non discriminative fair criteria and requirement for issuing licenses to run any telecommunication service.”¹⁹⁶

Government rejected outright this recommendation without advancing any reasons thereof, even though the measure could have rendered the licensing operation transparent, made the CCK accountable to some standards and eased the uncertainty visited upon intending investors by the discretionary provisions.

Postal services

Where postal services are concerned the commission is supposed to promote competition in the provision of postal services. In discharge of its duties, the commission is to have regard of efficiency and economy and the maintenance of effective competition between persons interested in providing postal services.¹⁹⁷

The Postal Corporation of Kenya is designated as the public postal licensee and it has the exclusive right to provide private letterboxes or bags for letters weighing less than three hundred and fifty grams. The Commission has under section 51(1) the discretion to provide a license for postal services and where the license intends to enter into any association contract or arrangement with a third party to provide postal services, to seek approval from the commission before entering into such agreement. The reasons upon which grant or refusal of approval will be given are not stated. This clouds the licensing conditions again, but follows the spirit of the statute where

¹⁹⁶Parliament. 28 July 1998. Hansard Nairobi pg. 1488 Hon Anyang Nyongo.

¹⁹⁷ Kenya Communication Act section 47.

discretion is concerned. If reasons such as avoidance of monopolistic arrangements or agreements that tie up the market were advanced the statute would look credible.

Providing Postal Corporation with the exclusive monopoly of conveyance of parcels under 350 grammes¹⁹⁸ and the leasing of private letter boxes has not translated into efficiency for indeed for any tangible benefits to the consumer.¹⁹⁹ On July 12 1999 Postal Corporation asked for an increase in the basic Postal rate from 14 shillings to 20 shillings. This proposal was predicated on its Universal Service obligation that obligates Postal Corporation to provide basic postal services to customers countrywide, including the remotest parts of the country necessitating additional investment in network and fleet and weak status of the shilling against the international currency. The CCK jettisoned the application because Postal Corporation was unable to provide any evidence that the new tariffs would translate into improved service. Giving this state owned enterprise monopoly services had not translated into any gains for it nor to the consumers. Under section 48(1) private competitors who offer carrier services are allowed to convey articles less than 350 grams provided the charge is five times more than that of the Postal Corporation.

It would appear that discerning customers would rather pay the quintupled amount. The courier firms have managed to entice away Postal Corporate customers, hence getting into the corporations core business despite the higher prices. The discerning customer would rather pay for efficiency, rather than cheap inefficient services. CCK has licensed about 50 Courier companies, hence competition thrives in the provision of courier services.

The statute establishes the National Communication Secretariat.²⁰⁰ It is supposed to advise government in adoption of a communication policy, which amongst other things promotes the benefits of technological development of competition and efficiency in the provision of telecommunication services²⁰¹. The membership of the secretariat is not designated by the statute. However, this is one area that needs the input of competition experts in fostering the most efficient use at the most cost-effective price to consumers, especially in the following areas.

1. Promoting the use of mobile telephone, due to its cheapness over conventional telephone lines
2. Promoting the licensing of more mobile telephone investors. This would create competition, satisfy demand, lower prices and increase density, hence promoting the business efficacy of formal and the informal sector which eventually leads to a more industrialized economy-
3. Promoting the licensing of more quality radio stations which compete with the national radio broadcasting station in offering news and information and well done commentaries to the nationals.

¹⁹⁸ Ibid. section 48 (1).

¹⁹⁹ Ibid. section 53 (1).

²⁰⁰ Ibid. section 84(1).

²⁰¹ Ibid. section 84 (2).

4. Promoting the rapid licensing of other internet service providers by allowing them to operate their own satellite dishes, currently internet service providers are not officially permitted to use their own satellite dishes to connect to the rest world wide web unless they use Kenstream which is expensive. As stated by a representative of the Association of Telecommunication Service Providers of Kenya "if companies have their own connections problems occurring would be minimized as in the case of neighbouring countries"²⁰². This was after Internet users were cut from the rest of the world for two weeks.

AGRICULTURAL SECTOR

In the decade after independence (1963-72) agricultural growth accelerated to an average of 4.6 percent per year. During the 1980s and early 1990s annual average rates of growth fell to only 2.2 percent.²⁰³ However, in the 1990s this rate has fallen to negative 1.4 percent.²⁰⁴ This is due to a reversal caused by the poor performance of several sub-sectors. The production trend of maize, the main food crop, declined between 1989 and 1993. Beans as well as other food crops have suffered similar reversals. Only tea and horticultural crops the latter depending heavily on imported seed have managed a sustained production increase, and it can be shown that these to sub-sectors have adhered to competition principles.

The slow growth GDP has reduced the sectors contribution to overall economic growth. During the 1970s, agriculture's contribution averaged 1.7 percent annually. This fell to 1.1. Per cent during the 1980s.²⁰⁵ In the present decade all growth in GDP has come from the industry and service sectors. Agriculture has made a negative contribution of 3.0 per cent²⁰⁶. This has retarded economic growth and has had serious consequence for all Kenyans.

It is said that some of the key constraints that inhibit full exploitation of this sector are:-

- (a) Inadequate and poor rural infrastructure especially access roads, energy sources, water and marketing facilities.
- (b) Lack of adequate and quality materials and inputs including seeds and fertilizers.
- (c) Lack of sufficiently conducive legal and policy framework and effective regulatory and quality control mechanism.
- (d) Low and untimely payments to farmers for commodities due to inefficient practices within marketing boards.²⁰⁷

²⁰² Interview with Richard Bell Chairman of Telecommunications Service Providers of Kenya (TESPOK) 1999 .

²⁰³ Government of Kenya (1997) National Development Plan 1997-2001. Government Printer Nairobi. paragraph 1-12

²⁰⁴ Government of Kenya . (1999) Improving the Legal and Regulatory Environment through Deregulation –Regulatory Constraints Resulting in the Unavailability to Farmers of High Quality Seeds-Office of the Vice-President and Ministry of Planning and National Development ,Nairobi pg2.

²⁰⁵ supra note 203.

²⁰⁶ Ibid. note 203.

²⁰⁷ Ministry of Agriculture Livestock Development and Marketing Kenya- Agricultural Sector Development Strategy 1996.

A focus in one of the constraints (b) shows that problems are caused by lack of adherence to competition policy tenets.

Seed sub-sector

The law governing seeds in Kenya is the Seeds and Plant Varieties Act, which provides for the regulation and control of the production, processing, testing and certification and marketing of seeds.

The proposed seed industry policy of October 1995 shows that there are legislative restrictions, which are:-

- 1) Access to farmers to government bred materials used in the production of improved seed is restricted due to the use of a parastatal – the Kenya Seed Company.
- 2) There are stringent standards in place for producing certified seed, small scale farmers are unable to meet these standards, hence certified seed is unavailable, where available it is highly priced by seed merchants.
- 3) There are quantitative restrictions in imported seed resulting in protection of the domestic industry, which offers a restricted choice of seed and higher prices to farmers.
- 4) Before a new variety of seed is released, it must undergo National testing, notwithstanding that there is evidence of satisfactory performance of the variety in conditions akin to those, which exist in Kenya. This constrains early release to farmers.
- 4) There is no adoption of breeder's rights denying Kenyan farmers planting materials from overseas.
- 5) Regulations require a developer of a new variety to release to government for testing purpose, samples of hybrid plant material. This places the developer at risk of having the secrecy of his germ plant released to a third party, operating as a disincentive of research and development.
- 6) Requirements of registration as a seed merchant are prohibitive for small-scale operations leading to restricted competition between merchants and poor services being offered to farmers.
- 7) There are recommendations, which are yet to be implemented, and which lead to an open transparent accountable and competitive seed industry. These are:-
 - (a) Plant materials developed by Kenya Agricultural Research Institute (K.A.R.I.) should be available for release to all interested parties through a simple transparent system. These varieties and associated licensing and royalty fees should be publicly disclosed on a frequent and regular basis.
 - (b) The requirement of compulsory seed certification should be removed so as to increase the varieties of seed on the market.
 - (c) There should be modification of requirements related to registration of seed merchants. This means that the Act should be amended to provide that seed quality control services are

extended to cover all seeds. Seedlings and planting materials at the breeding, release, production and certification stages.

- (d) Further the law should be amended such that licensed private inspectors can carry out inspections. The regulations will need to incorporate the criteria for licensing which should leave no room for discretionary decision making.

These recommendations are yet to be implemented and government appears to be reluctant to officially endorse the proposals as formal policy. A follow up study on the regulatory constraints resulting in the unavailability to farmers of High Quality seed has further endorsed those recommendations. Unfortunately government is reluctant to put into place this process.

The reasons can only be speculated upon. If the seed industry was liberalized in line with the recommendations, the losers would be the Kenya Seed Company -a parastatal- and the licensed seed merchants as they would face competition due to the transparent and accountable licensing. At balking in implementing measures that introduce efficiency in the seed sector in ex tenso improving Agriculture, whose interests is government protecting? Obviously the parastatal which still has a social and political function to perform and the already licensed seed merchants who would not want the field opened up for competition. If the provisions of the law as enunciated in chapter three were followed or taken up by the Commissioner the glaring inefficiencies in all these sectors would not exist. Yet not a whisper has emanated from the custodian of economic efficiency. It cannot be said that the exempting section 5 of the statute²⁰⁸ currently applies to the liberalized sectors. Even when he was exempted from examining state corporations and licensing boards he did hear cases against KPTC.²⁰⁹

Tea Sub-Sector

Tea accounts for one fifth of total earnings from merchandise exports in Kenya. It is the leading crop export in terms of foreign exchange earnings. Kenya is a world major export of tea.

In 1964, government setup the Kenya Tea Development Authority (KTDA) under section 191 of the Agriculture Act to foster and promote the development of tea growing in small scale farms. It provided smallholder tea growers with extension education on tea husbandry and farm management, how to improve productivity and increase returns, inputs on credit, marketing of green leaf tea to grower owned tea processing factories, sales and marketing services for tea processed by small holder factory companies, mobilization of financial resources for investment in the establishment of and development of tea processing factories, and management services to

²⁰⁸ Restrictive Trade Practices, Monopolies and Price Control Act.

²⁰⁹ See footnotes 120 and 125.

small holder tea factories. KTDA was a government agency, and it paid the farmers a percentage of the sale price of their green leaf tea.

KTDA was supported by the Kenya Tea Board (KTB), a parastatal in charge of inter alia, the promotion of the tea industry, licensing of tea growers and factories, control of pests and diseases, monitoring of tea exports and investigation of all matters related to the tea industry. This institutional framework was created by the Tea Act. In 1992 Sessional Paper number 2 on the Liberalization and the Restructuring of the Tea Sector was launched. it introduced a new regulatory framework , the Tea (Amendment) Act. The Act separated the functions of the two main government agencies into distinct functions and owned differently. The regulatory matters in the sector were vested in the KTB. KTDA was converted into a management agency under the Companies Act, responsible for the development of tea. That is all production issues on tea are now the sole ambit of KTDA. it was sold to farmers through their respective factory companies. it is now a body purely controlled by the private sector .

The liberalization of packing and distribution of tea gave rise to an increase in the number of firms involved in such activities to 30 new tea packing firms in 1996, all marketing and exporting their tea without restrictions. However, the Kenya Tea Packers (KETEPA) a state owned firm, is still the principal operator. The government graciously withdrew from heavy involvement in the sector and confined itself purely to regulatory functions. This has led to little disruptions in the tea sector. Indeed statistics show that the tonnage of tea produced has substantially increased from 211,000 in 1993 just after restructuring began to 294,000 in 1998²¹⁰ when restructuring was almost complete. This shows that a structured and logical introduction of competition in any sector, yields higher returns

TRADING SECTOR

Kenya has a complicated trading policy, which does not apply to all sectors in a predictable manner. It ratified the WTO in toto and every sector works out for itself how to implement the new trading rules. An example is the beer industry. Since May 1993, the beer industry has been liberalized. Taxation of malt lagers is at 153 per cent of production cost 105 per cent being excise duty. In Uganda and Tanzania it is 70 per cent and 50 per cent respectively²¹¹ at about the same time Kenya reduced custom duty from 35 percent to 25 percent, and relaxed the law relating to import restrictions allowing beers packaged in containers of 340 ml²¹² cheaper beers flooded the market due to the favourable taxation and packaging conditions and Kenya Breweries Limited immediately lost 25 per cent of its market share. In its annual general report of 1997 the Chairman

²¹⁰ Government of Kenya (1999b), Economic Survey 1999, Nairobi.

²¹¹ The Daily Nation, Tuesday, January 7 1997 "High Tax Killing Brewing Industry". Business Week page 1.

²¹² Legal Notice Number 140 of 1997 Weights and Measures Act.

of the Board urged the government to institute fair tax structures that would ensure that there was a level playing field for all the competitors. On import competition, he urged government to investigate those items that shelf price due to the export compensation they enjoyed back home as this posed unfair competition.

The target of this allegation was the South African Breweries a South African monopoly which controls 98 percent of the South African market and is listed as the fourth largest brewery in the world. It had a net value as of 1997 of shillings 640 billion. Its pre tax profit for that year was 48.1 billion shillings compared to Kenya Breweries of 1.5 billion.²¹³ While competition is necessary to ruffle KBL to higher levels of efficiency it is necessary to support local companies by offering reasonable tax structures. Government in the manner in which it dealt with KBL seemed intent to kill the goose that laid the golden eggs since KBL is Kenya's biggest corporate taxpayer.

A paper entitled "Major Adverse Effects of Liberalization on Manufacturing Industries in Kenya"²¹⁴ details the litany of woes that have buffeted this sector since liberalization. A review shows that that over the last nine years many firms have closed down are under receivership or are under producing, creating redundancies and investment losses. Costs of production in Kenya continue to be higher in addition to the skewed external trading policies which allow cheap importation, industrial importation in Kenya attracts five percent duty while as countries such as South Africa have the capacity to manufacture their own industrial machinery. Kenya has very little by way of raw material and other intermediary inputs that also have to be imported and also attract import duty. The cost of electricity which is rationed in Kenya is 7 cents per kWh compared to South Africa which is 2 cents per kWh. There are no government rebates to stimulate manufacturing for export and in addition there is 0.1 percent inspection levy on imported raw materials, which does not exist in many countries.

The Kenya Export Promotion Council clearly states that there is no level playing field in trade between Kenya and South Africa. South Africa subsidizes her industrial processes in and export incentive scheme. It has high tariff barriers and restrictive legislation such as import quotas and the 50/50 rule that dictates that South African importers of Kenyan tea for example must buy an equivalent amount of South African produce.²¹⁵ Under the international trading system, Kenya can use countervailing duties and antidumping duties²¹⁶ to stem the tide of cheap subsidized imports from the south so as to offer fair competition to local industries. Such measures, which are available under the WTO framework, are usually used to complement prevailing competition law.

²¹³ Daily Nation Tuesday September 30 1997. "Big Cash Fuels Raging Beer War" business week pg 6.

²¹⁴ Kenya Association of Manufacturers. (1999). Nairobi Kenya.

²¹⁵ The East African November 17-23 1997 "Kenya exporters cry foul over high SA tariffs".

²¹⁶ Customs and Excise Act. Sections 125 and 126.

Meanwhile Kenyan industrial base continues to be eroded. There was once a local and vibrant textile industry. There is none in existence now. Clearly Kenyan companies cannot compete or even survive under the current onslaught. In addition there is the element of poor infrastructure offered by way of poor roads, telephone network, electricity rationing and it becomes clear that having a law and policy that touches on competition will never guarantee efficiency in the market place if it is not buttressed by other supportive policies that aim at creating competitive markets. The Kenyan Association of Manufacturers reckons that the country plunged into the free trade regime too quickly without allowing the local industries adequate time to fully adjust to the internal freedoms.²¹⁷ It can also be added that the regulatory framework to monitor and guarantee efficiency was hardly suited nor prepared to handle restructuring and liberalization process.

However this problem was not for lack of foresight. In 1982 when the Ndegwa Report was compiled it had recognized that the importance of designing configuration of national policies and adjusting them in light of changing circumstances both domestic and international and having the best talent to do this after every three months²¹⁸. It had recommended that the Ministry of Finance and Economic Planning, and Central Bank do this. Unhappily this never happened. This was the core unit, which would have offered a guiding vision and review of laws and policies which needed continued evolution and evaluation in light of changing global trading scene.

The post war Japanese experience illustrates what should have happened to enable Kenya competitively liberalize and restructure her economy. The Japanese recognized the need for thematic plans and guiding visions. The plans indicated the direction of economic development and the contribution expected from individual sectors and guided the whole country toward those visions.²¹⁹

The agency, which played a key role in economic management, was Ministry of International Trade and Industry (MITI). It contributed in guiding industrial development through its strategic planning and authority both (formal and informal) over investment and production priorities. MITI persuaded and guided Japanese industry towards visions which it had created after consultations with expert groups and businesses. It protected selected industries from imports, offered export promotion, fiscal and financial incentives and development of technology. In the liberalization phase of the 70s protection was gradually and selectively reduced. MITI made detailed studies of the effects of liberalization on industry and the least vulnerable were exposed first. For some industries a detailed timetable of liberalization was drawn up which in effect stimulated efficiencies.

²¹⁷ East African Standard Tuesday August 31 1999. "KAM demands Fairness".

²¹⁸ Supra note 31 paragraph 26.

²¹⁹ World Bank (1982). World Development Report "State as a Regulator, Case study Japan- thematic plans and guiding visions." Oxford University Press Oxford. pg 53.

MITI also tried to realize economies of scale by arranging mergers where it felt that firms were too small to compete internationally. The Japanese experience exposes the lack of follow up on thematic long range economic planning, the lack of cogent analysis and coordination of the different sectors that has been characteristic of the economic restructuring process in this country, which has not helped at all in fostering competition.

THE CIVIL AVIATION SECTOR

Prior to 1995, Civil aviation for scheduled services was provided by the wholly state owned Kenya Airways. Years of mismanagement and inefficient provision of services brought this parastatal to its knees. It was the first parastatal to be privatized. A strategic investor was sought and KLM the national Dutch Airline bought 26 percent of the issued share capital of the former parastatal, government retained 23 per cent of the share capital, and the rest of the shares were issued to the public and the foreign investors.

To attract the investment of this strategic partner and hence much needed capital the government as the vendor undertook²²⁰.

- a) To continue to designate the company as the national flag carrier of Kenya for the purposes of compliance with provisions of treaties concluded to be entered with other countries concerning air transport operations between Kenya and other countries.
- b) To maintain the company's single carrier status on existing and future bilateral agreements for at least 5 years.

Effectively for 5 years since 1996, Kenya Airways has been granted monopoly status as the national flag carrier in the scheduled services. However, non scheduled services are liberalized. It is anticipated that by the time 5 years elapse the airline will have attained the ability to financially and structurally withstand competition.

Kenya Airways has continued to grow from strength to strength²²¹. This because competition was not introduced into the sector immediately. Should this have been done, there would scarcely been any interest from the strategic investor and the airline would have collapsed. For those five years any other airline which was locally incorporated and wished to fly to any other destination outside the country it had to enter into a commercial arrangement with Kenya Airways, wherein it had to cede part of its income to Kenya Airways.

This privatization exercise shows government was able to manage the sector to the advantage of the local industry. The privatized entity became structurally and financially competitive without any

²²⁰ The Share Holders Agreement.

²²¹ It was nominated best airline in Africa for the years 1999 and 2000 by IATA. Source Kenya Airways

detrimental impact on the aviation industry as the non-scheduled air services continued to be run competitively.

Currently, a Kenyan company East African Safari Air Limited has sought designation to fly to several European destinations where Kenya Airways has suspended operations, but without success, due to the monopoly designation and commitment by the Kenya government.²²²

CONCLUSION

From the foregoing it is clear that even though the government was forced to restructure the economy and implement wide ranging reforms on the basis of the Ndegwa Report and the Structural Adjustment Programmes promulgated by the World Bank. A direct consequence of this measure was the enactment of the competition law to act as the regulatory tool for a free market. Looking at the growth of the various sectors of the economies, since introduction of these measures, real growth in all sectors has seriously declined and the expected gains from efficient resource allocation have not materialized.

Government has not been able to extricate itself from the mire of entrenched economic interest that had been fostered in the command economy which were intricately intertwined with the political process which was also monolithic.

In the command economy government was primarily a gatekeeper which locked out new ideas. This kept out innovative thinking and development of new styles of management. Since most of the economy was controlled by government, it meant that the economy was locked in this mode for a long time. With the onset of liberalization, government was supposed to be the facilitator of new ideas, the gate opener which would welcome an innovative manner of management. For example it could have boldly used competition law to open the strategic sectors of the economy mentioned in chapter four to the competitive process so as to promote efficiency resulting in enhancing consumer welfare. It did not do this. Instead it has continued to encourage monopoly and duopolies which are clearly antithetical to competition and are mindsets of the old command economy. The useful dirigist role of competition law was not used.

There was clearly lack of coordination in the whole process. Once it was decided that restructuring was inevitable and government had ratified the WTO treaty, there should have been a core unit which should have introduced the process sectorally, starting with the sectors that were clearly in need of being opened up to the competitive process and identifying those that still needed protection. The Japanese example quoted is ample illustration of what should have happened.

²²² HCCC 1360 of 1998.

There was also need to recognize that other matters such as taxation had competition effects in the economy and could if used unwisely pose unfair import competition to the Kenyan industries and could damage them. Similarly sagacious use of duties could improve access to consumers of necessary items at lower price at no great loss to revenue triggering a chain reaction of enhanced economic activity.

It appears that government never appreciated the role competition law and policy could play in facilitating the whole restructuring process. The nature of the intertwined process between competition law and dropping tariff barriers, or the relationship between competition policy and fair tax structures, or the relationship between competition policy and the management of the public infrastructure and its relevance to the competitive nature of the finished product where industry and agriculture are concerned was never obvious. Otherwise these other areas of policies would have been addressed simultaneously so as to make the implementation of the law yield some measure of success.

CONCLUSIONS

Policy

What is evident from the foregoing is that is that government has opened up domestic markets to competitors with out overtly protecting local private invention in the national interest. This has not optimized the use of scarce resources or created an enabling environment for small businesses to operate or even increased the indigenisation of the economy.

Secondly government has divested from public enterprises whenever it is clear that the private sector can provide goods and services more efficiently even if not more equitably. This has certainly not led to fair income distribution or even protected consumers.

Thirdly, divesting or restructuring of the government from the public enterprises seems to be done with the primary objective of decreasing the budget deficit and not using savings for public welfare and investment. Therefore this has not led to static or dynamic efficiency and this exercise has not aided economic growth. All these were hoped to be achieved when competition law was simultaneously introduced with economic restructuring.

Competition can be a public policy tool that can be used in a completely controlled fashion and regulated within the confines of the economy to achieve stated goals. This is its dirigist role that can be used to selectively restructure certain sectors of an economy and even various sub-sectors within the sector for coherent growth. However, for its effective use in this manner it must be enunciated clearly in a comprehensive document, which then guides the manner in which the law will be set up, the institutions to be created, and the interstices that those institutions have with all the sectors of the economy. This was not the case with Kenya. The Ndegwa Report merely touched on competition in addition to many other things. Thus the law created was based on the recommendations of a government document, which suggested wide-ranging reforms in government and mentioned competition without being comprehensive.

Ratification of international agreements that have competition concerns has not translated into appropriate domestic legislation. In the case of the General Agreement on Trade and Tariffs the use of the safeguard mechanisms inbuilt in the agreement to protect industries in the domestic industries were never used even as the government liberalized the importation of finished goods. This has led the local manufacturers to complain of unfair competition and unfriendly taxation from the Government. Further, even where government has had the evidence that some goods are entering the market at less than fair value, there have been no countervailing duties imposed on

the goods, thus government seems to encourage the unfair competition that is posed on the local industries.

Where the economic process has been monolithic and the political process has been monolithic as well it is difficult to restructure the economic sector without attendant changes to the political sector. Since the political sector has drawn patronage from the economic. Inevitably any attempt to rock the sectors that have been the cash cows for the politicians will be delayed or blocked or the restructuring carried on in a manner that is not transparent and does not lend itself to efficiency. The best example is the attempt to restructure the telecommunications sector. Telkom Kenya the fixed line monopoly is still an untouched monopoly even after concerted attempts from the Bretton Woods institutions to have government divest from it.

Lack of implementation of competition policy as the guiding feature of the restructuring process has meant that very few efficiency gains have been made especially where the restructuring of the strategic sectors of the economy has taken place. Tangible benefits are yet to be discerned by the consumer either by way of efficient service delivery or lower prices. This is especially relevant in the electric sector. The electric sector was liberalized but consumers still pay higher prices and there have been no changes in the structure of the sector so as to have other sources of power generation, nor has there been any policy to encourage development of these other sources of power so as to encourage competition in the provision of electricity.

Disregard of the provisions of the competition policy in the restructured sectors of the economy has meant that few investors are willing to sink money in the sector or even the economy as a whole. Hence there has been very little discernible economic growth. This is evident in the manufacturing sector. Government without any foresight openly liberalized this sector without any thought of guiding it stage by stage, thus introducing cheaper manufactured goods into the market and killing the industries who could not compete with the cheaper imported finished product. At the same time government did not encourage the entrenchment of the industries that survived the onslaught and pursued skewed taxation policies which attached higher tax rates for industrial and intermediate goods. Inevitably this has meant that the Kenyan finished product becomes more expensive than its imported counterpart, which might originate from a country with friendlier policies towards its industries.

There has been lack of interface in the spheres of competition law and safeguard measures, countervailing measures and antidumping duties in countering unfair competition from imported subsidized goods once the market was liberalized under the GATT Agreement. Hence even though there are questionable cheap goods in the market government is yet to make any attempt to use the protective measures provided to protect its nascent industries.

In the agricultural industry it is even more damning because government has a skewed method of allowing huge imports of maize and sugar or wheat with duty waived, thus allowing entry into the market, goods which are far much cheaper than the goods produced locally. This unfair competition has had a negative effect on these sectors by causing glut and impoverisation of the farmers concerned, due to the distorted prices of these products. Yet these duty waived products have entered the market at the instance of the government.

There was the creation of institutions in the privatization process that have no in built measures of ensuring transparency and accountability and are mired in conflict of interest. These institutions could hardly ensure that privatization was done competitively and in the interests of efficiency. Ideally a law should have been passed, thus involving parliaments stamp of approval and this law should have been guided by competition concerns hence the Monopolies Commissioner would have been one of the key figures in guiding the manner in which privatization was to be performed. The Department of Government Investments and Public Enterprises is self-contained and runs privatization in a closed shop manner.

Law

The competition law has prolix provisions which could be anticompetitive in effect due to the exigencies of trying to interpret so many concepts. It even includes economic concepts such as the theory of oligopolistic interdependence. The risk is that this petrifies the law to the current economic thinking whereas economics and its concepts are usually fluid thus compromising the relevance of the law. The Act should have settled for simplicity in enunciating what it sought to prohibit, what it would investigate and what it would guide.

The law seemed to efface its own authority on most important aspects of the economy under section 5 and 73 of the Act. This is because it stated that bodies created for regulatory purposes by the statute to perform exclusive functions were not subject to it. This was anti-competitive because in most cases these bodies were monopolies and were bound to abuse their monopolistic situation without question, yet they were performing important functions in the economy. These should have been the bodies to be subject to investigation a priori. In their regulatory function they oversaw the establishment of distorted situations from a competitive point of view yet the status quo remained. If the breath of competition had been allowed to filter into these institutions it would have been a first step in the easy correction of market imperfections.

Institutions created under the law were not autonomous, did not have clout to make policy and lacked the requisite capacity to make them relevant to the task at hand, that is restructuring the

economy. These are namely the Monopolies Commissioners Office and the Restrictive Trade Practices Tribunal. The Monopolies Commission did not have independence nor power to have clout in the market due to the lowly status as a department in the Ministry of Finance. The budget was not independent from that of the ministry, nor was it big enough to ensure effective supervision of the entire economy.

The officers were treated in the manner akin to all public servants, yet their role was very important as it was to ensure the structural efficiency of the economy. Hence there is no incentive to continuously serve in that office since the perks are not enough. Further the function performed by these officers require a higher level of training than the average economist or lawyer, hence the need for funds to perform this purpose.

The Tribunal, the competition adjudicator, is not an independent body. Since it not de-linked from the Ministry of Finance and gets its budgetary allocation from that of the Ministry. Neither is it independent from the Commissioner and his staff yet they are the investigators. Therefore its impartiality is compromised.

There are no substantive qualifications given for the staff that is supposed to man the tribunal and it should be invested with procedural safeguards so as not to allow the Minister interfere with its proceedings. It should also listen to appeals from the administrative decisions de novo so that the order are not given *res judicata* status.

The laws that were enacted to deal with the restructured strategic sectors even where they paid lip service to the tenets of competition did not implement those tenets. The Kenya Communications Act states the licensing body should not allow the creation of either monopolies or duopolies. The fixed line licensing is monopolistic as it has allowed Telkom to be the only provider of trunk dialling and cross-switching as well as having the exclusive use of V-SAT. The mobile telephone sector is set to duopolistic.

There should be enactment of a privatization law / restructuring law which is guided by the tenets of competition and should have the Competition Commissioner play a key role in the privatization or the restructuring process. This will preempt creation of monopolies and duopolies which are controlled by the private sector, and will from inception ensure that even as government departs from the market what is to be created are structurally competitive sectors which offer very little by way of distortions which harm consumer welfare. This is because there will have been analytical input from the Commissioner from the time privatization or restructuring of an entity is conceptualized.

RECOMMENDATIONS

There should be vigorous advocacy of competition law and policy and its role in the effective regulation of efficient economic activity in all sectors both public and private.

Licensing provisions in all statutes should be open to competitive scrutiny by doing away with discretionary licensing as this is a potential entry barrier. Licensing should be used to record the necessary data in an industry and not to limit the entrants into a sector without any proper reasons. There should be fair and open criteria upon which licences will be granted.

There should be a review and amendment of the offending provisions of the competition law, which offer total exclusion to some sectors from the scrutiny of competition law, without prerequisites of reasonableness of transparency. Thereafter the law should be amended to include authorization procedure. This is an administrative procedure where a party seeks exemption from the application of competition law. The party has to make an affirmation showing that the activity at issue will produce benefits that outweigh any negative competitive impact. Thus an authorized conduct has overwhelming social benefits because it improves the production or distribution of goods and services, it promotes technical advancement and economic process, allows consumers a fair share of resulting benefits and it does not impact a substantial part of the market in question.

There should be simplification of the law especially as relates to provisions that offer economic definitions; these should be done away with. It is not realistic to include economic definitions in a statute. Economics is an evolving science and to provide definitions based on one school of thought reduces interpretation of the law to a static mode.

In the area of sanction the penalties are petrified into the main law and are not varied. Thus amendments should be sought to increase the types of sanctions and remedies. This should achieve not only punishment of the offender as a deterrence but it should compensate a person who has suffered loss or damage, it should seek to undo the effects of the contravention and prevent future contraventions as well as promote compliance.

The law as presently includes divestiture and monetary penalties. It should be amended to include injunctions, damages, community service orders, supervisory orders, and adverse publicity orders. Adverse publicity orders require a corporation to publicize the fact that it has breached the law and what it has been ordered to do. Supervisory orders impose controls over aspects of conduct and involve a corporation making an internal investigation of the contravention and the taking

appropriate disciplinary proceedings and filing with the court a detailed satisfactory compliance report. Community service orders if used wisely in sentencing can be a strong deterrent as by reason of the personal impact on an offender's spare time. They are difficult to nullify by monetary or other forms of indemnification. Used correctly it can serve as a useful form of penalizing a corporation. And may use serve the purpose of deterring future contravention as well as providing a form of compensation to the community.

The law tries to be exhaustive as far as descriptions go. For example, the describing in minute detail what constitutes a restrictive trade practice is confusing. It would be simpler to look at the effect of some practice and analyze whether it diminishes either static or dynamic efficiency. Thereafter it would be outlawed directly or it be analyzed on a case-by-case basis by using what is called the rule of reason approach.

There should be provision an office of an autonomous commissioner whose office is independently established and is not subject to the dictates of the Ministry of Finance.

The President of the Republic should appoint the Commissioner. This would vest this office with the importance and prestige and required of a job of this stature. This is because he is not a simple rank and file civil servant but is charged with the all- important duty of overseeing the static and dynamic efficiency of the economy and is also responsible for making and contributing to policy in this very important area.

The Commissioners office should have its own independent budget separate from that of the Ministry of Finance.

Secondly, the substantive qualifications of the Commissioner and the members of the Tribunal should be set out in the statute. This curbs misuse of discretion in appointment of the members. The Tribunal should not be ad-hoc and should sit continuously as it is the repository of all competition law in the country.

There should be harmonization of all the statutes that have a bearing on any economic activity to make them compatible with the provisions of competition law. These include the Capital Markets Authority Act, the Kenya Communications Act, the Electricity Act, the Central Bank Act, and all other statutes that have a bearing on the production allocation and exchange of resources. This will avoid the situation where decisions are made on the licensing of operators in the strategic sectors and the Commissioner has no input at all or his input is not manifest since the liberalized sectors are rife with monopolies or duopolies and are still structurally inefficient.

being of government Policy making should be left to a core unit within the government led by well trained economists, lawyers and other professionals in keeping with the far sighted recommendation that had been made by the 1982 Ndegwa report. This would require restructuring of international and regional developments in taking cues to the Kenyan my. To this end appropriate institutions would be designed as well as the proper regulatory works. For example competition law was up for negotiations of the 1990s. How did it take of, how prepared was Kenya for this outcome when there are still problems in implementation of the law that is current.

ality the Government should embrace competition policy wholeheartedly, as if it were a grown solution to all its problems which stemmed from the political function of government used to manage its economic resources. Using those resources not to further efficiency but to reward those entities perceived as supportive of the politics of the day. This led the growth not only in the public sector but also in the private sector. Some of the institutions of government including the law were manipulated to achieve that goal.

instructive that in the areas where government has allowed in competition without a lot of fuss the sectors have thrived and are vigorously growing. For example the tea sector and the mobile phone sub sector (even though it is duopolistic). Once the tea sector was restructured and government role reduced to that of policy making the tea sector has recorded higher growth. When another mobile phone provider was reluctantly allowed in by government then prices came falling down not only for hand- sets but also for connection fees.

competitive restructuring of all the sectors in the economy will benefit from a privatization law which builds in competitive and transparent bidding for all government assets. This law should in institutions it creates give a key role to the empowered commissioner of monopoly as well as emphasizing that all transactions under that law should only be sanctioned if they promote structural efficiency in a sector and will in the end promote static and dynamic efficiency. One way can restructuring and privatization bring growth and modernization in these sectors.

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Responsibility
of corporate
officers and
partners.

71. (1) Where a person charged with any offence under this Act is a body corporate, every person who, at the time of the commission of the offence, was a director, manager or officer of the body corporate may be charged jointly in the same proceedings with such body corporate, and, where the body corporate is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

(2) Any partner in any firm shall be answerable for the acts or omissions of any other partner in the same firm in so far as they concern such firm; and, if any partner commits any act or makes any omission which is an offence under this Act, every partner in the firm shall be jointly and severally liable to the penalties provided by this Act.

72. (1) No legal proceedings shall be instituted in any court against the Minister or Commissioner or any person authorized by the Minister or Commissioner for anything done or intended to be done in good faith under this Act.

(2) No compensation shall be payable to any person for any loss, damage or harm directly or indirectly caused by anything done or intended to be done in good faith by the Minister or Commissioner or any person authorized by the Minister or Commissioner under this Act.

73. Except insofar as it is exempted from the application of the provisions of this Act by section 5 or any other written law, every body corporate in which the Government holds one or more shares, whether as sole, majority, or minority shareholders, and which is carrying on any trade is a person to whom this Act applies and who may be investigated by the Commissioner, who is subject to an order of the Minister, and against whom a prosecution may be brought in respect of an offence against any provision of this Act.

74. The Commissioner shall consult with the Kenya Bureau of Standards in all matters involving definition and specification of commodities and grading of commodities by quality for the purposes of this Act.

75. The Minister may make regulations generally for the better carrying out of the provisions of this Act.

Protection
of officials
acts.

Application
of Act
to state
corporations.

Co-ordination
with the
Kenya Bureau
of Standards.

General power
to make
regulations.

The Restrictive Trade Practices, Monopoles
and Price Control Act

CHAPTER 504



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THE RESTRICTIVE TRADE PRACTICES,
MONOPOLIES AND PRICE CONTROL ACT

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THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT

Commencement: 1st February, 1989

An Act of Parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes

PART I—PRELIMINARY

1. This Act may be cited as the Restrictive Trade Practices, Monopolies and Price Control Act.

Short title.

2. In this Act, unless the context otherwise requires—
“business records” includes—

Interpretation.

(a) accounts, balance sheets, vouchers, records, minutes of meetings, contracts, files, instructions to employees, and other instruments; and

(b) any information recorded or stored by means of any computer or other device whatsoever and any material subsequently derived from information so recorded or stored;

“commission agent” means any person who receives or orders goods on account of others, or who solicits orders for goods on behalf of other persons, and includes a person carrying on business as a broker;

“Commissioner” means the Monopolies and Prices Commissioner appointed under section 3;

“competitor” means a person who produces, distributes, or supplies substantially similar goods or services, at the same stage of production or distribution of goods or supply of services, in relation to another person;

“consent agreement” means an agreement concluded pursuant to subsection (3) of section 15;

“consumer” includes any person who purchases or offers to purchase goods otherwise than for the purpose of resale; but does not include a person who purchases any goods for the purpose of using them in the production or manufacture of any other goods or articles for sale;

"customer" means a person who purchases goods or services from another person;

"distribution" includes any act by which goods or services are sold or supplied by one person to another person;

"distributor" means a person who engages regularly in distribution or who participates in some act or set of acts of distribution which is the subject of an action under this Act;

"downstream processor" means a manufacturer who adds value to goods supplied or manufactured by another person;

"fair market price" means a price at which the market for goods or services clears with sufficient competition without the occurrence of shortages or build-up of excess inventories;

"goods" include—

(a) ships, aircraft, and other vehicles;

(b) animals, including fish;

(c) minerals, trees, and crops, whether on, under, or attached to land or not; and

(d) gas or electricity;

"intermediate goods" means goods used as inputs in manufacturing;

"manufacture" or "manufacturing" includes any artificial process which transforms goods in order to add value to them for the purpose of resale; and includes any operation of packing or repacking not linked to another form of transformation within a single enterprise;

"Minister" means the Minister for the time being responsible for finance;

"monopoly undertaking" means a dominant undertaking, or an undertaking which, together with not more than two other independent undertakings—

(a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or

(b) provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof;

"person" includes a local authority or public body;

"price", in relation to the sale of goods or to the performance of services, includes every valuable consideration whether direct or indirect, and includes any consideration which in effect relates to the sale of the goods or to the performance of the services, although ostensibly relating to any other matter or thing;

"reasonable unit cost" means the average total cost of producing goods or services at the producer's normal scale of output, with all productive factors being remunerated at fair market rates;

"Restrictive Trade Practices Tribunal" means the tribunal established pursuant to Part V;

"restrictive trade practices" means trade practices described in sections 6 to 12;

"retail trade" means a form of distribution by which goods are customarily sold to consumers rather than for the purpose of resale or manufacturing; and includes any act or set of acts of sale to consumers which is the subject of an action under this Act;

"retailer" means a person regularly engaged in retail trade, or who participates in some act or set of acts of retail trade which is the subject of an action under this Act;

"sale" includes an agreement to sell or offer for sale, and an "offer for sale" shall be deemed to include the exposing of goods for sale, the furnishing of a quotation, whether verbally or in writing, and any other act or notification whatsoever by which willingness to enter into any transaction for sale is expressed;

"service" includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;

"supplier", in relation to a service, includes a person who performs the service and a person who arranges the performance of the service, and in relation to goods or services, means a person who sells or supplies goods or services to another person;

"supply", in relation to goods, includes supply or resupply by way of sale, exchange, lease, hire or hire purchase;

"trade association" means a body of persons (whether incorporated or not) which is formed for the purposes of

furthering the trade interests of its members or of persons represented by its members;

"trade practice" means any practice related to the carrying on of any trade; and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply, or price, in the course of trade, of any property, whether real or personal, or of any services;

"wholesale trade" means a form of distribution by which goods are customarily sold for the purpose of resale or as inputs in manufacturing; and includes any act or set of acts of sale for either of those purposes which is the subject of an action under this Act;

"wholesaler" means a person regularly engaged in wholesale trade, or who participates in some act or set of acts of wholesale trade, which is the subject of an action under this Act.

3. (1) There shall be appointed a Monopolies and Prices Commissioner and such other officers as may be necessary for the due administration of this Act.

(2) The Monopolies and Prices Commissioner shall, subject to the control of the Minister, be responsible for the control and management of the Monopolies and Prices Department of the Treasury.

(3) The Commissioner may authorize any officer to exercise any of the powers conferred by this Act upon the Commissioner subject to such limitations as the Commissioner may think fit.

PART II—PROVISIONS RELATING TO RESTRICTIVE TRADE PRACTICES

Restrictive Trade Practices

4. (1) For the purposes of this Act, "restrictive trade practice" refers to an act performed by one or more persons engaged in production or distribution of goods or services which—

(a) in respect of other persons offering the skills, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate; or

fair market prices for goods or services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.

(2) For the purposes of subsection (1) reduction or elimination of opportunities is to be measured with reference to the situation that would pertain in the absence of the practices in question.

(3) Subject to exemptions set out in section 5, the practices enumerated in sections 6 to 12 are declared to be restrictive trade practices for the purposes of this Act.

5. The following trade practices are exempted from the provisions of this Act— **Exemptions.**

(a) trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred on any person by an Act of Parliament or by an agency of the Government acting in accordance with authority conferred on it by an Act of Parliament;

(b) trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of Parliament.

Enumeration of restrictive trade practices

6. (1) For the purposes of this Act, the following categories of trade agreements are declared to be restrictive trade practices—

(a) an agreement or arrangement between persons engaged in the business of selling goods or services to engage in conduct—

(i) hindering or preventing the sale or supply or purchase of goods or services between persons engaged in the selling or buying of goods or services; or

(ii) limiting or restricting the terms and conditions of sale or supply or purchase between persons engaged in the selling or buying of goods or services;

Categories of trade agreements declared to be restrictive trade practices

- (b) an agreement or arrangement between manufacturers, wholesalers or retailers to sell goods at prices or on terms agreed upon between themselves;
- (c) an agreement or arrangement between manufacturers, wholesalers, retailers, or contractors to buy, or offer to buy, goods at prices or on terms agreed upon between themselves;
- (d) an agreement or arrangement between manufacturers, wholesalers, retailers or contractors or any combination of persons other than a partnership, engaged in the selling of goods or the performance of services, to sell goods, or perform services, at prices or on terms agreed upon between the parties to any such agreement or arrangement;
- (e) an agreement or arrangement between manufacturers or between wholesalers to sell goods on the condition that prices charged by or conditions of sale applicable to retailers shall be the prices or conditions of sale stipulated by those manufacturers or wholesalers;
- (f) a discriminatory agreement or arrangement between sellers or between sellers and buyers to grant rebates to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers;
- (g) an agreement or arrangement between sellers not to sell goods in any particular form or of any particular kind to buyers or to any class of buyers; or an agreement or arrangement between resellers not to buy goods in any particular form or of any particular kind from sellers or any class of sellers;
- (h) an agreement or arrangement between manufacturers or wholesalers or retailers not to employ or to restrict or favour the employment of any method, machinery, process, labour, land or other resources;
- (i) an agreement or arrangement between persons whether as producers, wholesalers, retailers or buyers, to limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods, or allocate territories or markets for the disposal of goods; or
- (j) an agreement or arrangement to enforce the carrying out of an agreement or arrangement referred to in this subsection.

(2) No agreement or arrangement enumerated in subsection (1) shall be enforceable in legal proceedings after the commencement of this Act, nor shall any person bring a suit against any other person by reason of failure to observe or adhere to the terms of that agreement or arrangement or by reason of damages arising from that failure.

(3) An agreement or arrangement enumerated in subsection (1) shall be regarded as a restrictive trade practice for the purposes of this Act whether or not the agreement or arrangement is intended to be enforceable by legal proceedings.

(4) Where an agreement is made by a trade association, the agreement shall be deemed to be made by the association and by all persons who are members of the association or represented thereon as if each of those persons were a party to the agreement.

(5) Nothing contained in subsection (1) shall apply in respect of any agreement or arrangement between consumers relating to goods which are bought by them for consumption and not for resale.

7. (1) The following practices conducted by or on behalf of a trade association are declared to be restrictive trade practices—

Application to
practices of
trade
associations.

(a) the unjustifiable exclusion from a trade association of any person carrying on or intending to carry on, in good faith, the trade in relation to which the association is formed; and in determining whether an exclusion from such an association is unjustifiable the Minister may examine, in addition to any other matters which he considers relevant, not only the application of any rules of that association but also the reasonableness of those rules;

(b) the making directly or indirectly of a recommendation by a trade association to its members or to any class of its members—

(i) which relate to the prices charged or to be charged by such members or any such class of members or to the margins included in the prices or to the pricing formula used in the calculation of those prices; or

(ii) which relates to the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

(2) A recommendation by a trade association as described in subsection (1) (b) shall be deemed to be a restrictive trade practice notwithstanding that any statement in the recommendation may or may not be complied with as the members or class of members to whom the recommendation is made think fit.

(3) A recommendation made by any person for the purpose of or having the effect of, whether directly or indirectly, enabling any trade association to defeat or evade the provisions of this Act shall be deemed to have been made by that trade association.

(4) Where a specific recommendation, whether express or implied, is made by or on behalf of a trade association to its members or to any class of its members, concerning the action to be taken or not to be taken by them in relation to any matter affecting the trading conditions of those members, the provisions of this Act shall apply as if membership of the association constituted an agreement under which the members agreed with the association and with each other to comply with the recommendations, notwithstanding anything to the contrary in the constitution or rules of the association.

(5) Notwithstanding anything in section 6 (4) or subsection (4) of this section, a member of a trade association who expressly notifies the association in writing that he dissociates himself entirely from an agreement made by that association or, as the case may be, that he will not take action or will refrain from action of a kind referred to in an express or implied recommendation made by that association shall not, in the absence of proof to the contrary, be deemed to be a party to that agreement or, as the case may be, a member of the association who has agreed to comply with the recommendation.

8. (1) For purposes of this section, and sections 9 and 10, "discrimination" means the act of a person in selling or supplying, or offering to sell or supply, goods or services to another person, whether for use in production, for resale or

final consumption, under conditions less favourable to that person than those on which he sells or supplies or offers to sell or supply substantially similar goods or services to third persons.

(2) Conditions of sale or supply may be deemed to be less favourable under the following circumstances—

- (a) goods or services are delivered or made available after a significantly longer period of time following receipt of an order, provided that such treatment shall not be deemed to constitute discrimination if more rapid delivery is openly offered to each purchaser on condition of payment of a uniform premium; or
- (b) goods or services are sold or supplied at higher prices, provided that the provisions of quantity discounts which are normal for the trade in question shall not be deemed to constitute discrimination; or
- (c) goods or services are sold or supplied on less favourable credit terms, provided that differential credit terms reflecting the established creditworthiness or lack thereof of different purchasers shall not be deemed to constitute discrimination; or
- (d) in a situation of shortage, such as one prompted by import restrictions, a person sells or supplies goods or services to non-favoured purchasers in quantities less than their normal proportionate share in his sale or supplies.

(3) A person commits a restrictive trade practice within the meaning of this Act, who, whether as principal or agent, and whether by himself or his agent—

- (a) being a manufacturer refuses to sell or supply or to continue to sell or supply or who discriminates in selling or supplying goods to another manufacturer, wholesaler, or a supplier of services;
- (b) being a wholesaler refuses to sell or supply, or discriminates in selling or supplying, goods to a manufacturer, a retailer, or a supplier of services;
- (c) being a retailer refuses to sell or supply or discriminates in selling or supplying goods to a manufacturer, a supplier of services or final consumer; or

(d) being a supplier of services refuses to sell or supply or discriminates in selling or supplying services to a manufacturer, a wholesaler, a retailer or another supplier of services.

9. Without prejudice to the generality of section 8, a person commits a restrictive trade practice within the meaning of this Act who, whether as principal or agent, and whether by himself or his agent, commits any of the following practices—

(a) the person, being an organization which manufactures intermediate goods used in part as inputs by downstream processors, or being in control of such an enterprise, having also a beneficial interest in one or more such downstream processors, and being a regular or part-time seller or supplier of such intermediate goods to one or more downstream processors in which he has no beneficial interest, refuses to sell or supply, or discriminates in selling or supplying such intermediate goods to one or more downstream processors;

(b) the person refuses to sell or supply or discriminates in selling or supplying goods or services to another person except on the condition that the other person also purchases other goods and services from him or from a third person nominated by him or the person attempts to impose such a condition: but nothing in this paragraph shall render unlawful a condition against the separate sale of any goods customarily forming part of a unified set or forming part of a single or composite article;

(c) the person being a retailer of goods or supplier of services indicates in the course of bargaining with another person, being a purchaser or prospective purchaser of goods or services—

(i) that he will sell goods or supply services to that person only if the other person sells or arranges the sale of second-hand goods to the seller or to a person nominated by the seller; or

(ii) that the terms and conditions on which he will sell those goods or supply those services will be less favourable than those upon which he would make them available if the purchaser

were to sell or to arrange the sale of second-hand goods to the seller or to a person nominated by the seller:

Provided that it shall not be a restrictive trade practice for a seller to stipulate the terms and conditions for second-hand goods in part exchange for reconditioned goods of the same kind if the second-hand goods are required for reconditioning and resale;

(d) the person refuses to sell or supply or discriminates in selling or supplying goods or services to any other person on the ground—

(i) that the other person intends or is likely to resell or supply the goods or services, or has in the past sold or supplied similar goods or services, at a price that is or was lower than a specified amount or lower than some other price proposed, recommended, determined, charged, collected, or paid by any person or trade association; or

(ii) that the other person refuses to impose, or to agree to impose, on any third person to whom he resells or supplies the goods or services, the condition that the resale or supply may not take place at a price lower than a specified amount or lower than some other price proposed, recommended, determined, charged, collected, or paid by any person or trade association.

10. (1) A person who, whether as principal or agent, and whether by himself or his agent, commits predatory trade practices with the intention, whether exclusively or in common with other objects, of accomplishing any of the following purposes—

Predatory trade practices to repress competition prohibited.

(a) to drive a competitor out of business, or to deter a person from establishing a competitive business in Kenya or in any specific area or location within Kenya; or

(b) to induce a competitor to sell assets to, or merge with, another party, whether that party is the offender himself or a third person; or

(c) to induce a competitor to shut down, whether temporarily or permanently an existing manufacturing facility or wholesale or retail outlet or outlet for the sale of services, or to deter a person from establishing any such facility or outlet in any one or more locations in Kenya; or

(d) to induce a competitor to desist from producing or trading in any goods or services, or to deter a person from producing or trading in any goods or services,

shall be guilty of an offence.

(2) For the purposes of this section a "predatory trade practice" shall be deemed to have been committed with the intention, exclusively or partially, of accomplishing any of the purposes described in subsection (1) if any outcome described in that subsection occurs subsequent to the occurrence of the practice, or if it may reasonably be inferred that successful execution of the practice would ordinarily be followed by that outcome.

(3) For the purposes of this section "predatory trade practice" includes the following—

(a) a person sells or supplies, or threatens to sell or supply, goods or services at certain prices which prices are found by the Minister to be below their average variable cost, or intended to drive a competitor out of business or to deter a person from establishing a competing business in Kenya;

(b) a person offers money or other consideration of value to a purchaser of goods or services on the condition that the purchaser refrains or agrees to refrain from purchasing the goods or services from some other person or persons unless such consideration is given by way of a normal trade discount;

(c) a person threatens an existing or potential competitor with bodily harm, damage to property, or other disadvantageous consequences if the competitor undertakes or continues or refuses to agree not to undertake or continue specified lawful trade practice;

(d) a person threatens another person with bodily harm, damage to property or other disadvantageous consequences if the other person purchases goods or obtains services from a third person or refuses to

agree to refrain from making purchases from the third person;

- (e) a person offers inducements to existing or potential suppliers of goods or services to an existing or potential competitor to withhold such supplies or to furnish them on terms and conditions that discriminate against the competitor, or he threatens the suppliers with bodily harm, damage to property or other disadvantageous consequences if they fail to carry out or agree to withhold the supplies or to furnish them on terms and conditions that discriminate against the competitor.

11. (1) It shall be an offence—

- (a) for two or more persons, being either manufacturers, wholesalers, retailers, or contractors, or suppliers of services, to tender for the supply or purchase of any goods or services at prices, or on terms, agreed, or arranged between them; or
- (b) for two or more persons to agree or arrange for all or any of them to abstain from tendering for the supply or purchase of any goods or services, tenders for the supply or purchase of which have been invited

Collusive
tendering
prohibited.

(2) It shall not be a defence in proceedings for an offence under this section—

- (a) that the invitation to tender or the tender was not made or submitted in writing; or
- (b) that the invitation to tender or the tender was not described as such or was given some other description; or
- (c) that the invitation to tender was extended to some or all of the parties to the agreement or arrangement at different times; or
- (d) that the tender of any party to the agreement or arrangement was submitted before that party had consulted with all or some of the other parties to the agreement or arrangement on the prices or the terms that those other parties were to submit or on the question as to whether all or some of those parties should abstain from tendering.

(3) Nothing in this section shall apply to a tender made by two or more persons jointly at the express request or with the prior express consent of the person inviting the tender

(whether made in the name of one person or in the names of two or more persons), where the tender is made with the intention that if it is successful the supply or purchase of the goods or services purchased, as the case may be, will or may be shared by two or more persons.

(4) Any person who is guilty of an offence under this section shall be liable to a fine of one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

12. (1) It shall be an offence for any two or more persons, being either manufacturers, wholesalers, retailers, or contractors, to enter into any agreement or arrangement as to the price or prices which any of them will bid at any auction sale of goods, or any agreement or arrangement whereby any party, to that agreement agrees to abstain from bidding at any auction sale of goods.

(2) Any person who is guilty of an offence under this section shall be liable to a fine of one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

Enquiries and investigations into restrictive trade practices

13. Any person who considers himself to be aggrieved as a result of a restrictive trade practice may submit a complaint to the Minister, through the Commissioner, in the prescribed form.

14. (1) The Commissioner shall investigate a complaint made under section 13 which appears to him to have merit and he may also initiate investigations into alleged restrictive trade practices of which he takes cognizance by other means, including but not limited to references by agencies of the Government.

(2) The Commissioner, or any person authorized in writing by him, may require access to copies of such records of trade practices, business transactions, and enterprise ownership and control as he may reasonably need to investigate complaints made under section 13 and without limiting the generality of the foregoing, he or his authorized agent may—

(a) address to any person currently or previously engaged in trading in goods or services to which the allegations refer, or to any person currently or previously connected with a relevant trade association, questions concerning the existence or otherwise of agreements.

minutes of meetings or instructions to employees, or other records relating to the alleged trade practices and demand a response to the questions within a reasonable time;

(b) require any person currently or previously engaged in trading in goods or services to which the allegations refer to grant him access to records indicating the specifications of goods or services traded, persons from whom they have been sold or supplied, quantities and dates of purchases, sales and deliveries, prices charged, paid, and collected, terms and conditions of payment, credit provided, periods of delivery, manner of shipment and other relevant information;

(c) require any person possessing records such as those described in this subsection to give them copies of those records or alternatively to submit the record to him for copying by the Commissioner.

(3) Where the Commissioner deems it necessary for the purpose of verifying the specification of any goods whose trade is the subject of allegations under this section, or of verifying the movement of such goods in the course of trade, he or a person authorized in writing by him may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be engaged in trading in those goods, and may inspect the premises and any goods situated thereon.

(4) Upon entering premises in pursuance of the powers conferred by subsection (3), the Commissioner or any other person authorized by him in writing shall, before proceeding to conduct an inspection of the premises or goods situated thereon, inform the person present who is or who reasonably appears to be for the time being in charge of the premises of his intention to exercise his powers under this Act.

15. (1) The Commissioner may take any of the following steps with respect to a person alleged to be engaged or to have been engaged in restrictive trade practices—

(a) inform the person in writing that allegations have been made and that specific evidence has been presented to substantiate the allegations, and invite the person to comment on the allegations and the evidence and to indicate what remedies

Powers of
Commissioner
in respect of
restrictive
trade
practices.

(if any) the person would propose in order to bring his trade practices into conformity with this Act; or

(b) inform the person that in his opinion the weight of the evidence supports allegations that have been made concerning the occurrence of a restrictive trade practice, and request the person to take specific steps to discontinue such practices and, in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers, competitors or customers to participate actively in producing or trading in the goods or services to which the allegations relate.

(2) In either of the cases referred to in paragraph (a) or (b) of subsection (1) the Commissioner shall request the person alleged to have committed restrictive trade practices to respond to his communication by a certain date, and additionally he may request the person to take the corrective steps described in paragraph (b) of subsection (1) by a certain date and to furnish him with evidence that the steps have been taken by that date.

(3) If the person alleged to have committed a restrictive trade practice does not respond to the Commissioner's communication by the indicated date, or the Commissioner deems the person's response not to remove the grounds for the allegation, or the person fails to implement measures to which he has agreed in his response, the Commissioner shall invite the person to negotiate a consent agreement satisfactory to the Commissioner, stipulating that the person will desist from specified practices and will take specified measures to compensate for the past effect of such practices.

(4) The Commissioner shall cause a consent agreement entered into under subsection (3) to be published in the Gazette as early as practicable and he shall send copies of the agreement to any person who complains to him of the trade practices in question, and also to any other persons whom he deems to be affected by the agreement.

16. (1) If a person considered by the Commissioner to be committing or to have committed a restrictive trade practice under this Act fails to take steps satisfactory to the Commissioner under section 15 or, having signed a consent agreement under subsection (3) of section 15, fails to abide by the terms of the agreement or commits restrictive trade practices not covered by the agreement, the Commissioner shall inform the

person that he proposes to recommend that the Minister make an order regulating the practices in question, and that a hearing on the desirability and contents of such an order will be held on a specified date.

(2) Any person whose trade practices are the subject of a proposed order, and any person who has complained in writing to the Commissioner in respect of those trade practices, shall be given reasonable advance notice of the holding of a hearing on that order and shall be invited either to attend in person or to send a duly appointed representative.

(3) A person invited to a hearing under subsection (2) shall be entitled to representation by an advocate of his choice.

(4) The Commissioner may authorize any person in writing to conduct all or any portion of any hearing on his behalf.

17. Upon concluding his investigation under section 16, including the holding of a hearing as specified in that section, the Commissioner shall present his report together with recommendations for action to the Minister.

Report by
Commissioner
to the
Minister after
investigation.

Orders on restrictive trade practices and appeals therefrom

18. (1) At any time after the holding of a hearing under section 16 the Minister may, by notice in the Gazette, make an order requiring a person committing or deemed to have committed a restrictive trade practice to desist from the trade practices prohibited by this Act and may also require him to take certain positive steps to assist existing or potential suppliers, competitors, or customers, in order to compensate for the past effects of those practices.

Orders of the
Minister on
restrictive
trade
practices.

(2) An order made under this section shall specify the effective dates by which the actions specified therein must be undertaken which dates shall be no sooner than twenty-eight days following the date of publication of the order in the Gazette.

19. (1) In any case where one or more restrictive trade practices are alleged to be committed or to have been committed by two or more persons acting in concert, whether expressly or implicitly, the Commissioner may classify all such persons as objects of a single investigation, and two or more such persons may be invited to negotiate and sign a single consent agreement.

Actions
following
joint trade
practices of
several
persons.

(2) The Minister may address a single order to two or more persons, and in general wherever the context allows the word "person" in sections 15, 16 and 17 may be interpreted to mean two or more persons alleged to be committing or to have committed one or more restrictive trade practices in concert.

20. (1) A person aggrieved by the order of the Minister under section 18 may appeal to the Restrictive Trade Practices Tribunal against the order within twenty-eight days of the making of the order.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Restrictive Trade Practices Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

Offences and penalties

21. (1) Every person who, whether as principal or agent and whether by himself or his agent—

(a) having not lodged an appeal in accordance with section 20 against an order of the Minister made under section 18, contravenes or fails to comply with the order; or

(b) after the Restrictive Trade Practices Tribunal or the High Court has pronounced its decision on an appeal made under section 20, contravenes or fails to comply with any portion of an order of the Minister under section 18 which is confirmed by the Tribunal or the High Court or as modified by the Tribunal or the High Court,

shall be guilty of an offence.

(2) Any person who is guilty of an offence under this section shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one hundred thousand or to both.

(3) If the Restrictive Trade Practices Tribunal is satisfied that a monetary value can reasonably be placed on the damage, including loss of income, suffered by a person, as a result of restrictive trade practices committed by a person guilty of an offence under section 11 or 12, or subsection (1) of this section, the convicted person shall, in addition to any other penalty which may otherwise be imposed, be liable to a fine

of two times such monetary value, which the Restrictive Trade Practices Tribunal shall order to be paid to the person suffering the damage.

(4) A person aggrieved by the decision of the Restrictive Trade Practices Tribunal made under subsection (3) may appeal to the High Court whose decision shall be final.

PART III—CONTROL OF MONOPOLIES AND CONCENTRATIONS OF ECONOMIC POWER

Preliminary

22. (1) In this Part, unless the context otherwise requires—

*Interpretation
of Part.*

“beneficial interest” or “interest” means ownership of shares or a proportion of the assets of an enterprise engaged in production, distribution, or the supply of services;

“control” means the power to make major decisions in respect of the conduct of the affairs of an enterprise after no more than nominal consultation with other persons, whether directors or other officers of the enterprise;

“merger or takeover” means a transaction or other action which involves the implementation of a merger or takeover proposal;

“merger or takeover proposal” means—

(a) a proposal relating to the acquisition or disposition of any shares in a company which, together with shares, if any, to which the transferee already has a beneficial interest, carry the right to exercise or control the exercise—

(i) in the case of a private company, of more than fifty percent of the voting power at any general meeting of the transferor company; or

(ii) in the case of a company other than a private company, of fifty per cent or more of the voting power at any general meeting of the transferor company; or

(b) a proposal for the acquisition or disposition of—

(i) the whole of the equity capital of the business of any person or body of persons (other than a company); or

- (iii) a portion in the equity capital of the business of any person or body of persons (other than a company), being a portion which, together with the portion (if any) in the equity capital of the business to which the transferee is already beneficially entitled or in which the transferee is already beneficially interested, gives the transferee the whole, or more than fifty per cent, of the equity capital of the business; or
- (c) a proposal relating to the acquisition or disposition of—
- (i) the whole of the assets of a section of a business (whether or not the business or the section of the business is carried on by a company); or
 - (ii) a portion of the assets of a section of a business (whether or not the business or that section of the business is carried on by a company), being a portion of those assets which, together with any equity capital already held in that section by the transferee, represents the whole of, or more than fifty per cent of the value of, the assets used in carrying on that section of the business; or
- (d) a proposal (not being a proposal coming within paragraph (b) or paragraph (c)) relating to the acquisition or disposition of the tangible and intangible assets employed in the business or section of a business if the total value of the assets to which the proposal relates, together with any equity capital already held in the business or the section of the business, is more than fifty per cent of the combined value of the tangible and intangible assets employed in connection with the business or section of a business (whether the business or section of a business is carried on by a company or not); or
- (e) a proposal which if effected would result in the establishment of a new business to acquire, by any of the means set out in paragraphs (a) to (d), a controlling interest in two or more independently owned businesses or in one or more sections of at least two such businesses, being sections capable in themselves of being operated as businesses; or
- (f) a proposal (not being a proposal coming within the foregoing paragraphs of this definition) under which

a company or business or section of a business (whether incorporated or not) ceases to be carried on at all and does so under or in consequence of any arrangement or transaction entered into for the purpose of, or having the effect of, preventing or restricting competition between that company, business, or section of a business and the other party to the arrangement or transaction or any body corporate that is interconnected with that party;

“market”, in relation to any goods or services, means the total value of transactions measured in prices at the stage of production or distribution under examination based on the recent year for which they are available;

“nominee”, in relation to any person, means any other person who may be required to exercise his voting power in relation to any company in accordance with the direction of the first-mentioned person, or who holds shares directly or indirectly on behalf of the person;

“participant”, in relation to a merger or takeover proposal or to a merger or takeover, means—

- (a) where the proposal is of the kind described in paragraph (a) of the definition of that term, the transferee and the transferor company;
- (b) where the proposal is of the kind described in paragraph (b) of the definition of that term, the transferee and the business whose capital or portion of whose capital is the subject of the offer or offers involved in the proposal;
- (c) where the proposal is of the kind described in paragraph (c) of the definition of that term, the transferee and the business (whether a company or not) whose assets or portion of the assets are the subject of the offer or offers involved in the proposal;
- (d) where the proposal is of the kind described in paragraph (d) of the definition of that term, the business whose assets are the subject of the proposal and the purchaser;
- (e) where the proposal is of the kind described in paragraph (e) of the definition of that term, each business or section of a business involved in the proposal;
- (f) where the proposal is of the kind described in paragraph (f) of the definition of that term, the parties to the arrangement or transaction and the company.

business, or section of a business which is to cease to be carried on;

"private company" has the same meaning as in the Companies Act;

"section of a business" means a section of a business which is capable in itself of being operated independently;

"share", in relation to a company, includes stock, any beneficial interest in any share, and any perpetual debenture or perpetual debenture stock;

"transferee" means a person who, whether or not in concert with any other person, and whether by himself or his agent, is intended to receive a merger or takeover proposal, or proposes to acquire shares in a company, or the whole or a portion of a section of a business, or the whole or part of the tangible or intangible assets of a business or a section of a business;

"transferor" means the owner of a business the capital or assets of which are sought to be acquired or disposed of in whole or in part under a merger or takeover proposal;

"transferor company" means a company whose shares, or any of them, are sought to be acquired or disposed of under a merger or takeover proposal.

(2) For the purposes of this section, a person appointed as the receiver or manager of the property of a body corporate or as the liquidator of a body corporate is not solely by reason of his appointment a transferee.

(3) The reference in paragraph (a) of the definition of the term "merger or takeover proposal" in subsection (1), and the references in subsection (4), to shares to which the transferee is beneficially entitled shall each be read as including a reference to—

(a) shares held by any person or body corporate as a trustee for or nominee or agent of the transferee; and

(b) shares in or over which the transferee has any right, title, interest, or control over the vote; and

(c) shares which the transferee is or will be entitled to acquire under any option or on the fulfilment of any condition under any other shares or financial interest in the transferor company; and

(d) if the transferee is a company, shares to which any interconnected bodies corporate are already beneficially entitled, or which any such interconnected bodies corporate are or will be entitled to acquire in any such manner as aforesaid;

(4) Where—

(a) in the case of a proposal of the kind described in paragraph (a) of the definition of the term “merger or takeover” proposal in subsection (1) the transferee is already beneficially entitled to, or already has a beneficial interest in, any shares in the company to which the proposal relates, being shares which carry the right to exercise or control the exercise of more than fifty per cent of the voting power at any general meeting of the transferor company; or

(b) in the case of proposal of the kind described in paragraph (b) (ii) of the definition of the term “merger or takeover” proposal in subsection (1) the transferee is already beneficially entitled to more than fifty per cent of the equity capital of the business to which the proposal relates; or

(c) in the case of a proposal of the kind described in paragraph (c) (iii) of the definition of the term “merger or takeover” proposal in subsection (1), the transferee already holds, in the assets used in the carrying on of the section of the business to which the proposal relates, equity capital that represents more than fifty per cent of the value of those assets; or

(d) in the case of a proposal of the kind described in paragraph (d) of the definition of the term “merger or takeover” proposal in subsection (1) the transferee already owns tangible or intangible assets employed in connection with the business or section of the business to which the proposal relates, being assets which have a value that is more than fifty per cent of the combined value of the tangible and intangible assets employed in connection with the business or section of the business,

that proposal shall not be a merger or takeover proposal within the meaning of that definition.

(5) For the purposes of paragraph (c) (ii) and paragraph (d) of the definition of the term “merger or takeover proposal”

in subsection (1) the value of the assets of the section of the business involved in the merger or takeover proposal shall be determined by reference to the value at which the assets less any current liabilities attributable to the section of the business are shown in the books of the relevant business, less any relevant provisions for depreciation.

Control of unwarranted concentrations of economic power

23. (1) The Minister shall keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution; and in identifying unwarranted concentration of economic power he shall pay particular attention to the following factors—

- (a) a person controls a chain of distributing units the value of whose sales exceeds one-third of the relevant market for the category of goods sold by the chain, comprising the national market in the case of a national chain or a regional or urban market in the case of a regional or urban chain, respectively; or
- (b) a person, by virtue of controlling two or more physically distinct units which manufacture substantially similar products, supplies more than one-third of the value, at ex-factory prices, of the domestic market for the category of the goods into Kenya but excluding exports of the goods from Kenya; or
- (c) a person has a beneficial interest, exceeding twenty per cent of outstanding shares, in a manufacturing enterprise, and simultaneously has a beneficial interest, however small, of outstanding shares, in one or more wholesale or retail enterprises which distribute products of the manufacturing enterprise; or
- (d) a person has a beneficial interest, exceeding twenty per cent of outstanding shares, in a wholesale distributing enterprise, and simultaneously has a beneficial interest, however small, in one or more retail enterprises which distribute goods supplied by that wholesale enterprise.

(2) The Minister may direct the Commissioner to investigate any economic sector which he has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power; and for that purpose the Commissioner shall be entitled to require any participant in that sector to grant him or any person authorized in writing by

him access to records relating to patterns of ownership and percentages of sales accounted for by leading enterprises in the sector.

(3) The Commissioner may require any person possessing the records referred to in subsection (2) to give him copies of the records or alternatively to submit the records to him for copying.

(4) For the purpose of this section, an unwarranted concentration of economic power shall be deemed to be prejudicial to the public interest if, having regard to the economic conditions prevailing in the country and to all other factors which are relevant in the particular circumstances, the effect thereof is or would be—

- (a) to increase unreasonably the cost relating to the production, supply, or distribution of goods or the provision of any service; or
- (b) to increase unreasonably—
 - (i) the price at which goods are sold; or
 - (ii) the profits derived from the production, supply or distribution of goods or from the performance of any service; or
- (c) to reduce or limit competition in the production, supply or distribution of any goods (including their sale or purchase) or the provision of any service; or
- (d) to result in a deterioration in the quality of any goods or in the performance of any service.

24. (1) After receiving the report of the Commissioner on an investigation under subsection (2) of section 23 the Minister may make an order directing any person whom he deems to hold an unwarranted concentrations of economic power in any sector to dispose of such portion of his interests in production or distribution or the supply of services as the Minister deems necessary to remove the unwarranted concentration.

Orders of the Minister to dispose of interests.

(2) A disposal of interest pursuant to an order made under subsection (1) may be accompanied by sale of all or part of a person's beneficial interests in an enterprise, or by sale of one or more units in a group or chain of manufacturers or distributors or supplies of services controlled by the person.

(3) No order shall be issued under this section that would have the effect of subdividing a manufacturing facility

whose degree of physical integration is such that the introduction of independent management units controlling different components reduce its efficiency and substantially raise production costs per unit of output.

(4) An order made under this section shall allow sufficient time for orderly disposal of interests so as not to cause undue loss of value to the person to whom the order is addressed.

25. (1) A person aggrieved by an order of the Minister made under section 24 shall appeal to the Restrictive Trade Practices Tribunal in the prescribed form.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Restrictive Trade Practices Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

Offences and penalties

26. (1) Every person who, whether as principal or agent, and whether by himself or his agent—

(a) having lodged no appeal within the time allotted for appeals under section 25 against an order of the Minister made under section 24, contravenes or fails to comply with such order;

(b) after the Restrictive Trade Practices Tribunal has pronounced its decision on the appeal, contravenes or fails to comply with any portion of an order of the Minister made under section 24 which is confirmed by the Tribunal or as modified by the Tribunal,

shall be guilty of an offence.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Restrictive Trade Practices Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court will be final.

Control of mergers and takeovers

27. (1) Every person who, whether as principal or agent, and whether by himself or his agent, in the absence of an authorizing order by the Minister, participates in consummating—

(a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or engaged in supplying substantially similar services; or

(b) a takeover of one or more such enterprises by another such enterprise, or by a person who controls another such enterprise.

shall be guilty of an offence.

(2) No merger or takeover as described in subsection (1) carried out in the absence of an authorizing order by the Minister, shall have any legal effect, and no obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be enforceable in legal proceedings.

(3) Any person who is guilty of an offence under this section shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding two hundred thousand shillings or to both

28. Any person may apply to the Minister, through the Commissioner, for an order authorizing a merger or takeover as described in section 27.

Application to
the Minister
for approval.

29. (1) The Commissioner shall investigate any application under section 28 and for that purpose the Commissioner shall be entitled to require any participant in any economic sector within which a merger or takeover under section 27 is proposed to take place to grant to the Commissioner or to any person authorized in writing by him access to records relating to patterns of ownership and percentages of sales accounted for by participants in the proposed merger or takeover or by other leading enterprises in the relevant sector.

Investigation
by the
Commissioner.

(2) The Commissioner may require any person possessing such records to give him copies of those records or alternatively to submit such records to him for copying by the office of the Commissioner.

30. In evaluating an application under section 28 for the purpose of formulating a recommendation to the Minister, the Commissioner shall have due regard to the following criteria

Criteria for
evaluating
applications
for approval

(a) a merger or takeover will be advantageous to Kenya to the extent that the participants produce goods and services entering into international trade and the merger or takeover will yield a substantially more efficient unit with lower production costs and greater

marketing thrust, thus enabling it to compete more effectively with imports, expand Kenya's exports and thereby increase employment;

(b) a merger or takeover will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices in accordance with the principles of oligopolistic interdependence;

(c) a merger or takeover will be disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labour-intensive technology.

31. (1) After considering the recommendation of the Commissioner made under section 30 the Minister may make an order concerning the application for authorization of a merger or takeover.

(2) An order made under subsection (1) may approve or reject the application, or it may approve the application on condition that certain steps be taken to reduce the negative effects of the merger or takeover on competition.

(3) The Minister shall cause an order made under subsection (1) to be published in the Gazette as soon as reasonably practicable after it is made.

32. (1) A person aggrieved by an order of the Minister made under section 31 shall appeal to the Restrictive Trade Practices Tribunal in the prescribed form.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Restrictive Trade Practices Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

PART IV—PROVISIONS RELATING TO THE CONTROL AND DISPLAY OF PRICES

Preliminary

33. In this Part, unless the context otherwise requires—
"cost" means the cost determined in the manner prescribed by an order under section 37;

"invoice" includes a record of a cash sale;

"maximum price" means the maximum lawful price at which goods may be sold in wholesale or retail quantities or otherwise, as the case may be, in accordance with this Act, and includes any consideration for an option to purchase;

"maximum service charge" means the maximum lawful charge at which any service may be rendered in accordance with this Act;

"overcharge" means a sale of any goods at a price in excess of the maximum price or rendering a service at a charge in excess of the maximum service charge;

"percentage fixed goods" means goods or any quantities of goods in respect of which the maximum percentage of profit on cost is fixed under section 36;

"price-controlled goods" means percentage fixed goods and price-regulated goods;

"price-controlled service" means a service the maximum charge for which has been fixed by an order made under section 35;

"price-regulated goods" means goods the maximum price for which has been fixed by an order made under section 35;

"selling price" means the actual net price charged to the purchaser of the goods concerned, after all discounts and other allowances have been deducted;

"trader" includes—

(a) any person, other than a commission agent or clearing or forwarding agent, who is required to take out a licence under the Trade Licensing Act;

(b) any person who carries on the business of supplying goods, whether or not the person is required to take out a licence under the Trade Licensing Act; and

(c) any person carrying on business in the course of which he supplies goods for the purpose of or in performance of a contract by him for work, labour and materials;

"transporter" means any person who carries on the business of transporting goods on behalf of another person.

34. The Minister may, by notice in the Gazette, establish a costs and prices committee to advise him on all matters affecting, arising out of or relating to the prices of goods or services or to the control of the prices of goods or services and appoint members thereof.

Cap. 497.

Appointment of
costs and
prices
committee.

35. (1) The Minister may from time to time by order—

- (a) fix maximum prices for the sale, either wholesale or retail, which may include charges for packing and delivery, of any goods—
 - (i) by any person to another person; or
 - (ii) by their manufacturer to or through the agency of a trader in those goods; or
 - (iii) by a trader in those goods to another trader of such goods; or
 - (iv) by a trader in those goods to a person who is not a trader in such goods; or
 - (v) by a person who is not a trader in any particular goods to a trader in those goods;
- (b) fix the maximum service charge that may be made for any service in relation to any goods;
- (c) prohibit any person carrying on any business or gainful occupation specified in the order from increasing the price of any goods sold by him in the course of such business or occupation above the price which was ordinarily charged by him for like or similar goods, or the charge which was ordinarily made by him for any like or similar service, on a date or during a period specified in the order; and in any proceedings brought for failing to comply with an order made under this paragraph the burden of proving the price ordinarily charged or the charge ordinarily made on the date or during the period specified shall be upon the defendant;
- (d) prescribe the type of packing, weight, size, quality, marking and the processing and ingredients of any goods manufactured in Kenya;
- (e) prescribe the amount of the deposit which any person selling any price-controlled goods subject to the condition that any container of those goods is to be returned may require in respect of any such container, and prescribe the amount (which may exceed the amount of the deposit) which such person shall, on the return of the container, refund to the person by whom the container is returned and the conditions subject to which the refund shall become payable;
- (f) exclude anything from the operation of all or any of the provisions of this Act.

the maximum price or any maximum charge in respect of the sale of any goods or the rendering of any service by declaring in any manner whatsoever how the maximum price or charge shall be ascertained, and, without prejudice to the generality of the foregoing, may fix any such maximum price or charge either by declaring the maximum price or charge irrespective of the price or charge of such goods or services to the seller, or person rendering the same, or by declaring that any maximum price of goods shall be a price not exceeding the cost to the seller plus a stated sum or a stated percentage of such cost or a stated maximum profit.

(3) Under this section, the Minister may—

- (a) fix a maximum price or a maximum service charge for any area of Kenya which differs from the maximum price or maximum service charge fixed in respect of like or similar goods or services for another area or other areas;
- (b) fix a maximum price for goods which includes any charge made for any service, whether a price controlled service or not, rendered in relation to the sale of those goods;
- (c) fix a maximum service charge for any service which includes any price or charge for the sale of goods, whether price-controlled goods or not, sold in connection with that service.

(4) For the purposes of this section, the Minister's power shall be limited to the goods and services produced by monopoly undertakings.

(5) For the purposes of subsection (4), "monopoly undertaking" means a dominant undertaking or an undertaking which, together with not more than two other independent undertakings—

- (a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or
- (b) provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof:

Provided that for the purposes of this subsection, the goods produced by an undertaking which do not amount to more than five per cent of the market shall not be taken into account.

36. (5) The Minister may from time to time by order prescribe any goods of which the maximum price shall, except where the price is fixed under section 35, be the cost of such goods to the importer, manufacturer or producer, plus the percentage of profit set forth in the order, and plus, in addition as a separate item, such transport charges as are permitted by subsection (2).

(2) Every importer, commission agent, manufacturer or producer of percentage fixed goods shall, on first sale, endorse on the invoice the maximum retail price which may be charged for such goods sold at the place at which the importer or commission agent has taken delivery of the goods, or at which the goods have been manufactured or produced, and every trader when reselling those goods (except when selling retail to a consumer) shall endorse on his invoice the maximum retail price endorsed on the importer's or previous seller's invoice, adding thereto, as a separate item, the expense (if any) ordinarily incurred in transporting the goods from the importer's or previous seller's place of business to his own place of business.

(3) A trader who acquires for resale any percentage fixed goods by the transfer of such goods from one department or branch of his business to another, or from an associated business or from any business in which he has a financial interest other than that of a shareholder, or in which he has an interest in the management or control thereof, whether such department, branch, associated business or other business is in Kenya, or in any other country, shall, when selling those goods, endorse on his invoice the maximum retail price of the goods, which shall be the price which would be permissible had he himself imported the goods direct from the country of origin; and every trader when reselling those goods (except when selling retail to a consumer) shall endorse on his invoice the maximum retail price endorsed on the first or previous seller's invoice, adding thereto, as a separate item, the cost (if any) ordinarily incurred of transporting the goods from the first or previous seller's place of business to his own place of business.

(4) Any person who sells or transfers percentage fixed goods otherwise than in accordance with the provisions of this section, or who omits to do anything which he is required to do under this section, or who, purporting to give any information or to make any endorsement required by this section, gives any false information or makes any false endorsement, shall be guilty of an offence.

37. The Minister may from time to time by order declare the method by which the cost of any goods or of any service shall be determined, and may in such order declare different methods of determining the cost in respect of different classes of goods, transaction or sellers.

Minister's order

38. All orders made under section 35, 36 or 37 shall be laid before the National Assembly as soon as may be after they are made, and if a resolution is passed within the next twenty days on which the National Assembly sits next after any such order is laid before it that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything done thereunder, or to the making of any new order.

Orders to be laid before the National Assembly.

Auctions

39. (1) No price-controlled goods shall be sold by auction except under and in accordance with the conditions of a permit issued by the Commissioner and the Commissioner may grant such a permit to any auctioneer either generally in respect of any class of such goods or specifically in respect of any particular sale, and may in such permit impose such conditions relating to the maximum prices at which the goods may be sold as he may consider necessary in order to avoid the contravention of this Act.

Auction sales.

(2) Any person who sells any price-controlled goods by auction without a permit granted under this section or otherwise than in accordance with the conditions imposed in such permit shall be guilty of an offence.

Effective Date of Orders, Publicity, Invoices and Books of Account

40. Every order made under this Act shall come into operation on the day on which the same is made, unless another date is therein specified, and every such order shall be published in the Gazette as soon as circumstances permit after the making thereof.

Effective date and publication of orders

41. Copies of any order made under this Act or lists of maximum prices or maximum service charges fixed under this Act shall be displayed in such places in Kenya as the Commissioner may consider necessary to bring such matter to the notice of the public.

Publicity for orders and lists of maximum prices and charges

42. (1) The Commissioner may, by notice published in the Gazette, require any trader or other person, or any class of traders or other persons, supplying price-controlled goods

Traders, etc. required to display maximum prices

or rendering price-controlled services to display a list in English, or in any other language or languages specified in the notice, in a prominent manner and in a conspicuous position, so that it may easily be read by and is clearly legible to customers in those parts of his or their business premises where business is done, of the current maximum prices for such price-controlled goods as are mentioned in the order which he or they may supply, or the maximum service charge for any price-controlled service as are specified in the notice which he or they may render.

(2) A notice under this section may apply to Kenya as a whole or to any area or areas thereof, and may provide for the form in which any such list of maximum prices or maximum service charges which it requires to be displayed shall be arranged.

43. (1) Every trader, manufacturer, producer or commission agent—

(a) shall, at the time of sale, supply to every purchaser from him of goods in wholesale quantities an original invoice containing the following particulars—

- (i) the name and address of the seller;
- (ii) the name of the purchaser;
- (iii) the date of the sale;
- (iv) a description sufficiently exact to identify the goods;
- (v) the net quantity of the goods sold;
- (vi) the price or charges charged therefor, showing any authorized transport charge separately; and
- (vii) in the case of imported goods, other than price-regulated goods, the customs entry, number and date; and

(b) shall retain in his records a duplicate copy of the invoice.

(2) Every trader, manufacturer, producer or commission agent—

(a) shall, at the time of sale, supply to every purchaser from him of goods in retail quantities an original invoice containing the following particulars (unless the purchaser at the time of sale dispenses with this requirement)—

- (i) the name and address of the seller;
- (ii) the date of the sale;

(iii) a description sufficiently exact to identify the goods;

(iv) the net quantity of the goods sold; and

(v) the price or charges charged therefor; and

(b) shall retain in his records a duplicate copy of the invoice.

(3) Every transporter shall--

(a) as soon as practicable after completion of the transport of any price-controlled goods, supply to the person for whom the goods have been transported an original invoice containing the following particulars--

(i) the name and address of the transporter;

(ii) the date on which the transportation took place;

(iii) a description sufficiently exact to identify the goods transported;

(iv) a description sufficiently exact to identify the conveyance in which the goods were transported;

(v) the place from which and the place to which the goods were transported;

(vi) the quantity of the goods transported; and

(vii) the rate or rates charged therefor; and

(b) retain in his records a duplicate copy of the invoice.

(4) For the purposes of this section, the seller shall specify in writing the price or charge which he assigns to each class of price-controlled goods included in the transaction.

(5) Every person who renders to any person any price-controlled service for which a charge has been made or is to be made shall, as soon as possible after such service has been rendered, supply to such person an invoice describing the service and showing the charge which has been or is to be made for such service, including the selling price of any materials used in connection therewith, and shall keep a copy of every invoice in his records.

(6) Any person who fails to comply with the provisions of this section or with any conditions imposed under subsection (5) shall be guilty of an offence.

44. (1) Every trader, manufacturer, producer, commission agent, clearing and forwarding agent or other person supplying any price-controlled goods or rendering any price-controlled service shall keep such books of account or other records in respect of his dealings in price-controlled goods or price-controlled services, and shall make such entries therein, as may

Books of
account

be prescribed, and shall preserve such books of account or records after the date of the last entry therein for a period of two years, or such other period as the Commissioner may allow:

Provided that, if any retail trader, commission agent, clearing and forwarding agent or other person supplying any price-controlled goods or rendering any price-controlled service shows to the satisfaction of the Commissioner that the application of this section would impose undue hardship the Commissioner may exempt such retail trader, commission agent, clearing and forwarding agent or other person from complying with the provisions of this section subject to such conditions and for such time as he may consider necessary.

(2) Any person who fails to comply with the provisions of this section or with any conditions imposed thereunder shall be guilty of an offence.

Miscellaneous Provisions

45. (1) For the purposes of assisting him--

(a) to determine whether any goods or any service shall be made the subject of an order under this Act fixing the prices therefor; or

(b) to decide the manner in which the powers conferred on him by this Act shall be exercised in respect of any goods or any service,

the Minister may, from time to time, by notice published in the Gazette, or by notice in writing served on such person, require any trader, manufacturer, producer, transporter or any other person supplying any goods or rendering any service--

(i) to furnish to the Commissioner, either verbally or in writing, and in such form as the Minister may specify in such notice, any information in relation to his trade or business, either by way of periodical return or otherwise;

(ii) to produce for inspection by the Commissioner any books, accounts or other documents relating to his trade or business, and to submit to the Commissioner samples of any goods in which he deals.

(2) No person shall be required under subsection (1) to furnish any balance-sheet or profit and loss account, but this subsection shall not prevent the requiring of information by

reason only that it is or may be contained in or on a balance-sheet or profit and loss account.

(3) Any notice authorized to be served under subsection (1) on any person believed to be carrying on any trade or business therein mentioned shall be deemed to be duly served if it is addressed to him by the description of "the occupier" of the premises upon which the trade or business in question is believed to be carried on, and delivered to some person, not appearing to be merely a subordinate employee, on the premises.

(4) No information relating to any particular trade or business obtained under this section shall be published or otherwise disclosed without the previous consent in writing of the person by whom the information was furnished:

Provided that nothing in this section shall restrict the disclosure of information—

- (i) to any Minister responsible for, or any officer of, any Ministry or department of the Government;
- (ii) to any person or any authority having any functions in relation to the development or regulation of trade or business in Kenya; or
- (iii) to any person for the purpose of legal proceedings; or the use of such information in any manner which the Minister thinks necessary or expedient in connection with the purposes of this Act.

46. (1) The Commissioner or any person authorized in writing by the Commissioner, or any police officer of or above the rank of inspector, is empowered to do any one or more or all of the following things—

General powers
of the
Commissioner.

- (a) to enter any premises in the occupation or under the control of any trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or any other person supplying any goods or rendering any price-controlled service;
- (b) to inspect any such premises as are specified in paragraph (a);
- (c) to examine any books, accounts or other documents relating to the trade or business of any person specified in paragraph (a), and to require a copy of any such book, account or other document or of the record of any transaction which he has reasonable cause to believe relates to price-controlled goods

or price-controlled services to be provided and to be certified by such person; and where any such books, accounts or other documents or records are in a language other than the English language, and he is satisfied that any such person can provide or obtain a translation, and further to require that any such books, accounts or other documents to be deposited at his office for examination;

(d) to require, from time to time, by notice in writing served upon any person specified in paragraph (a), such person to furnish verbally or in writing, and in such form as may be required, such information in relation to his trade or business as may be specified in such notice.

(2) Upon entering any premises in pursuance of the powers conferred by paragraph (a) of subsection (1), the Commissioner or any other person so authorized to enter the premises, or any police officer of or above the rank of inspector, shall, before proceeding to exercise any of the powers conferred by subsection (1), inform the person present on such premises who is or who reasonably appears to be for the time being in charge of such premises of his intention to exercise his powers under subsection (1).

(3) When any books, accounts or other documents are deposited in pursuance of paragraph (c) of subsection (1), the person who has required the deposit of such books, accounts or other documents shall—

(a) furnish the owner thereof with a receipt therefor;

(b) be responsible to the owner thereof for the safe custody of the same; and

(c) return the same to the owner thereof as soon as his purpose therewith has been served.

(4) Nothing in subsection (3) shall be construed as requiring any person to return or be responsible for the safe custody of any books, accounts or other documents which have been handed to the police or which have been produced as exhibits in proceedings before any court.

(5) The Commissioner is empowered—

(a) to require, by notice published in the Gazette, in respect of any goods, that, when exposed or offered

for sale, they shall bear such mark or label as may be specified in such notice for the purpose of indicating their quality, grade, weight or other measure, price or place of origin;

- (b) to prohibit or regulate in like manner, the sale, purchase, disposal or movement by any person of any price-controlled goods in such manner as he may direct;
- (c) to require, by notice in writing served upon such person, any person who is in possession of any price-controlled goods to sell the goods to that person and in such manner and at such price or charge as he may specify in the notice;
- (d) to require, in like manner, any trader, manufacturer, producer or commission agent to submit to him samples of any price-controlled goods in which he deals;
- (e) to direct, in like manner, the place in which any price-controlled goods may be stored;
- (f) to demand, in like manner, from any person in apparent possession of any price-controlled goods, who alleges that such goods or any of them have already been sold by him, the immediate production of the invoice, contract or other documentary evidence of the sale.

(6) The Commissioner may—

- (a) by notice published in the Gazette or by a notice in writing served upon, or left at the place of business of, any trader, manufacturer, producer, commission agent, clearing and forwarding agent or transporter or any person who renders any service—
 - (i) require, in relation to any price-controlled goods or any price-controlled service, any such person as and from a date to be specified in such order to endorse on any sales invoice any information, directions or such other particulars as may be specified in such notice;
 - (ii) require, in relation to any price-controlled goods or any price-controlled service, that such information, directions or other particulars shall be declared in writing to an intending purchaser or other person before any sale or rendering of service;

(b) determine—

(i) what constitutes a wholesale or retail quantity;

(ii) what constitutes a wholesale or a retail transaction;

(c) with the approval of the Minister, prohibit or regulate the movement of any goods.

(7) The Commissioner shall acknowledge all correspondence pertaining to price changes within ninety days of the receipt of that correspondence.

(8) Whenever a person has overcharged in respect of any price-controlled goods which he has sold or in respect of any price-controlled service which he has rendered, the Commissioner may, irrespective of any action that may have been taken or that may be taken against the person under this Act, direct him to refund a sum equal to twice the overcharge; and that sum shall within a time specified by the Commissioner, be paid to him, and he shall refund to the purchaser the amount constituting the overcharge and such other sum as he may in his absolute discretion consider reasonable, and shall pay the balance, if any, into the Consolidated Fund.

(9) Where it appears that, in determining the selling price of price-controlled goods, the seller thereof has complied with this Act but that the price charged by any previous seller of those goods was in excess of the maximum price, the Commissioner may direct the previous seller to refund a sum equal to twice the amount by which the price paid by such purchaser exceeded the maximum price which he would have been required to pay for the goods, if the provisions of this Act had been observed by each of the persons who dealt in the goods up to the time of their acquisition by such purchaser; and that sum shall be paid to the Commissioner who shall refund to the ultimate purchaser the amount by which the price paid by the purchaser exceeded the maximum price which he would have been required to pay for the goods if the provisions of this Act had been observed by each of the persons who dealt in those goods up to the time of their acquisition by the purchaser, and such other sum (not exceeding the balance of the sum refunded by the seller) as he may consider reasonable, and shall pay the balance, if any, into the Consolidated Fund.

(10) For the purposes of this section, "trader" includes an auctioneer.

47. The Commissioner may, with the approval of the Minister, delegate in writing all or any of his powers, duties or functions under this Act, either generally, or in any area in Kenya, or for such periods or purposes as he may specify, to any Deputy Commissioner, Assistant Commissioner, Price Inspector or Assistant Price Inspector, or to any other person approved by the Minister, and may at any time revoke or vary such delegation.

48. (1) The Commissioner may, at any time and from time to time, and without assigning any reason therefor, cancel, revoke, amend or vary any permit, exemption or permission which he may have granted under this Act

(2) An appeal shall lie to the Minister against any decision of the Commissioner under this section; every appeal shall be in writing and shall be lodged with the Minister within seven days of the communication to the person concerned of the Commissioner's decision; and the decision of the Minister shall be final.

49. (1) The Commissioner or any public officer authorized by him may in writing certify—

- (a) the maximum price that has been fixed for any wholesale or retail sale of any price-regulated goods;
- (b) what constitutes a wholesale or retail sale, or what is a wholesale or retail quantity;
- (c) the precise amount of the overcharge invoiced in any transaction, subject to proof that such transaction has constituted an offence involving overcharge;
- (d) that any exemption or permission which may be given under this Act by the Commissioner has or has not been given;
- (e) the maximum percentage of profit allowed upon the sale of any percentage fixed goods;
- (f) in any proceedings concerning the price at which price-controlled goods were sold, if such price is not expressed in currency of Kenya, the equivalent selling price in currency of Kenya;
- (g) the maximum service charge that has been fixed for any price-controlled service

(2) In any proceedings instituted in any court under this Act, any fact so certified or purporting to be so certified by the Commissioner or any public officer authorized by him shall

be admitted without further proof as prima facie evidence of the fact so certified:

Provided that, in any proceedings in any court arising out of the provisions of this Act, the certificate of the Commissioner or any public officer authorized by him as to what constitutes a wholesale or a retail sale, or as to what constitutes a wholesale or retail quantity, in respect of the subject matter of such proceedings shall be final and conclusive.

50. If a magistrate is satisfied by information on oath that there is reasonable grounds for suspecting that an offence has been committed under this Act, and that evidence of the commission of the offence is to be found on any premises specified in the information, he may grant a search warrant authorizing any police officer to enter the premises at any time within one month from the date of the warrant, and to search the premises and seize any goods found on the premises which the person so authorized has reasonable ground for believing to be evidence of the commission of the offence.

51. (1) The Commissioner or any officer authorized by him or any police officer of or above the rank of inspector, if he has reasonable cause to believe that any offence under this Act is being committed on any premises, or if he has reasonable cause to believe that any goods, in respect of which there is reasonable ground for suspecting that any such offence has been committed, are in or upon any premises, and that the delay which would occur in obtaining a search warrant as provided under section 50 would defeat the purposes of this Act, may enter and search the premises without a search warrant for the purpose of ascertaining if an offence is being committed or whether or not the goods are in or upon such premises, and may inspect such goods and any documents relating to them, and may seize any goods or documents on such premises which the person so searching or inspecting has reasonable cause to believe to be evidence of the commission of such an offence.

(2) The Commissioner or any officer authorized by him may, in connection with the investigation of any alleged offence arising out of a test purchase involving payment with marked money, search any person for the marked money, or enter and search premises, or search any box or receptacle and the contents thereof, at the place at which such test purchase has been made, and may seize any marked money so found.

52. (1) If the Commissioner or any officer authorized by him or any police officer, has reason to believe that any vehicle contains any goods which are being transported in contravention of any of the provisions of this Act, he may order such vehicle to stop, and may examine the contents thereof, and if that person fails to stop he shall be guilty of an offence.

Power to search vehicles.

(2) Where any vehicle has been stopped under subsection (1), the person stopping the vehicle may take it with its contents to the nearest police station, and the officer in charge of the police station may thereupon seize any goods found therein, being goods which the officer has reasonable cause to believe are goods in respect of which an offence under this Act is or has been committed.

53. Where any goods have been seized under section 50, 51 or 52 the person who has seized the goods shall forthwith report to a magistrate the fact of the seizure, and if a magistrate is satisfied that the goods are of a perishable nature, or that, by reason of the fact that the market for goods is seasonal, or for other good reasons, to delay the disposal of the same would otherwise unduly prejudice the owner thereof, he may authorize the Commissioner to sell or otherwise dispose of the goods.

Procedure on seizure of goods.

54. (1) Where any vehicle, goods or money has been seized under section 50, 51 or 52 the vehicle, goods or money may be retained for a period not exceeding one month or, if within that period proceedings are commenced for any offence under this Act, until the final determination of those proceedings.

Retention and disposal of seized goods

(2) Where proceedings are taken for any offence under this Act, the court by or before which the alleged offender is tried may make such order as to the forfeiture of the vehicle or goods in respect of which such offence was committed, or as to the disposal of any vehicle, goods or money seized in connection therewith, as the court shall see fit.

(3) In this section, "goods" shall be construed as including the proceeds of the sale of any goods, where such goods have been sold in accordance with section 53.

55. (1) Any person who sells any price-controlled goods or renders any price-controlled service at a price or charge which exceeds the maximum price or the maximum service charge, as the case may be, shall be guilty of an offence

Offence to sell or purchase above maximum price

(2) Subject to section 62, any person who purchases or offers to purchase any price-controlled goods at a price or charge which exceeds the maximum price for the goods, or who pays or offers to pay for any price-controlled service a charge which exceeds the maximum service charge fixed therefor, shall be guilty of an offence

56. (1) Any person carrying on a business in the course of which any goods are supplied, and who has in his possession a stock of the goods, and who—

(a) falsely denies that he has the goods in his possession or ownership; or

(b) refuses or fails, except with the permission of the Commissioner, to supply the goods in reasonable quantities upon tender of immediate payment of the maximum price thereof (in the case of price-controlled goods) or the price indicated by any mark or label borne by the goods (in the case of any other goods); or

(c) refuses or fails to expose or offer for sale such goods continuously when required by the Commissioner, shall be guilty of an offence:

Provided that it shall be a good defence for a person charged with an offence under paragraph (b) to prove that the supply of the goods would involve a breach of an obligation lawfully binding on him.

(2) The servant or agent of any person carrying on a business in the course of which any price-controlled goods are supplied shall be deemed to have in his possession a stock of such goods if any such goods are being kept or stored in the premises where he is employed and if he sells such goods on behalf of his employer in the ordinary course of his employment.

57. Any trader, manufacturer, producer or commission agent to whom an offer to buy price-controlled goods has been made, and who, except with the permission of the Commissioner, imposes any condition of sale other than a condition requiring immediate payment on delivery thereof or prescribing the terms within which payment must be made or delivery taken, or a condition requiring a deposit in respect of any container of such goods, shall be guilty of an offence.

58. Any person who—

(a) obstructs or hinders any person authorized by this Act to enter and inspect or search any premises or to stop

and search any vehicle or to examine any books, accounts or other documents or to seize any vehicle, goods or money; or

(b) refuses or delays or fails to produce any books, accounts or other documents or certified copies or translations thereof relating to his trade or business which he may be required under this Act to produce; or

(c) refuses or delays or fails to furnish any information or, in purported compliance with any requirement of this Act, knowingly or without reasonable grounds for believing the same to be true furnishes information which is false or misleading in any material particular, whether upon demand being made by a person authorized by this Act to demand the same or otherwise; or

(d) publishes or otherwise discloses any information in contravention of any provision of this Act; or

(e) refuses or delays or fails to comply with any order, prohibition, direction, demand, requirement or notice lawfully made, given, issued, served or published under this Act,

shall be guilty of an offence.

59. (1) Any person who is guilty of an offence under this Part shall be liable to imprisonment for a term not exceeding five years, with or without corporal punishment, or to a fine or to both.

Penalties.

(2) Where the offence in respect of which a person is convicted is an offence under section 55 (1), that person shall, in addition to any other penalty which may be imposed, be liable to a fine of not less than five times the value of the overcharge, and in such a case the court may order that there shall be paid therefrom to the purchaser such sum as may in the opinion of the court serve to compensate him for any loss of time or any expenses which he may have incurred.

(3) Where any trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or person rendering any services has been found guilty of any offence under this Act, the court may, in addition to any other penalty to which the convicted person may be liable, make such order, having effect during such period, as the court thinks fit, for preventing the offender from carrying on,

or being concerned directly or indirectly in the carrying on of, the business in the course of which the transaction constituting the offence was effected, or any branch of that business, or in any business or branch of a business of a similar character.

(4) Where a person charged with any offence under this Act is a body corporate, every person who, at the time of the commission of the offence, was a director, manager or officer of the body corporate may be charged jointly in the same proceedings with such body corporate, and, where the body corporate is convicted of the offence, every such director, manager or officer shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

(5) Any partner in any firm shall be answerable for the acts or omissions of any other partner in the same firm in so far as they concern the firm; and, if any partner commits any act or makes any omission which is an offence under this Act, every partner in the firm shall be jointly and severally liable to the penalties provided by this Act.

(6) Any employer who employs in his shop, store or other place of business any agent, clerk, servant or other person shall be answerable for the acts or omissions of such agent, clerk, servant or other person in so far as they concern the business of such employer; and if such agent, clerk, servant or other person commits any act or makes any omission which is an offence under this Act, or which would be an offence if made or committed by such employer, such employer and his agent, clerk, servant or other person shall be jointly and severally liable to the penalties provided under this Act.

(7) Notwithstanding the provisions of the Magistrates' Courts Act or of the Criminal Procedure Code relating to the jurisdiction of subordinate courts, any subordinate court of the first class may impose any penalty or any combination of penalties prescribed under this Part.

60. (1) In any proceedings in any court instituted for an offence under this Part, the production by the Commissioner, and Deputy Commissioner, any Assistant Commissioner, Chief Price Inspector, any Senior Price Inspector, any Assistant Price Inspector or any person authorized by any such persons in writing, or by any police officer, or by a public prosecutor within the meaning of section 85 of the Criminal Procedure

Code, of an original invoice, a duplicate invoice or a triplicate invoice purporting to have been found in the possession of the seller or a copy of such invoice certified by the Commissioner or by the seller shall, save where the prosecution alleges the falsity of the contents of such invoice, be prima facie evidence of a sale by the seller and of all the facts contained in such invoice, duplicate invoice or triplicate invoice or certified copy; and for the purposes of this subsection, "sale" includes the rendering of services.

(2) Where, in any proceedings instituted in any court for an offence under this Part, any goods are described in the charge, information or indictment, the description shall be prima facie evidence of the fact that the goods are, or were, at the time of the alleged offence, as so described, and the burden of proving the contrary shall lie upon the defendant.

(3) In any proceedings instituted for an offence under section 36, the burden of proving that any information or any endorsement is not false shall lie upon the defendant.

61. In any proceedings against any person for an offence under section 55, it shall be no defence--

What is not a defence.

(a) that the defendant has purchased such goods at a price which exceeds the maximum price thereof under this Part; or

(b) that any invoice or other document showing the price at which the goods were sold was endorsed to the effect that no responsibility could be accepted in respect of any error or omission in the invoice or document, or was endorsed with the letters "E. and O.E." or any other symbols or letters of a like nature indicating that the statements in such invoice or documents were subject to correction.

62. (1) No proceedings shall be instituted under this Part against any person, being a person duly authorized by the Commissioner, who has knowingly purchased any price-controlled goods at a price in excess of the maximum price, or who has paid a charge for any price-controlled service in excess of the maximum service charge, with the intention of procuring evidence for the purpose of prosecuting the seller or person rendering the price-controlled service for an offence under this Part.

Protection against liability in certain cases

(2) No proceedings shall be instituted against any person who knowingly purchases any price-controlled goods at a price in excess of the maximum price, or who knowingly

pays a charge for any price-controlled service in excess of the maximum service charge, for an offence under this Part in respect of such purchase, if that person notifies the Commissioner of such transaction within seven days from the date of the transaction, or within such longer period as the Commissioner may, in his discretion, allow.

63. (1) The Minister may make regulations for the better carrying out of the intent and purposes of this Part.

PART V—ESTABLISHMENT OF THE RESTRICTIVE TRADE PRACTICES TRIBUNAL

64. (1) There shall be established a Restrictive Trade Practices Tribunal (hereinafter referred to as "the Tribunal") to exercise the functions conferred upon it by this Act.

(2) The Tribunal shall consist of a chairman who shall be an advocate of not less than seven years standing and not less than two and not more than four other members appointed by the Minister.

(3) A member of the Tribunal shall hold office for the period, not exceeding five years, specified in the instrument of his appointment unless, prior to the expiration of that period—

- (a) he resigns his office by written notification under his hand addressed to the Minister; or
- (b) the Minister, being satisfied that the member is unfit by reason of mental or physical infirmity to perform the duties of his office, or that the member has failed to attend at least three consecutive meetings of the Tribunal, revokes his appointment.

(4) The quorum for a meeting of the Tribunal shall be the chairman and two other members.

(5) The members of the Tribunal shall be entitled to receive such subsistence and travelling allowances as the Minister may determine.

(6) The Minister may make rules—

- (a) prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of an appeal;
- (b) prescribing the procedure to be adopted by the Tribunal in hearing an appeal and the records to be kept by the Tribunal;

(c) prescribing the manner in which the Tribunal shall be convened and places where and the time at which the sittings shall be held;

(d) generally for the better carrying out of the provisions of this Act relating to the Tribunal and appeals there-to.

65. In an appeal under this Act—

Procedure on appeals to the Tribunal.

(a) the appellant shall appear before the Tribunal either in person or by an advocate on the day and at the time fixed for the hearing of the appeal but if it is proved to the satisfaction of the Tribunal that, owing to absence of the appellant from Kenya, sickness, or other reasonable cause, he is prevented from attending at the hearing of the appeal on the day and at the time fixed for that purpose, the Tribunal may postpone the hearing of the appeal for such reasonable time as it thinks necessary; and

(b) the costs of the appeal shall be at the discretion of the Tribunal.

66. The following persons may exercise the right of appeal to the Tribunal conferred under this Act—

Persons entitled to appeal to the Tribunal.

(a) any person who, by an order made under section 18—

(i) is directed to discontinue or not to repeat any trade practice; or

(ii) is permitted to continue or repeat a trade practice subject to conditions prescribed by the order; or

(iii) is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices; or

(b) where any order referred to in paragraph (a) is directed to a class of persons, any person belonging to or representing that class; or

(c) any person who by an order made under section 31—

(i) is enjoined from proceeding with a proposed merger or takeover; or

(ii) is authorized to proceed with a proposed merger or takeover subject to conditions prescribed by the order.

67. (1) The Tribunal may in any case, if it considers it in the interest of the parties or of any of them and is not contrary to the interest of other persons concerned or the public interest, order that the hearing or any part of it shall be held *in camera*.

(2) The Tribunal may make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings in any appeal before it (whether heard in public or in private); but no such order shall be made prohibiting the publication of the names and descriptions of the parties to the appeal, or of any decision of the Tribunal.

(3) In its determination of any appeal, the Tribunal may confirm, modify, or reverse the order appealed against, or any part of that order.

68. (1) Notwithstanding anything contained in section 67, the Tribunal may in any case, instead of determining any appeal under that section, direct the Minister to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(2) In giving any direction under this section, the Tribunal shall—

- (a) advise the Minister of its reasons for so doing; and
- (b) give to the Minister such directions as it thinks just concerning the rehearing or reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(3) In reconsidering the matter so referred back, the Minister shall have regard to the Tribunal's reasons for giving a direction under subsection (1) and to the Tribunal's directions under subsection (2).

69. (1) Where an appeal is brought under section 20 against any order of the Minister under section 18 the order to which the appeal relates shall, unless the Tribunal otherwise orders, be held in abeyance pending the determination of the appeal.

(2) Where an appeal is brought under section 32 against any order of the Minister under section 31 the merger or takeover to which the appeal relates may not be consummated pending the determination of the appeal.

PART VI—MISCELLANEOUS PROVISIONS

Submissions of records required by the Commissioner.

70. (1) Every person who, whether as principal or agent, and whether by himself or his agent, being in possession of business records required by the Commissioner or his authorized agent pursuant to section 14 or 29—

- (a) denies the existence of such records; or
- (b) refuses access to such records by the Commissioner or his authorized agent; or
- (c) refuses to supply copies of those records designated by the Commissioner or his authorized agent, or alternatively refuses to deposit such records with the Commissioner or his authorized agents; or
- (d) supplies false or misleading information to the Commissioner or his authorized agent,

shall be guilty of an offence.

(2) When any business records are deposited in pursuance of paragraph (c) of subsection (1) the person who has required the deposit of such records shall—

- (a) furnish the owner thereof with a receipt therefor;
- (b) be responsible to the owner thereof for the safe custody of the same; and
- (c) return the same to the owner thereof as soon as his purpose therewith has been served:

Provided that paragraph (c) shall not be construed as derogating from the provisions of any other law for the time being in force which authorizes the retention by a police officer of such records.

(3) Nothing in subsection (2) shall be construed as requiring any person to return or be responsible for the safe custody of any books, accounts or other documents which have been handed to the police or which have been produced as exhibits in proceedings before any court.

(4) A person who, whether as principal or agent, and whether by himself or his agent, publishes or discloses records obtained pursuant to section 14 or 29 without the previous consent in writing of the person by whom the records were furnished shall be guilty of an offence.

(5) Any person who is guilty of an offence under this section shall be liable to imprisonment for a term not exceeding one year or to a fine or to both.