

**A JUXTAPOSITION OF KENYA' S
ANTITRUST POSITION WITH AMERICAN
AND EUROPEAN
POSITIONS**

BY

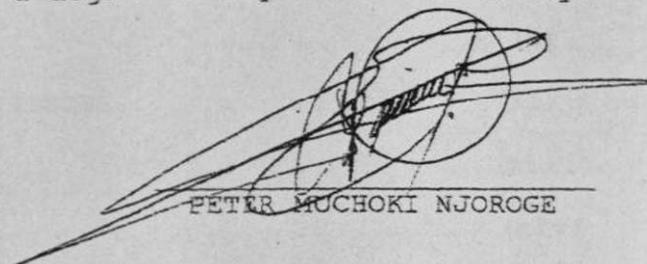
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A THESIS SUBMITTED IN PART FULFILMENT OF THE
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1998

DSCUVKATION

I, PSTZR M. NJORCGE, do hereby declare that this thesis _s my or-iginal work and has not been submitted and is roc currently being submitted for a degree in any other University.

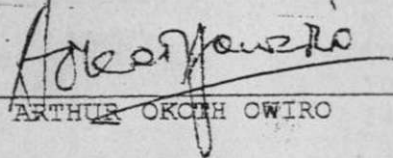


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TABLE OF CONTENTS

DECLARATION	(ii)
TABLE OF CONTENTS. . .	(iii)
ABSTRACT	(vi)
ACKNOWLEDGMENT. . . .	(x)
TABLE OF ABBREVIATIONS	(xi)
LIST OF TABLES. . . .	(xiii)
LIST OF FIGURES..	(xiv)
TABLE OF CASES. . . .	(xv)
TABLE OF STATUTES AND TREATIES..	(xx)

CHAPTER i

INTRODUCTION

1.1.0 Statement of the Problem	1
1.2. The Importance and Objectives of the Study	1
1.3 Research Methodology. . .	4
1.4 Literature Review and Hypotheses	5
1.5 Chapter Breakdown	9
1.6 Limitations of the Study	10
1.7 Introduction to Antitrust ..	10
1.7.1 Perfect Competition	14
1.7.2 Monopoly.. ..	5
1.7.3 Monopolistic Competition.. ..	16
1.7.4 Oligopoly..	17
1.7.5 Duopoly	18
1.8 The Historical Foundation of Antitrust.	20
1.8.1 The Sherman Act	25
1.8.2 GATT and Other Perspectives	30
1.8.2.1 The Theory of Comparative Advantage	31
1.9. Enforcement of Competition and Fairness in International Trade.. ..	55
1.10 International Perspectives..	68
1.11 Chapter Summary.	70
1.12 Programme of Work..	70

CHAPTER 2

THE ANTITRUST POSITION'S OF THE USA, THE EU AND KENYA

2.1. <u>CANTITRUST POLICY IN THE USA.</u> •	71
2.1.1 Introduction	71
2.1.2 Procedures..	78
2.1.3 Remedies	81
2.1.4 Demonstration of Antitrust ¹ •' Violations	82
2.1.5 Market Power	83
2.1.6 Intent	38
2.1.7 Extra-territorial Relations..	95
2.2.0 <u>THE EUROPEAN UNION' ANTITRUST POSITION</u>	97
2.2.1 Introduction	97
2.2.2 European Union Policy Towards Restrictive Trade Practices - Article 85 of the EC Treaty.. .	98
2.3 European Union Antitrust Policy Towards Mergers And Abuse of Dominant Position - Article S2 (old 86) of EC Treaty	123 —
2.3.1 Introduction..	123
2.3.2 Fundamental Principles addressed by Article 86..	123
2.3.3 Extraterritorial Relations ..	143
2.4. <u>THE KENYAN ANTITRUST POSITION</u>	149
2.4.1 The Historical Foundation of the Kenyan Antitrust Position....	149
2.4.2 Kenya's Antitrust Law..	158
2.4.3 Enforcement Institutions	160
2.4.3.1 Legislature	160
2.4.3.2 Office of the Minister	161
2.4.3.3 Commissioner of Monopoli	162
2.4.3.4 Tribunal	163
2.4.3.5 The High Court	164
2.4.4 Legal Provisions	164
2.4.5 Procedures.. ..	172
2.4.6 Intention..	176
2.4.7 Market Power..	177 .
2.4.8 Remedies ..	179
2 - 4.9 Practical Operation of Kenya Antitrust Department..	184 —
2.4.1C Selected Cases	191-
2.4.H Extraterritorial Relations	220

2.5	Chapter Summary.	225
-----	------------------	-----

CHAPTER 3

A JUXTAPOSITION OF KENYA'S ANTITRUST POSITION WITH AMERICAN AND EUROPEAN POSITIONS

3.1	Introduction.. .. .	226
3.2	A Juxtaposition of the- Kenyan Position with one USA Position	229
3.3-	A Juxtaposition of the Kenyan Position with the European Union Position.... ..	265
3.4	Chapter Summary.. .. .	274

CHAPTER 4

SUMMARY, OBSERVATIONS AND RECOMMENDATIONS

4.1	Summary.. .. .	276
4.2	- Observations.. .. .	281
4.3	Recommendations.. .. .	289
4.4	Chapter Summary and Suggestions for Further Study.	298

FOOTNOTES..	301
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SELECT BIBLIOGRAPHY.	315
------------------------------	-----

ABSTRACT

This work is a comparative study of the competition law regimes of Kenya, The USA, and the European Union. In chapter i, the study discusses the need for antitrust measures. The historical foundation of antitrust is also addressed. It is seen that antitrust in its present form was introduced in the USA by the Sherman Act, 1890. The Sherman Act experiment was seminal in the area of antitrust and interesting hybrids have since sprouted around the world. In all cases, the aim is clear in concept: to bring about the optimal degree of competition in the world. The American system is the substructure upon which the European and Kenyan antitrust positions are superstructured.

In Chapter 1, the economics behind the need for competition is looked at in fair detail. The theory of comparative trade is examined and it is shown that competition at the international level is important to world trade and can impact upon national trade. It is further shown that what matters is comparative advantage and not absolute advantage. Any attempt to suppress trade which is predicated upon the theory of comparative advantage inexorably leads to pernicious results. The example of the Great Depression is given to illustrate this point.

It is demonstrated that the Great Depression was precipitated by the intransigence of the American Congress and President Hoover who sought to overprotect American manufacturers, farmers and businessmen from foreign competition. The rest of the world retaliated and as a result world trade fell and the deleterious effects of this fall led to the Great Depression.

It is shown that there were feelings, postulated mostly by **American** leaders, that the cause of the second world war may have been partly fuelled by the failure of the international trading system. This realization, coupled with the experience that the USA had undergone during the Great Depression, spurred the USA to spearhead

ABSTRACT

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the establishment of an international organization to promote competition in international trade. Although the proposed International Trade Organization was not given ratification by the USA senate, which action led to its demise, 23 states, America included, acceded to the General Agreement on Tariffs and Trade (GATT) in 1947. The GATT established international machinery to promote competition. The USA, the European Union and Kenya are all participants in GATT rounds and fully participated in the most recent Uruguay Round whose Final Act was signed in Marrakesh, Morocco, in April, 1994. All existing GATT members including the USA, the European Union and Kenya, acceded to the World Trade Organization (WTO) which succeeded GATT in January, 1995.

Chapter 1 also examines international perspectives that impact upon international trade. These include diverse laws regulating competitive behaviour, product liability laws, bankruptcy Laws, international court judgments-and global trends in politics and trade. To the extent that these perspectives can affect international trade, they are important both to international and national competition. This, once again, is borne out by the effect of the Great Depression to international trade and national economies.

Chapter 2 examines in detail the antitrust positions of the USA, EU and Kenya. By and large, it is seen that the USA and the EU antitrust regimes have similar jurisprudential foundations towards restrictive trade practices, monopolization and mergers and takeovers. The USA and the EU systems are however more robust than the Kenyan system, no doubt, due to their long existence.

Chapter 3 comprises a juxtaposition of the American and EU antitrust laws with the Kenyan law. In the area of monopolization it is seen that the USA and the EU regimes make extensive use of the market share which is arrived at after the definition of the relevant market. In USA and the EU this area has been riddled with controversy and a lot of litigation has taken place. In the case of Kenya, the law

Monopolies and Prices Department of the Treasury in Kenya should transformed into a fully-fiedged autonomous antitrust agency.

[560 words.]

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TABLE OF ABBREVIATIONS

Aluminium Company of
America.

Carbonated Soft Drinks.

Common Market Law Reports.

Circuit.

"Director -General of Fair
Trading.

East African Community.

Court of Appeal for Eastern
African Law Reports

European Community.

European Court of Justice.

European Community Reports.

European Currency Unit

European Free Trade Area.

Electric Storage Battery
Company.

European Union.

Foreign Corrupt Practices
Act.

Federal Trade Commission.

General Electric.

General Agreement on
Tariffs and Trade.

International Business
Machines.

International Monetary
Fund.

International Nickel
Company of Canada.

International Trade
Organization.

Kenya Law Reports.

Most Favoured Nation.

Ministry for Trade and
Industry (Japan).

Monopolies and Prices
Commission.

Restrictive Trade Practice
Tribunal.

Securities Exchange
Commission.

Trade Related Aspects of
Intellectual Property.

United Nations Conference
on Trade and Development.

United States of America.

United Shoe Machinery
Corporation.

United States Steel
Corporation.

Voluntary Restraint.
Agreements.

World Trade Organization.

LIST OF TABLES

Cases Considered by the
Monopolies and Prices
Commission (1989-2003). 135

Refreshment Market
Percentage/per
Segment per cent 231

LIST OF FIGURES

Figure 2.1 - *	Phases of Antitrust interpretation(USA).. ..	••
figure 2.2 -	Determination, of Market Power (USA) . . .	88
figure 2.3 -	The Steps of Antitrust Enforcement (USA).	"
Figure 2.4 - Figure	Enforcement - European Union Law (Articles 81 and 82 EC Treaty - eld 85 & 56).	^
Figure 2.5 - 5	Enforcement - Restrictive Trade Practices (Kenya).	102
Figure 2.5a - ^	Enforcement - Monopolies/Dominant Positions (Kenya)	
Figure 2.7 - *	Enforcement - Mergers/Takeovers (Kenya)	^

TABLE OF CASES

Addyston Pipe and Steel -vs- US, 175, US 211.

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23. The US Constitution.
24. The Foreign Corrupt Practices Act (1977).
25. The Indian Contract Act.

EU Area

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26. The Competition Act (1980) - UK.

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Subsidiary Legislation (EU)

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29. Council Regulation 19/65.

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Treaties

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34. The General Agreement on Tariffs and Trade (GATT) .

35. The Uruguay Rounds Final Act (WTO).

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37. Lome I, II, III and IV.

The US-Canada Trade Agreement.

CHAPTER 1

INTRODUCTION

1.1 STATEMENT OF THE PROBLEM

Kenya enacted its antitrust law in 1988 through the Restrictive Trade Practices, Monopolies and Price Control Act. The law was operationalised on 1st February, 1989. The United States of America operationalised its law in 1890, a hundred years before Kenya, through the Sherman Act. The European Union introduced its antitrust law in 1957.. thirty one years before the enactment of Kenya's law. through the Treaty of Rome.

This study seeks to compare how antitrust law has regulated competition in the three regimes over the different periods they have had antitrust laws. Strengths and weaknesses will be compared. With regard to Kenya, the study will see whether it can gain from the experiences of the two older regimes. Necessary recommendations will be made.

1.2 THE IMPORTANCE AND OBJECTIVES OF THE STUDY

This study is deemed important for the following reasons:-

- (1) Although Canada enacted its first antitrust law in 1899, Modern antitrust measures were activated in the USA by the Sherman Act 1890 and quickly sprouted around the world. The UK was one of the countries that adopted the

Sherman principles of antitrust. Before the USA became a world leader in international trade, the UK was already the centre of world commerce. The two countries have for historical and practical reasons contributed to the setting of world commercial standards and practices. A study of the antitrust positions of the two countries is therefore rendered necessary. As the UK antitrust position has been subsumed by the EU common competition position, we are constrained to examine the EU position.

- (2) When the UK established its authority in Kenya, the antitrust position obtaining in England became the new Kenyan position. Section 3 of the Judicature Act which sets out sources of the law of Kenya decreed that the substance of common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897 constitute a source of law in Kenya. Hence the need to study the antitrust position that Kenya adopted at the beginning. In theory, at least, antitrust court decisions in cases such as Darev v. Allein¹ formed part of the law of Kenya. The position on the ground was however different. For example, the control of the Business of Life Assurance with Africans Ordinance, 1945² made it almost impossible for an African to delve into the insurance business. The act effectively thwarted African competition in this important business area. It becomes necessary to find out the reason for the promulgation of laws that derogated from the adopted antitrust position.

- (3) As said earlier, the UK antitrust position has been subsumed by the European Union position through its membership of the EU. Members of the European

Union have a common antitrust position and this fact makes them a formidable force in world politics and commerce. We should, therefore, strive to understand their position.

- (4) The EU has fifteen members at present and the number is poised to increase as there are pending applications from Turkey, Cyprus, Malta and the former Eastern European Countries. The EU members have a strong voice in the two Bretton Woods institutions (the IMF and the World Bank). The two institutions have inexorably impacted the speed with which developing countries such as Kenya have been required to liberalise and adopt antitrust measures. A study of their position and that of the USA, which occupies an unassailable position in the world of politics and commerce today due to the obtaining unipolar state the world finds itself in, is therefore important.
- (5) The Kenya antitrust law as enunciated by die Restrictive Trade Practices, Monopolies and Price Control Act, has borrowed heavily from the principles enshrined in USA and EU antitrust positions. It is therefore important for the rookie to learn from the denizens.
- (6) The Western Economies have enormous influence in World Trade bodies such as GATT (from January 1995 the WTO) and UNCTAD. These are bodies which are concerned with competition and trade in the world. In order to gain fully from the benefits made possible by these organisations, it is important to under-stand the approaches to competition matters of the regions which influence these organisations most (USA and EU).

- i⁷) Kenya has announced that it seeks to liberalize fast and be a newly industrialized nation by the second decade of the twenty first century. A freed market which is fully competitive is deemed to be key to the achievement of this goal. A study of the competitive practices of the leading free market regions (USA and EU) can, therefore, not be avoided.
- (8) Kenya only embraced antitrust in the USA and EU sense in 1988 when the Restrictive Trade Practices, Monopolies and Price Control Act was promulgated. It was operationalised on P¹ February 1989. This is a very short experience. Hence the need to look at seminal positions and juxtapose them with the nascent Kenyan position.

1.3 RESEARCH METHODOLOGY

This study will be comparative. It will examine the antitrust positions of Kenya, the USA and the European Union. There is a lot of material on USA and the EU. There is, however, a yawning dearth of books examining the Kenyan position. The statutes forming the basis of the antitrust positions being compared will be examined. In the case of Kenya, assistance regarding local practices will be sought from the antitrust department. Efforts will be made to access court cases (if there have been any) dealing with antitrust.

At the end of the comparison, differences, strengths, weaknesses etc. will be highlighted and necessary recommendations will be made. By and large, there will be no reliance on empirical methods of research.

1.4 LITERATURE REVIEW AND HYPOTHESES

The antitrust area is a practical one dealing with the actual application of the law by the agencies and in courts. The writing of the project will in itself involve an extensive examination of the relevant literature. The writer wishes to point out that there is ample literature regarding the antitrust positions of USA and of the European Union (EU). In the USA and the EU, a lot of the literature has also been developed by the courts. The same cannot be said to be the position with regard to Kenya as the writer has been unable to get hold of any books dealing with the legal aspects of this subject. Furthermore the Restrictive Trade Practices Tribunal has hardly been operational. As a result no appeals have reached the High Court. This has inimically denied the Kenya Courts a role in the development of antitrust jurisprudence. The writer will, however, make an extensive use of the Restrictive Trade Practices, Monopolies and Price Control Act [Chapter 504 of the Laws of Kenya] which constitutes Kenya's antitrust position. The Annual Reports of Kenya's antitrust agency will also be made use of.

The writer will review two books dealing with the American position and two books dealing with the EU position. W. Boyes and M. Melvin in their work, *Economics*³, give a thorough background towards what led to the promulgation of the Sherman Act in America in 1890. They demonstrate how over the years the antitrust law has been practically applied. They conclude that, to a large extent, antitrust law

has been effectively enforced in America. They show that after the enactment of the Sherman Act in 1890 up to around 1914 a rule of reason method which, by and large, embraced lax enforcement was employed in antitrust enforcement. They also opine that from around 1914 to the eighties a *per se* rule and tight enforcement method was used. They conclude that in the eighties, the original rule of reason method, coupled with lax enforcement, crept back and continues to be applied.

W.G. Shepherd and C. Wilcox in their work. *Public Policies Toward Business*⁴, treat antitrust in America as a public policy aimed at enhancing efficiency in the market place through regulated competition in which the aim is to protect the process of competition rather than the competitors. According to them, the business community is like a continent full of warlike tribes spawning strife among firms and among industries. Hence the need for antitrust laws to bring about a semblance of peace. These two authors have ably demonstrated how this is done through practical treatment of the generic antitrust areas of Control of Mergers and Takeovers, Control of Restrictive Trade Practices and Control of Abuse of Dominance.

P.J.P. Verioop, in his book, *Merger Control in the European Union* . traces the legal authority to control mergers within the European Common Market to the Treaty of Rome, 1957. His authority is derived from Article 86 (formerly Article 82) which prevents abuse of dominant positions by undertakings within the European Common Market or a substantial part of it. The book shows how, over the years, the European Commission has extended the Article 86 mandate, to embrace the Control

of Mergers and Takeovers within the European Common Market. The author decries the European Commission as being effective in its enforcement of antitrust law.

R.M. Maclean in his work. *European Law and Hitman Rights*⁶, demonstrates how the European Commission handles the three main generic areas of competition law, viz: Restrictive Trade Practices, Abuse of Dominance and Mergers and Takeovers. He shows how the Article 85 (formerly Article 81) mandate has been applied to promote competition within the European Union. He also ably demonstrates how the Article 86 mandate has been furthered and been employed to control abuse of dominance by undertakings. He also explains how this mandate has been extended to the area of Control of Mergers and Takeovers.

By and large both the United States and the EU, have similar jurisprudential approaches to antitrust issues. The main generic areas of competition law are embraced by the two regimes. These areas, as seen above, are: Restrictive Trade Practices, Abuse of Dominance and Mergers and Takeovers. The Kenyan law also embraces these three main areas.

With regard to local literature, and as stated earlier on, the writer has been unable to trace any books dealing with competition law and/or policy in Kenya. Yash Vyas has, however, written various articles dealing with the conflict of the two "freedoms" of contract and of trade. This he has done through examining the doctrine of restraint of trade which in contractual relations can, depending on how it is handled, promote or stifle competition. In his paper published in July, 1990 he has pointed out that the doctrine of

restraint of trade is a difficult and confused area of law . He has abiv demonstraied how the doctrine is handled by the courts. In Kenya the contracts in Restraint of Trade Act, 1932, Codifies the doctrine. Before 1932, section 27 of the Indian Contract Act was applicable. In another article Vyas ably sets out the manner in which the doctrine is interpreted in cases involving different categories of contracts and shows how the existence of unequal bargaining power, as in employer/employee covenants, influences the rigour with which this is done*.

Before the promulgation of the Restrictive Trade Practices, Monopolies and Price Control Act, competition issues relating to contracts were solely addressed through the Contracts in Restraint of Trade Act. In a rather obiusicatory manner, the act allows agreements or contracts containing provisions restraining parties from exercising any lawful professions, trades, businesses or occupations to be valid, subject to the power of the High court to void them. In a paper written for the University of Nairobi Law Journal Vyas has. in detail, demonstrated that the doctrine of contracts in restraint of trade is still relevant especially in two situations' These are with respect to covenants between employer and employee and between the vendor and purchaser of business, both of which have obvious implications for competitive markets. Vyas has also opined that the doctrine, in the restrictive trade practices area, can play a role, though a residual one, in view of the fact that it has shed some of the features that formerly inhibited its usefulness. He has also forcefully argued that the doctrine may, in apposite circumstances, fill in the gaps left by the Restrictive Trade Practices, Monopolies and Price Control Act. Vyas is also unequivocal that the doctrine is applicable to vertical commercial arrangements since such arrangements are generally made by means of formal contracts. Hence the relevance of the doctrine to any serious considerations of antitrust issues. Unfortunately, the Kenyan courts have not been proactive in developing adequate jurisprudence in this area.

As already stated when we dealt with methodology, this will be a comparative study of the antitrust positions of Kenya, USA and the European Union. The study wil] be based on the following hypotheses:

[1] The writer assumes that the USA antitrust laws with their advantage of long existence are better tested and more effective in the promotion of competition than those of Kenya.

[2] The same assumption is made with regard to the European Union.

[3] Kenya's nascent antitrust position will gain from a study of the USA and European Union positions. *t*

The above hypotheses will be proved or disproved by the study. Differences, strengths and weaknesses will be highlighted. Necessary recommendations will be made.

1.5 CHAPTER BREAKDOWN

The Chapters of this study will be broken down as follows:

a) Chapter 1 This Chapter looks at the rationale for antitrust law and policy in fair detail.

bj Chapter 2 - This Chapter examines in detail the antitrust positions of the USA, the EU and Kenya.

c) Chapter 3 - This Chapter comprises a juxtaposition of the USA and the EU antitrust laws with the Kenyan law.

d) Chapter 4 - This Chapter contains a summary, observations and recommendations.

1.6 LIMITATIONS OF THE STUDY

As far as the writer has found out, there are no books dealing with Kenya's antitrust law. This will make this study quite difficult. As will be seen in Chapter 2, judicial activism has contributed a lot to the EU and USA antitrust positions. To the extent that the same can not be said with regard to Kenya, our study will have some limitations.

1.7 INTRODUCTION TO ANTITRUST

Antitrust is the universally accepted generic name for laws, agencies and actions to promote competition. Over the years, it has been stressed by economists, businessmen and others that in a free market economy, the forces of supply and demand determine the optimality of prices. Where supply and demand considerations

are not allowed to rule untrammelled we end up with imperfect competition and in extreme cases with positions of monopoly.

Competition has always been recognized as one of the pillars upon which business in a capitalist economy is predicated. A capitalist economic system has always espoused the laissez faire doctrine which favours non-intervention by government in a national economy. This notion spawns laissez faire capitalism in which government allows business to operate relatively free of regulation.

The operation of business relatively free of regulation does not ensure that the consumer is given the best deal in a capitalist situation. What ensures that the customer gets a fair deal is the untrammelled operation of the market forces of demand and supply. This is facilitated by public policy affirmative action in the form of legislatively promulgated competitive regimes.

In order to understand the forces that underwrite competition regimes, it is necessary to understand the substructure upon which the superstructural edifice of competition is founded. That substructure is the market structure. As Alan S. Swan & John F. Murphy have stated, to comprehend antitrust laws one must know the basic principles governing the market structure¹⁰. They have said, "One can not make much sense of the antitrust laws without a firm grasp of these principles and without them, the discussion of antitrust enforcement becomes almost incomprehensible.' They are brought out here-below.

One must keep two points in mind when dealing with the subject of market structure. First a market structure is a model-a simplification of reality. Few if any industries or businesses fit neatly into one market structure or another. Economists use the four models of market structure to describe how firms might behave under certain conditions. They can then modify the models to improve their understanding of how firms behave in real life. Second, the fact that the term competition is present in only two of the models does not mean that competition occurs only in conditions of perfect competition and monopolistic competition. Competition is pervasive - it occurs in all economic systems.

Those analyzing the behaviour of firms assume that firms participate in one of four market- structures. Once a market structure is defined, anti-trust lawyers, economists and all those concerned can then examine the conduct of firms within it. Conduct predicted by the market structure models provides insight into the real life behaviour of firms.

The market structure in which a firm produces and sells its product is defined by three characteristics'

- the number of firms it comprises,
- the ease with which new firms may enter the market and begin producing the good or service, and
- the degree to which the products produced by the firms are different.

in some industries, such as agriculture, there are millions of individual firms. In others, such as the photofinishing supplies industry, there are very few firms. It is relatively easy and inexpensive to enter the flower business by opening a flower shop, but it is much more costly and difficult to start a new airline. In some industries entry is strictly prohibited. For example, in the USA, it is illegal for any firm other than the US Postal Service to deliver certain classes of mail in the United States

In some industries, the product offered by each seller is virtually identical: in other industries, each product is slightly different. Differentiated products are perceived by consumers as having characteristics that products offered by other sellers do not have. Whether the products are physically "different doesn't matter. All that matters is whether consumers think the products are different. For instance, *Doom* may be chemically identical to *Johnson's It* or some other brand of insecticide, but if consumers believe *Doom* and *Johnson's It* are different, they are differentiated products. Standardized or non-differentiated products are perceived by consumers as identical.

Firms behave differently depending on whether they have few or many rivals; whether their products are differentiated from those of their competitors; and whether entry is easy or not. Let us now turn to a brief discussion of each of the market structures. The writer notes that the characteristics of the various market structures have gained universal acceptance and, therefore, do not require source identification. The terms Perfect Competition, Monopoly (including all its various sources), Monopolistic Competition, Oligopoly and Monopsony in this chapter take their universally accepted, and, therefore, generic meanings.

1.7.1 Perfect Competition

Perfect competition is a market structure characterized by a large number of firms, so large that whatever any one firm does has no effect on the market; firms that produce an identical (standardized or non-differentiated) product; and easy entry. Because of the large number of firms, consumers have many choices of where to purchase the product or service, and there is no significant cost to the consumer of going to a different store. Because the product is standardized, consumers do not prefer one store to another or one brand to another. In fact, there are no brands - only identical, generic products. For instance, wheat from one farm is no different from wheat from another farm. Because of the easy entry, no one firm can earn more than a normal profit (zero economic profit). Above normal profit (positive economic profit) means that revenues exceed opportunity costs. The profit attracts entrepreneurs who decide that they too can earn profits in the business. Since anyone can enter (entry is easy), many people rush in and begin producing and selling the good, competing with existing firms for the consumer's business.

With more firms and more production, the price of the product is driven down and economic profit is reduced. Entry continues until everyone earns just enough revenue to cover opportunity costs. At this point, firms in the industry cannot do better leaving the industry, and firms outside cannot do better entering. An equilibrium is reached at zero economic profit.

Monopoly is a market structure in which there is just one firm and entry by other firms is not possible. Because there is only one firm, consumers have only one place to buy the good, and there are no close substitutes. Because entry is impossible, even if the firm earns above normal returns, no new firms can compete for those returns. As a result, the firm in a monopoly can earn positive (above normal) economic profit over a long period of time.

The following are the various sources of monopoly:-

1. Natural - This arises out of the geographical condition of supply. For example, South Africa has an almost complete monopoly of the western world's supply of diamonds.

Historical - A business may have a monopoly because it was the first in the field and no one else has the necessary know-how or customer goodwill. Lloyd's of London's command of the insurance market is largely based on historical factors.

5. Capital Size - The supply of a commodity may involve the use of such vast amount of capital equipment that new competitors are effectively excluded from entering the market. This is the case with the chemical industry.

- Technological - Where a firm acquires immense technological advantages, quite often this leads to a monopoly. Two examples are apposite. The first one is the Rolls Royce Engines which are used by virtually all aircraft manufacturers. The other one is Microsoft in the area of internet software.

5. Legal and Public - The government may confer a monopoly upon a company. For example, in Kenya all Oil Companies are required to have their crude oil refined at Kenya Oil Refiners Limited. Similarly, all Insurance Companies in Kenya are by law required to reinsure with Kenya Reinsurance Company Limited. Also, in many jurisdictions. Public Corporations such as the Post Offices and The Central Banks have monopolies.
6. Contrived - Where people discuss the evils of monopoly, however, it is not usually the above types of monopoly they are thinking about but, rather those that are deliberately contrived. Business organisations can contrive to exploit the market either by taking over, or driving out of business, the other firms in the industry (scale monopoly) or by entering into agreement with other businesses to control prices and output (complex monopoly). It is this type of monopoly that most anti-trust regimes are aimed at.

Monopoly and perfect competition represent the extremes of market structure - one firm versus an infinite number of firms; entry achievable by only one firm versus free and easy entry by all. Between these two models lie oligopoly and monopolistic competition.

1.7.3 Monopolistic Competition

A monopolistically competitive market structure is characterized by a large number of firms, easy entry, and differentiated products. Many agricultural products provide good examples of non-differentiated products - milk is milk and oats are oats. But beer, detergents, cereal and soft drinks provide examples of differentiated

products - for example Coke is not Pepsi. Each brand is to some degree different from the others. Tusker beer, brewed by Kenya Breweries Limited, differs from Castle beer produced by the South African firm of the same name.

Product differentiation distinguishes a perfectly competitive market from a monopolistically competitive market (entry in each is easy, and a large number of firms exist in each). When a new firm enters a perfectly competitive market, it produces an identical product - more haircuts, or more wheat for example. When a new firm enters a monopolistically competitive market, it produces a slightly different product. For instance, all major breweries produce several lines of beer, and competition often takes the form of a new line such as Tusker Kubwa or Tusker Premium. Other beer firms will have different lines of similar beers. The soft-drink industry also competes by introducing new lines of products. In 1990, the Coca-Cola Company introduced PowerAde in the USA as a fountain product in convenient stores to directly compete with Quaker Oat's Gatorade, and Pepsi-Cola Company quickly followed with Mountain Dew Sport.

1.7.4 Oligopoly

In an oligopoly, there are few firms - more than one but few enough so that each firm alone can affect the market. Auto producers constitute one oligopoly, steelmakers another. Entry into an oligopoly is more difficult than entry into a perfectly competitive or monopolistically competitive market but, in contrast to entry into a monopoly, it can occur. The difficulty of entry enables the firms in the

oligopoly to earn at least positive economic profits for a long period of time than can perfectly competitive or monopolistically competitive firms.

The products offered by the firms in an oligopoly may be differentiated or non-differentiated. Daewoos differ from Fords and Nissans. However, the steel produced by USX in the USA is no different from the steel produced by Bethlehem Steel also in the USA.

Because an oligopoly consists of just a few firms, each firm, or oligopolist, must take the actions of the others into account. Oligopolistic firms are interdependent, and this interdependence distinguishes oligopoly from the other market structures. An oligopolist that is trying to decide whether to lower the price of its product must consider whether its competitors will follow suit. If one firm lowers its price and the competitors do follow suit, none of the firms in the oligopoly will be able to increase their sales much. However, if the competitors do not follow suit, the sales of the now-lower-priced firm may rise substantially.

1.7.5 Duopoly

A duopolistic market structure exists where there are only two firms in a market. A good example is the existence of only two firms providing mobile services in Kenya. These are Safaricom and Kencell. In pricing decisions the firms are interdependent, as any substantial reduction or increase in the price of services rendered will have the effect of customers moving to the cheaper provider.

From the above treatment of market structures, it is quite clear that a consumer is more likely to gain from the advantages derived from competition in situations of perfect competition and monopolistic competition than in situations of monopoly and oligopoly.

In 1776, Adam Smith argued that the fundamental explanation of human behaviour is founded in the rational pursuit of self-interest. In a celebrated and often quoted passage, he said:-

"But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them....It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner-but from their regard to their own interest

...People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise

prices .

What Smith observed in England in 1776 has indubitably proved prophetic up to this day. It has become one of governmental or intra governmental regulatory functions to encourage fair and open competition. This has been done through antitrust laws.

The notion of self interest as espoused by Adam Smith came out in the expression of the intentions of the United States State Department which bore the thinking of Secretary of State Cordell Hull who believed in the liberal theory that free trade would lead to economic prosperity and international peace. The State Department said:

"A great expansion in the volume of international trade after the war will be essential to the attainment of full and effective employment in the United States and elsewhere, to the preservation of private enterprise, and to the success of an international security system to prevent future wars".

1.8 THE HISTORICAL FOUNDATION OF ANTITRUST LAWS

As long ago as 1603, English courts did abhor monopolies. In Darcey V. Allein " the leading Court decision of the time, a monopoly on playing cards was struck down. Also in England, during the 17^m century, grants of monopoly by the crown were held illegal under Common Law by the courts and were voided by parliament in 1623¹⁷. The abolition did not extend to grants conferred by parliament, to monopolies acquired through individual effort, or to those resulting from private agreement. In the 18^m century, however, monopolistic agreements came usually to be condemned, unless they were merely ancillary to some innocent action and were judged by a rule of reason. A single person could still monopolize, but not a group. The courts had also refused since the 15th century to enforce contracts which restrained trade¹⁸. This refusal was narrow but gradually broadened.

During the 19th century the doctrine of restraint of trade was extended to cover any arrangement where competitors sought to exclude outsiders from the market or otherwise to limit freedom to compete ". In most jurisdictions the courts came to reject all contracts that involved such practices as curtailment of output, division of territories, fixing of prices and pooling of profits. Here no rule of reason was applied: these practices were held by their very nature to harm the public interest, and contracts that required them were not enforced.

The maintenance of competition was thus supported by the common-law. But as an instrument of public policy the common law was of limited effectiveness. If all conspirators stayed in line, and if no victim sued, the action went scot-free. If competition were to be restored in such cases, public action was needed.

In response to this need for public action the first Restrictive Trade Practices Act was promulgated in the United Kingdom in 1956 and by the end of 1980. 387j agreements concerning the supply of goods had been registered. A further 3211 agreements had been terminated since 1956 and 658 referred to the Court. In 1980 five organisations were found guilty of breaking previous undertakings to the court and fines for contempt of £185000 were imposed on four suppliers of concrete pipes and a fine of £50000 was imposed on the British Steel Corporation. In 1991 price fixing by the suppliers of ready mixed concrete was investigated and declared illegal. By this time many of the customers, including the National Health Service, had paid many millions of pounds in excess of the competitive price"⁰

In 1980 the Competition Act was promulgated. It gave the Director-General of fair trading [DGFT] the power to investigate and control the anti-competitive practices of single firms. It supplements the existing powers for investigation of monopolies and restrictive agreements among firms. The government's firm intention in the Act is to promote competition and efficiency in industry and commerce.

More than one company has agreed to alter its trading practices in accordance with the DGFT's suggestions rather than face an investigation by the Commission, and British Gas and British Rail have been the subject of preliminary investigations"

The Price Commission has been abolished by the Competition Act 1980, although the Secretary of State for Trade and Industry has power under the Act to investigate prices which he considers to be of major public concern having regard to whether the supply, or acquisition, of goods or services in question is of general economic importance, or the price is of special significance to consumers. There are no direct sanctions that can be taken in such a situation but it can be taken as an anti-competitive practice.

Since the accession of the United Kingdom to the European Economic Community in 1973, its anti-trust laws have more or less been subsumed by EEC competition laws²². The European Economic Community was established by the Treaty of Rome which was signed by Belgium, Germany, France, Italy, Luxembourg and Netherlands on 25th March 1957. In 1973 membership of the Community was increased by the admission of the United Kingdom, Ireland and Denmark. These three states were followed by Greece in 1981 and Spain and Portugal in 1986. Since 1995 membership of the Community has been increased to fifteen members following the accession of Austria, Finland and Sweden. Negotiations are now in hand for the admission of a considerable number of other states from Eastern Europe and the Mediterranean area.

Since the coming into force of the Treaty of European Union 1992, the European Community has been transformed into the European Union [The EU]. Articles 81 & 82 (old 85 & 86) of the Treaty of Rome are the Pillars of the Community's competition policy. Each of these articles addresses different forms of

anti-competitive behaviour. Article 81 prohibits agreements and concerted practices among private commercial bodies if they affect trade between member states and distort, prevent, or restrict competition. Article 82 prohibits commercial practices by one or more enterprises where such practices amount to an abuse of a dominant position within the Community. These two provisions, therefore, seek to achieve separate objectives. Article 81 attempts to eradicate unfair commercial practices which result from collaboration between enterprises while Article 82 strikes at companies taking advantage of dominant or monopoly positions in the market place.

In the United States, during 1865 - 1900, the pattern of industrial organisation was rapidly changed. With the growing network of railways, local and regional markets broadened to national scope. In these larger markets, the scale of industrial operations was increased, production was mechanized, and small shops were displaced by large factories. Large, capital-intensive corporations arose, able to sweep away and absorb small firms. Deflation and depression aggravated the tendency for larger firms to cut prices. During the 1880s, efforts to contain cut-throat competition - and to gain monopoly profits - led to agreements or mergers in scores of industries from petroleum, to meat packing, to coal, whisky, gunpowder ad infinitum.

As this process continued, many groups in the community - farmers, producers of raw materials, small businessmen, and labourers - suffered injury. The farmers in particular, experiencing a persistent decline in farm prices, complained of high freight rates charged by the railroads, high interest rates charged by the banks, and high prices charged by the makers of agricultural implements and other manufactured goods. Producers of raw materials, where manufacturing was

monopolised, found themselves selling to a single buyer who manipulated the market to depress the prices they received. Independent businessmen, if they refused to be absorbed, were often driven out. Workers were crowded into growing cities, made dependent" on industrial employment, and faced with increasing competition for uncertain jobs.

These conditions gave rise to a strong political movement against monopoly, uniting Populists, Grangers, and many other groups. It arose among farmers in the West and South, and among the nascent labour unions and many small businessmen. The movement bred farmer-labour parties, ran antimonopoly candidates for the presidency, elected a number of members to Congress, and came to control the legislatures of several states. As it grew in strength, the older parties sought to win the votes of its adherents by themselves professing opposition to monopoly. In this way, the movement soon achieved part of its purpose: towards the end of the 1880s, antitrust laws were enacted by the state and federal governments.

Since the new monopolies were "trusts" (rather like holding companies), the sections and laws against them were called "antitrust." The trust as a legal device was soon abandoned, but the name has stuck. Led by Kansas in 1889, 18 states had enacted antitrust laws by 1891 and most states now have them. These "baby Sherman Acts" vary in detail, but most have proven to be weak and little used, partly because the major cases reach far beyond state boundaries.

In the national election campaign of 1888, both major parties sought the farmer vote by pledges against monopoly. The Democrats, then in office, denounced

the tariff as the mother of trust. The Republicans, proposing high duties, replied that they could compel competition at home while preventing competition from abroad. Following the Republican victory. President Harrison sent a message to congress, in 1889. asking that this pledge be redeemed. A number of antimonopoly bills were introduced, one of them by Senator Sherman of Ohio. There was little popular interest in the legislation at the time. Attention was centred, rather, on the effort to grant business and labour further protection against competition by raising the tariff and on the effort to assure farmers higher prices by passing the Silver Purchase Act. The antitrust law was included in the legislative package to quieten the critics of these measures. No hearings were held: the bill that finally emerged from the Congressional committees was enacted, following a brief debate that raised no fundamental issues, with only one dissenting vote in the Senate and without a record vote in the House. It was signed by the President on July 2, 1890. Bearing little or no resemblance to the bill originally introduced by Senator Sherman (and later said by him to be of little consequence), the law was given his name.

1.8.1 The Sherman Act

The act contained little new doctrine. Its real contribution was to turn restraint of trade and monopolisation into offences against the federal government, to require enforcement by federal officials, and to provide for the imposition of penalties. The penalties were small, and during 1890-94 the Act was used mainly as a weapon to break strikes. Then in 1897 it was used to convict a price-fixing ring, and in 1904 Theodore Roosevelt started "trust-busting" with Section 2. Since 1911, the Sherman

Ac: has been the fulcrum of all US competitive policy. Senator Sherman is an ubiquitous ghostly board member of most large firms and many small ones.

To buttress the antitrust momentum there followed other statutes such as, The Clayton Act 1914 which broadened the scope of the Sherman Act by trying to prevent anti-competitive behaviour rather than by dealing with its consequences, The Federal Trade Commission Act 1914 which created the Federal Trade Commission and gave it extremely broad authority to monitor the market place ,and The Robinson-Patman Act which bans price discrimination.

The American experiment, which began with the Sherman Act in 1890 is seminal in the area of antitrust. Interesting hybrids have since sprouted around the world. The aim is clear in concept: to bring about the optimal degree of competition in the economy. The American experiment is the substructure upon which the European and Kenyan antitrust positions are superstructured.

The importance of competition was accorded prominence in the 1940s. Even before the tide had turned for the allies in the World War II, allied officials led by the British and Americans were laying plans for the post-war international order". The aim was to establish an order that would obviate the tragedies of the inter-war period. Three basic institutions were projected, viz., the International Monetary Fund (IMF), the International Trade Organization (ITO), and the International Bank for Reconstruction and Development (the World Bank).

The International Monetary Fund was created to supervise the exchange-rate practices of member countries, and to encourage the free convertibility of any national money into the monies of other countries. It was also the aim of the IMF to lend money to countries experiencing problems meeting their international payment obligations. The World Bank was created to help finance economic development in poor countries. Its aim was to provide loans to developing countries at more favourable terms than are available from commercial banks and also to offer technical expertise.

The third projected institution was the International Trade Organisation (ITO). Its aim was to promote competition in world trade. The ITO charter (known as the Havana Charter) was however still-born owing to the decision by President Truman of USA to refuse to submit the Charter to the USA Senate for its advice and consent. In the USA international treaties will only be acceded to with the consent of the Senate.

The demise of the ITO notwithstanding, twenty-three of the world's major trading nations drew up the General Agreement on Tariffs and Trade (GATT), incorporating many of the substantive trade provisions of the Havana Charter. The preamble of the Charter reads as follows:

"The governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United States of America:

Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.

Have through their Representatives agreed as follows:...."

It is instructive that the signatories felt that promotion of competition would lead to raised standards of living, full employment and a large and steadily growing volume of real income and effective demand. They also felt that competition would engender the full use of the resources of the world and expanded production and exchange of goods.

The importance of promotion of competition is also underlined by the fact that many economists believe that the Great Depression of the 1930s was, at least partly, due to the Smoot-Hawley Tariff Act, signed into law by President Herbert Hoover in 1930²⁴. Hoover had promised that, if elected, he would raise tariffs on agricultural products to raise US farm income. Congress began work on the tariff increases in 1928. Congressman Willis Hawley and Senator Reed Smoot conducted the hearings.

In testimony before congress, manufacturers and other special-interest groups also sought protection from foreign competition. The resulting bill increased tariffs on over 12,000 products. Tariffs reached their highest levels ever, about 60 per cent of

average import values. Only twice before in US history had tariffs approached the levels of the Smoot-Hawley era.

Before President Hoover signed the bill, 38 foreign governments made formal protests, warning that they would retaliate with high tariffs on US products. A petition signed by 1028 economists warned of the harmful effects of the bill. Nevertheless, Hoover signed the bill into law²⁵.

World Trade collapsed as other countries raised their tariffs in response. Between 1930 and 1931, US imports fell 29 per cent, but US exports fell by 33 per cent. By 1933, world trade was about one-third of the 1929 level. As the level of trade fell, so did income and prices. In 1934, in an effort to correct the mistakes of the Smoot-Hawley Act Congress passed the Reciprocal Trade Agreements Act, which allowed the President to lower US tariffs in return for reductions in foreign tariffs on US goods²⁶. This Act ushered in the modern era of relatively low tariffs.

Many economists believe the collapse of World Trade and the Depression to be linked by a decrease in real income caused by abandoning production based on comparative advantage. This was occasioned by the trammelling of competition by the Smoot-Hawley Tariff Act²⁷.

European Union antitrust law is more or less predicated upon American principles which were activated by the Sherman Act 1890. The European antitrust position is now encapsulated in Articles 81 and 82 of the European Community Treaty 1957 (Treaty of Rome). The Kenyan position is ensconced in the Restrictive

Trade Practices. Monopolies and Price Control Act 1989 (Chapter 504 of the Laws of Kenya) which replaced the Price Control Act. Up to 1988 Kenya had a Price Control Act which by and large sought to control prices of goods. The provisions of the new Act have engendered the regulation of mergers, regulation of concentrations of economic power and restrictive trade practices. It has, however, rather atavistically in this age of liberalisation, contained virtually all the price control provisions contained in the replaced Act.

Sessional Paper number 1 of 1986 had earlier on indicated the path that Kenya was to follow. It said:-

"Price controls in Kenya are administered to stabilize the prices of necessities and to restrain monopoly producers from raising prices above competitive levels in the absence of sufficient import competition. To make price controls more effective as a tool to increase productivity and growth, the functions of price control will be integrated with those of control over restrictive market practices; and to make controls more equitable for both consumers and producers, the rules and procedures will be streamlined-

1. A Department of Price and Monopoly Control (DPMC) will be created in the Ministry of Finance, under new legislation to be prepared, to monitor actions in restraint of trade and to enforce rules prohibiting unfair practices;
2. administration of price controls will be streamlined and applications for adjustments acted upon within 90 days, in the absence of which price adjustments will be automatically permitted;
3. the Determination of Costs Order will be revised to include costs that are not currently a basis for price adjustments and will permit the introduction (on an experimental basis at first) of importality formulae on which to base adjustments;
4. items that are not produced by monopolies and are not essentials for low-income families will be considered for decontrol on a gradual basis."⁸

- 8.2 GATT in WTO! AND OTHER INTERNATIONAL ANTI-

TRUST PERSPECTIVES

1.8.2.1 The theory of* comparative advantage

It is apposite that we address the sources of international trade before we look at how competition is handled at the international level .According to Paul Samuelson & William Nordhaus. nations find it beneficial to participate in international, trade because of three main reasons²⁹:

- Diversity in Conditions of Production,
- Decreasing Costs, and
- Differences in Tastes.

Diversity in Conditions of Production

In many cases two countries or regions will have extremely diverse conditions of production. If we consider the economies of the tropics and the temperate zone, each region has distinct endowments of natural resources, land, labour, capital and technology, and as a result of the differences the producible goods and services may differ greatly among regions.

Trade may therefore take place because of the diversity in production in productive possibilities among countries. Countries with tropical climates will naturally specialise in sunbathing, coffee and citrus fruits. Countries with frostier climates will produce goods such as salmon, skiing and reindeer meat.

Decreasing Costs

A second reason for trade arises when there are increasing returns to scale, or decreasing costs of large-scale production. For example, Britain had a head start in textiles in the early 1800's, the United States in telecommunications in the 1980's and Japan in the consumer electronics in the 1980's. Once the country begins to produce and export the product, the economies of scale give it a significant cost and technological advantage over other countries, so it can outcompete its foreign rivals. In the extreme, countries would specialise in different products: all the economies of mass production would be realized as each country produced and exported the goods in which it had a head start and imported these goods for which foreigners were further down the cost curves. '

Differences in Tastes

A third cause of trade lies in preferences. Even if the conditions of production were identical in all regions, countries might engage in trade if their tastes for goods were different. A good example is Kenya and Ghana. Kenya grows tea and Ghana grows cocoa, yet many Kenyans have a fondness for cocoa and many Ghanaians have a fondness for tea. In this case a mutually beneficial export of cocoa to Kenya and tea to Ghana would take place. Both countries would gain from this trade; the sum of happiness is increased.

David Ricardo came up with a deeper principle underlying all trade "in a family, within a nation, and among nations" that goes beyond the three common sense reasons for international trade already considered¹¹. The theory called the principle of comparative advantage, holds that a country will trade with other regions even if it is absolutely more efficient or more inefficient in the production of every product.

The writer wishes to use a hypothetical production structure relating to the United States to demonstrate the principle of comparative advantage as enunciated by Ricardo. Assuming that the United States has higher output per worker (or per unit) than the rest of the world in computers and steel. But suppose the United States is relatively more efficient in computers than it is in steel—for example, U.S. productivity might be 50 percent higher than other countries in computers and 10 percent higher in steel. In this case, it would benefit the U.S. to export that good in which it is relatively more efficient (computers) and import that good in which it is relatively less efficient (steel).

Or consider a poor country like India. How could impoverished India, whose productivity per worker is but a fraction of that of advanced countries, hope to export any of its textiles or wheat? Surprisingly, according to the doctrine of comparative advantage, India can and will trade with countries that are absolutely more efficient. This is because by exporting the goods in which it is relatively more efficient (like wheat and textiles) and importing the goods in which it is relatively less efficient (like turbines and super-computers) both India and the advanced countries will gain.

The principle of comparative advantage holds that each country will specialize in the production and export of those goods that it can produce at relatively low cost (in which it is relatively more efficient than other countries); conversely, each country will import those goods which it produces at relatively high cost (in which it is relatively less efficient than other countries).

Two eminent Professors of law, Alan C. Swan & John F. Murphy have produced an unassailable conspectus regarding the theory which stresses that what is important is not the existence of absolute advantage but comparative advantage. This distinction is important because countries which have absolute advantages in the production of many products could be persuaded to go ahead with the production of all those products even though their production does not engender comparative advantage vis-a-vis other countries. The aforementioned conspectus demonstrates that such countries stand to gain more when they respect the theory of comparative trade than when they do not do so¹.

Similarly Robert Z. Lawrence and Robert E. Litan have in their work "*Saving Free Trade*" defended competition in international trade by articulating that nations can maximize the economic welfare of their citizens by concentrating in the production of goods and services where limited resources are best employed. They can then export the excess not consumed domestically and import other goods. They have further debunked the hypothesis that there are advantages to be gained from interfering with free trade on grounds that 1] intervention is needed to preserve

essential production, 2] intervention serves to protect so-called infant industries, and 3] intervention is necessary to compensate for private costs of dislocation that may not fully reflect total social costs".

To illustrate how stupendous costs of protectionism are, Hufbaer, Berliner and Elliott in 1986 calculated that the third phase of protection granted the US Carbon-Steel industry beginning in 1980 imposed a total recurring annual cost on American consumers of \$6.8 billion dollars³. That worked out to be a cost of \$750,000 annually for every steel worker's job that the protection was thought to have saved. The same program yielded a gain to US Steel producers of \$3.8 billion annually, a gain to foreign Steel producers of \$2 billion annually, an annual-revenue loss to the government of \$ 560 million and loss to efficiency of \$ 330 million each year.

The same study shows that the Voluntary Restraint Agreements (VRAs) limiting import of automobiles beginning in 1981 visited an annual cost of \$5.8 billion on consumers. This meant it cost consumers \$105,000 annually for every auto worker's job saved. American automobile producers gained \$2.6 billion, foreign automobile manufacturers gained \$4.3 billion, \$790 million of government revenue was lost each year and the annual welfare loss to the nation was \$200 million.

Paul Samuelson & William Nordhaus have given a traditional way of explaining comparative advantage as the example of the case of the best lawyer in

town who is also the best typist in town¹⁴. How should the lawyer spend his time? Should she write and type her legal briefs? Or should she specialize in law and leave her typing to her secretary? Clearly, the lawyer should concentrate on legal activities, where her relative or comparative skills are most effectively used, even though she has absolutely greater skills in both typing and legal work. Another example is that of a male Chef trained at the best tourism school, Utalii College, and employed by an international hotel. He has also been trained as a Registered Nurse whereas his wife is a trained Enrolled Nurse. There is need for one of the parents to take early retirement to take care of their child who is suffering from a debilitating form of cerebral palsy. The job of a chef pays ten times better than that of an enrolled nurse. Although the husband is more qualified as a nurse than the wife, comparative advantage, and common sense, dictate, that it is the lesser qualified wife who will retire to look after the kid³⁵.

It is therefore self evident that the whole world will gain from unbridled application of the theory of comparative advantage. Over the years, however, states have ,for all sorts of reasons, frustrated the free application of the said doctrine. Inexorably global competition in trade has been fettered. Different states have made use of the following four methods to stave off untrammelled competition in the global arena:

- Tariffs
- Import Quotas
- Embargoes

- Bureaucratic Red Tape

Tariffs

»

Historically nations have protected themselves against imports by using tariff duties, which are taxes imposed by a country on imported goods. These taxes take two forms. *Revenue tariffs* are imposed solely to generate income for a government. Those who favour free trade have less trouble with revenue tariffs than they have with the other form of import duty, the *protective tariff*, which is a tariff imposed to protect a domestic industry from competition by keeping the prices of competing imports level with or higher than the price of domestic products. For example, the French and the Japanese agricultural sectors would both shrink drastically if their nations abolished the protective tariffs that keep the price of imported farm products high.

Import quotas

A limit on the quantity of a particular good that can be brought into a country is an import quota. The most important quota imposed by the United States in recent years was one on Japanese cars in response to Japanese dominance in the economy car market. Japanese auto makers responded to the import quota in classic free-market style simply by exporting more expensive cars. Such cars provided them with greater per-car profit, thus making up for the lost volume³⁶.

Embargoes

A law or government order forbidding either the importing or exporting of certain specified goods is an embargo. More often than not, countries impose an embargo not to protect a domestic industry but to punish another country. In 1961 the United States placed an embargo on Cuban goods that is still in force. The embargo featured prominently in Banco Nacional Du Cuba V Sabbatino¹. Although the crux of the matter was the international principle of the act of state doctrine. In 1973 a number of Arab oil-exporting countries imposed an embargo on the United States and certain Western European Countries that supported Israel. More recently, South Africa's Apartheid policies triggered embargoes by various nations of the world.

Bureaucratic Red Tape

This form of protectionism is more subtle than the other three forms. Yet bureaucratic red tape can be the most frustrating trade barrier of all. It can cause unexplained delays and generate great confusion. Motorola's experience in Japan is an apposite example. When Motorola introduced the then world's smallest portable telephone to the Japanese Market in early 1989, it was given permission by the Japanese government to sell the new phones only in the western half of the country. Unfortunately, the majority of Japan's then \$720 million cellular phone market including Tokyo, was in the eastern half of the country. According to Business Week:

"When Motorola protested, Japan compromised. Motorola could attach adapters to its phones so that they could be used in Tokyo. But the adapters only work in car phones, while 90 percent of the customers use portable phones on the train". Frustrated by all this bureaucratic red tape, Motorola turned to United States trade negotiators for help in forcing open the lucrative Japanese cellular market⁸.

1.9 ENFORCEMENT OF COMPETITION AND FAIRNESS IN INTERNATIONAL TRADE

1.9.1 The General Agreement on Tariffs and Trade (GATT)

We have already seen that the whole world stands to gain when international trade is allowed to be conducted on the basis of comparative advantage. Indeed many economists believe that the Great Depression of the 1930s was instigated, at least partly, by the Smoot-Hawley Tariff Act, signed into law by United States President Herbert Hoover in 1930⁹. Hoover had promised that if, elected, he would raise tariffs on agricultural products to raise US farm income. In the event, when congress began work on the increases in 1928 it did not confine itself to agricultural products. It increased tariffs on over 12000 products. Tariffs reached their highest levels ever, crystallizing at about 60 per cent of average import values. Senator Reed Smoot and Congressman Willis Hawley Conducted the hearings and the resultant bill was named after them¹⁰.

Many governments petitioned President Hoover not to sign the bill into law warning that they would retaliate with high tariffs on US products. 1028 United States economists petitioned the President warning him of the deleterious consequences of the intended action. The President, nevertheless, went ahead and other governments retaliated. World Trade collapsed and between 1930 and 1931, US imports fell 29% but US exports fell by 33%. By 1933 world trade was about one-third of the 1929 levels. The level of trade fell, so did income and prices. The whole world suffered⁴¹.

The second world war made it virtually impossible for any meaningful international trade to take place. The war had started only hardly before the world had recovered from the ravages of the Great Depression. The two events acted as powerful catalysts towards the need for the facilitation of untrammelled international trade.

The catalytic influence of the Second World War to the need for promotion of international trade can be discerned from the sentiments of some American leaders who felt that a liberal international economic system would enhance the possibilities of peace in addition to assuring economic prosperity and economic harmony. One of those who saw such a security dimension was Cornell Hull, the United States Secretary of State from 1933 to 1944 who postulated that:

"unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war...it we could get a freer flow of trade-freer in the sense of fewer discriminations and obstructions-so that one country would not be deadly jealous of another and the living standards of

all countries might rise, thereby eliminating the economic dissatisfaction that breeds war. we might have a reasonable chance of lasting peace"."

Harry D. White, a major architect of the Bretton Woods system held similar views. He belonged to the school of thought that believed that both the great depression and the Second World War were caused by policies which had prioritized national goals, measures by individual states which stressed independent action in the inter war period and the failure to perceive that those goals could not be realized without some form of international collaboration. Inexorably such misconceived goals resulted in economic and political disaster. Thus, the failure to control beggar-thy-neighbour-policies such as high tariffs and competitive devaluations contributed to economic breakdown, domestic political instability, and international war. He said:

"the absence of a high degree of economic collaboration among the leading nations will...inevitably result in economic warfare . that will be but the prelude and instigator of military warfare on an even vaster scale"¹⁰⁰.

As we have already seen, it is believed that the United States precipitated the Great Depression through the Smoot-Hawley Tariff Act. To ameliorate the otherwise depressing scenario, the US congress passed the Reciprocal Trade Agreements Act, in 1934, which allowed the President to lower US tariffs in return for reductions in foreign tariffs on US goods. This Act was the harbinger to the modern era of relatively low tariffs. The Second World War, however, interfered with the development of the new era which the United States had spearheaded. No wonder GATT, which has since January 1995 changed its name to the World Trade

Organization, can be said to be a product of L'S planning and a reflection of certain views that dominated the thinking on trade matters of US diplomats in the 1940s.

The GATT can trace its genesis to the efforts of some US State Department officials during World War II. The officials however intended to have a wider embracing institution, to be named the International Trade Organization. At the beginning the negotiations regarding the workings of the intended body involved only the US and the United Kingdom. The proposals of the said bilateral negotiations were published in a booklet entitled Proposals for Expansion of World Trade and Employment, the first published version of US thinking regarding the future of world trade⁴⁴. Thereafter the United States elaborated the proposals into a draft Charter, which was amended in successive conferences from 1946 to 1948 in London, New York, Geneva, and Havana⁴⁵. The final version, drawn up in Havana in March 1948, became known as the Havana Charter.

The International Trade Organization, as envisaged by the Havana Charter, effectively died in 1948 when President Truman declined to submit the proposed ITO Charter to the senate for its advice and consent. Senate opposition had grown steadily as compromises were increasingly grafted onto what US planners had initially envisioned as a bold and comprehensive effort at multilateral governance of the world economy.

There was some paradox in the demise of the ITO arising out of the failure by the United States to obtain senate ratification. This was because the most potent force for international trade growing out of the interwar period was the United States willingness to lead the system. Apparently the United States had learnt from the Great Depression that the system needed a leader and that the United States would be the major and foremost candidate for that role. The State Department had explained:

"The only nation capable of taking the initiative in promoting a worldwide movement toward the relaxation of trade barriers is the United States. Because of its relatively great economic strength, its favorable balance of payments position, and the importance of its market to the well-being of the rest of the world, the influence of the United States on World commercial policies far surpasses that of any other nation. While the cooperation of the United Kingdom will be essential to the success of any broad program to reduce trade barriers, the prospective post-war position of the United Kingdom is such that its cooperation can be attained only if it is assured that strong leadership will be furnished by the United States⁴⁶."

The demise of the ITO notwithstanding, twenty-three of the worlds major trading nations had met in Geneva in 1947 to conduct the first of what came to be known as negotiating "rounds" concerned with reducing tariffs and other barriers to trade. Both to record the agreements reached and to ensure that participants did not, in their trade policies, subvert those agreements, the parties to the Geneva conference drew-up the General Agreement on Tariffs and Trade, incorporating many of the substantive trade policy provisions of the Havana Charter. Updated in 1957, the GATT (since 1995, the WTO) is today the principal body of substantive international law governing the trade policies of its members.

As GATT was only intended to record the agreements reached at one trade conference and was not thought of as a permanent framework for the multilateral governance of international trade, it was given over almost entirely to setting forth substantive rules of law. No provision was made for any kind of organization or for its governance. Initially no procedures were specified for the conduct of future "rounds" and such procedures as were set forth for policing the agreement and resolving disputes were rudimentary. Over the years during the evolution of GATT law, however, there has developed a series of special agreements usually negotiated within the framework of a formal GATT round which either elaborate upon the rules already embodied in the General Agreement or address some important trade problem for the first time. The translation of the GATT into the World Trade Organization with all members acceding to the new body has solved the administrative and operational problems.

All in all the GATT fulfills several functions. It provides:

1. A set of agreed rules to govern trade between nations;
2. Rules and procedures to facilitate and discipline negotiations between nations on trade and commerce;

3. A forum for international multilateral negotiations on trade as well as for the day-to-day bilateral negotiations and conciliation meetings which form a large part of the normal work of the GATT;
4. A small but highly skilled and experienced secretariat which can assist in all these matters through research and documentation of the issues and by the exercise of leadership and diplomacy.

Rules

The General Agreement is a very complex, detailed and technical document which sets out the rules for the conduct of trade between the members and the many exceptions to these rules which political necessity requires. However, three rules and their exceptions are of particular importance. The first is the rule against discrimination in imports or exports. This is the most favoured nation (MFN) clause of the agreement which is central to competitive trade in the international arena. The major exception to the principle is the provision permitting full customs unions or free trade areas. Preferential agreements which existed before GATT were allowed to continue but subject to negotiation and to erosion as tariffs in general came down.

The Most Favoured Nation (MFN) Principle

The MFN principle has a long history of use in tariff negotiations. Traditionally its main purpose has been to ensure that a party to a tariff negotiation does not find that the concession of a reduced tariff on its exports to the other party is

eroded by a greater concession made to a third country at a later date. The advantage is that the adoption of the MFN principle increases confidence in the long-term value of any concessions obtained in the tariff negotiations. From a world viewpoint there is the additional advantage that tariff reductions will be spread by the operation of the MFN principle. For example, if A and B have a tariff treaty and B and C enter tariff negotiations, any concessions made by B to C will have to be given equally to A where similar products are involved. Within the GATT where all members have agreed to the MFN clause, the effect is to multilateralise or bilateralise agreements, thus speeding up the liberalising of trade. The economic rationale for the principle of non-discrimination is that this gives the best prospects for the supply of the important good being from the country which is the most efficient, i.e., the lowest cost producer of that good. This is the basic objective of free trade.

Current economic theory, however, takes the view that the situation is in practice much more complex than that assumed in the classic analysis of the gains from free trade. The real world is characterised by many distortions apart from tariffs on final goods : subsidies, overvalued or undervalued exchange rates, tariffs or subsidies on inputs, monopoly and artificial pricing of the output of state industries, differences between nations in tax policies - all of these can influence the degree of protection or assistance afforded to industries. Accordingly it is not possible to say that non-discrimination necessarily results in a more efficient production pattern than would tariff reductions that discriminated between Countries.

In addition, considerations of income distribution may argue for the giving of preferential reductions in tariffs on goods exported by low income countries. This argument may be reinforced by a variation on the infant industry argument. The growth of manufacturing industries in the developing countries, for example, may be fostered by abolishing tariffs on goods exported by them while retaining tariffs on similar goods imported from industrialised nations.

Perhaps the most telling arguments for the MFN principle is the practical one that without it many countries would be reluctant to negotiate reductions in tariffs for fear that their trading rivals may be given a better deal at a later date. If we also accept progress towards freer trade is likely to promote higher standards of living in the world, then the **MFN** clause has a valuable role to play through spreading tariff reductions across all the GATT member nations who, between them, account for over 80% of world trade.

The "second" best arguments for distortions to balance distortions, beloved by economic theorists, have plausibility in certain limited situations but when considering sweeping cuts in tariffs across many countries and for a wide range of goods it is implausible that this does not represent a greater progress towards an optimum allocation of the world's productive resources than would any attempt at nicely adjusted discriminatory tariffs cut.

The MFN clause may also benefit poorer countries with no bargaining power, in that as members of GATT they automatically benefit, through the MFN principle, from all the tariff cuts agreed through reciprocal bargaining among the more powerful and richer members. This may not mean much to countries near the bottom of the income scale because their exports are often raw materials and food products which have not figured much in tariff cuts, either because they are already free of duties or because they affect sensitive areas in the economies of the industrially developed nations. But developing countries which have a fair range of manufactured exports have certainly benefited and of course all gain indirectly from prosperity in their main markets. Discrimination breeds discrimination. While any two countries or a group may gain more from a discriminatory-reduction of tariffs retaliatory action by others is likely to ensure that the world as a whole is worse off.

Exceptions to the MFN Clause

The pre-existing preference system such as commonwealth preferences were permitted as an exception to the MFN rule. While important at the time and the source of bitter dispute between the UK and USA they have faded into insignificance with the passage of time. This is mainly because over the years colonies and dominions have become independent.

Other small exceptions to the MFN rule include permission to impose anti-dumping duties on the exports of a country which are sold at less than the normal value of the goods which is charged in the country of origin. This is fairly closely controlled and involves showing that the good is being sold below its normal value, for example, the domestic price in the home market of the exporting countries, and that this is causing or threatening "material injury" to established industries in the territory of a contracting party or materially retards the establishment of a domestic industry" (Article VI). Moreover the "countervailing duties" may not be any more than the estimated subsidy of the offending goods.

The major exception to the MFN principle lies in the permission to form customs unions or free trade areas provided these do not increase tariffs or other obstacles to trade with contracting parties outside the union or agreement and provided that the union or agreement results in the elimination of duties on substantially all trade between the members (Articles XXIV). This provision had in mind the political benefits that might be obtained from economic integration in Europe but was also influenced by the belief that any substantial dismantling of tariffs between groups of countries would represent a step towards free international trade. Subsequent research has shown that this need not be the case. The effect of a customs union or a free trade area is both "trade creating" and "trade diverting". This means that the location of production of any traded good may move either to a more efficient country or may be diverted from an efficient source outside the union to a less efficient source within it. An example may make this clear.

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Suppose three countries A, B and C (which may stand for the rest of the world) have costs of production for bicycles as shown below:

	B	
£40	£30	£20

If A's tariff is 100 per cent A will be self-sufficient in bicycles. Should A now form a customs union with B, abolishing tariffs on trade between them, A would import all the bicycles its customers want from B. World efficiency would have improved as more efficient production in B replaces the inefficient bicycle industry in A. This represents trade creation.

If A's pre-union tariff had been 60 per cent, trade diversion would have occurred as a result of the union. A 60 per cent tariff would have excluded B bicycles, but country C would have supplied A's entire market. The abolition of the tariff on B's exports to A, however, would make B's bicycles cheaper to customers in A than the tariff inclusive price of £32 for bicycles from C. The location of production of bicycles purchased in A would move from C, the most efficient producer, to B, a less efficient producer.

The formation of the European Economic Community has resulted in one clear example of trade diversion. Its system of protection for agriculture has reduced imports of foodstuffs from the low cost producers of North America, Australasia and the Caribbean in favour of the relatively high cost farmers in Europe.

Of course the pros and cons of a given customs union go far beyond the mere static welfare economics outlined here. The situation is much more complex when repercussions on consumption patterns, on scale of production, attitudes to competition, foreign investment and many other factors are brought into the analysis. But there can be no clear preconception that a customs union or free trade area will necessarily increase the welfare, even of the members, let alone the world as a whole.

In fact the contracting parties to GATT have been reluctant to pronounce on whether various customs unions and free trade areas are compatible with GATT. Most have met with hostility from some members and operate either with the tacit (but not explicit) consent of GATT, or under specific waiver.

Quantitative Restrictions

The second important rule is that concerning quantitative restrictions. Under Article XI most direct controls on trade are forbidden as a general method of

protection. However, a long list of exceptions to this rule has robbed it of a good deal of its force. When written it could clearly be no more than an expression of piety. Hardly any country other than USA would have been prepared to abandon the use of controls on trade in that period of acute dollar shortage which followed the Second World War. Restrictions to safeguard the balance of payments were specifically authorised and were justified on this basis well into the 1950's. Since then, most countries have resorted to other weapons such as temporary surcharges on imports to meet temporary balance of payment crises rather than use quotas, despite the fact that quotas are acceptable under the GATT while surcharges are not.

The disapproval of quantitative restrictions on trade has backing in economic theory. A quota which produces the same reduction in imports as a given tariff will always involve a greater loss of economic welfare. The effects on domestic production and consumption are uncertain. It is liable to give monopoly profits to domestic producers. Economic rents, arising from the restriction on the supply of imports, may accrue to home or foreign firms and, depending on their relative bargaining strengths, the terms of trade may even move against the country imposing the quota.

Despite these objections to quotas, quantitative restrictions, especially in agricultural protection, form the most important barriers to trade at the present time. So-called 'voluntary' quotas have also severely affected the exports of Japan and of a number of developing countries, particularly in the field of textiles, clothing and footwear.

Reduction And Binding Of Tariffs

Rules governing tariff negotiations can be found in various parts of the agreement. The MFN is of course highly relevant, but Article XXVIII stresses the importance of negotiations on a reciprocal and mutually advantageous basis to reduce tariffs and other imports on trade. The agreement recognizes that there are great disparities between tariff levels and states that, "the binding against increase of low duties or of duty free-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties." It is also worthy of note that even in 1947 the special situation of developing countries was taken into account by acknowledging their need, "for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes" (Article XXVIII, sec. 3(B)).

One point to stress is that negotiations were expected to involve reciprocity. At first sight this sits oddly with notions of the benefits of free trade and also with the MFN principle. The latter extends tariff reductions arrived at through negotiations between any of the contracting parties to all the other members of GATT whether or not they have reduced any of their tariffs. In practice, reciprocity has been confined to the major trading nations who have done most of the bargaining and benefits have spilled over to the smaller and poorer nations. This is fortunate for they would have had little to offer by way of return.

The notion of reciprocity- also seems at odd with theory for it appears to imply that the reduction of a duty on an import benefits oniv the exporting country. Each tariff cut is seen as a concession to be matched by a reciprocal concession from a trading partner, but the main gain from a cut in tariffs is the release of resources from inefficient use in producing goods directly, for use in increasing exports which can be exchanged to obtain imported goods more cheaply than they can be produced at home. A secondary gain stems from an increased stimulus to competition.

Despite these traditional arguments for unilateral tariff cuts one does not attribute an archaic mercantilism to the politicians to justify their preference for negotiations based on reciprocity. It is undoubtedly the case that mutilateral tariff cuts bring greater benefits to a nation than simply cutting its own tariffs. For one thing the , terms of trade are less likely to move against it But slow adjustment problems, frictional unemployment, immobility of capital, and other costs of reallocation of resources will also be less in a world in which demand for one'^ exports is rising commensurately with increased imports.

The once-over increase in world income resulting from the more efficient allocation of resources brought about by general tariff cuts will widen markets, bring additional economies of scale, enhance competition and generally improve managerial efficiency. These advantages would justiiy a nation, which firmly believed in the advantages of free trade, in holding on to the existing tariffs as bargaining counters to try. through exacting reciprocal tariff cuts, to see a much greater movement to freer trade than could be gamed by unilaterally cutting its own

duties, and lowering its exchange rate to maintain, external balance-of-payments **equilibrium**⁴.

1.10 Other International Perspectives

In many ways, the legal framework of nations is the result of a particular political philosophy or ideology . Just as each country has its own political climate, so does the legal system change from country to country. The legal systems of the world are based on one of four sources-common law derived from English law found in the United Kingdom, the United States, Canada, and countries previously part of the English Commonwealth; civil or code law, which is based on the Roman law of written rules found in non-Islamic and non-Marxist countries; Socialist law derived from the Marxist-Socialist system found in China, the former Russia, Cuba and other socialist nations; and Islamic law derived from the Koran found in Iran, Iraq, Pakistan, and other Islamic nations. Thus, internationally traders find themselves in a situation where they have to conform to more than one legal system. Although this is complex enough, the difficulty of determining whose laws apply in some cases adds further to an already complex environment.

Some of the important practices and aspects which may affect competition in international trade are considered here-below.

Laws Against Bribery and Corrupt Practices

Though bribery in international business has been known to exist for years the enormity surrounding some bribery scandals in the early 1970s has caused a public furore about the practice in the United States. For example, in 1975, the US-based company, United Brands, was accused of paying a bribe of \$1.25 million in 1974 to a high government official in Honduras later identified as that country's president¹⁸. The bribe had been paid to obtain a reduction of an export tax levied by Honduras on each box of bananas. United Brands was a major banana exporter that marketed its products worldwide under the Chiquita label. Despite the public outcry about the affair that resulted in the replacement of the Honduran president, United Brands' only violation of US laws was the failure to have reported the payments by concealing them in the books of its subsidiaries⁴¹. As a result of these revelations, scores of US companies voluntarily declared such payments to the Securities Exchange Commission. According to some sources, more than 300 US corporations voluntarily declared illicit payments.

The flood of declarations triggered a new federal law, The Foreign Corrupt Practices Act of 1977, intended to stop the payment of bribes. Though the act covered the whole range of record keeping and control activities of a company both in the US and abroad, its best known section specifically prohibited US companies, their subsidiaries, and representatives from making payments to high ranking, foreign government officials or political parties. Specifically, the FCPA stated: "Prohibited are the use of an instrumentality of interstate commerce (such as the telephone or the mails) in furtherance of a payment or even an offer to pay 'anything of value,' directly

or indirectly, to any foreign official with discretion or to any foreign political party or foreign political candidate, if the purpose of the payment is the 'corrupt' one of getting the recipient to act (or to refrain from acting) in such a way as to assist the company in obtaining or retaining business for or with or directing business to any person. "

This portion of the FCPA applied to all US concerns and was not exclusively limited to companies subject to SEC jurisdiction⁰ The penalties for violation can be stiff: an executive who violates the FCPA may be imprisoned for upto five years and fined up to \$10,000. The company involved may be fined up to one million dollars. Though the FCPA prohibits outright bribery, small facilitating payments are not outlawed as long as they are made to government clerks without any policy-making responsibility.

One of the principal reasons why payoffs continue is due to the different attitudes toward bribery by various governments. Contrary to US law, the German government considers payoffs legal as long as they are made outside Germany. Furthermore, any such payments are tax deductible. As a result, many (JS-based) companies consider themselves at a disadvantage when competing for business in certain parts of the world where kickbacks are common. Some efforts have been made to help the US companies distinguish illegal from legal payments. The US Justice Department reviews proposed transactions and lets the companies know about the legal consequences¹. There is little likelihood that other governments would come around to accepting the US position. Europeans and Japanese view such payments as a cost of business.

In a study of US and Australian business people, both groups reported that bribery was a major ethical problem facing international business managers⁵². There has been criticism that the FCPA has had a negative impact on US companies versus their competitors who are not held to the same standard. This criticism is refuted by a macroeconomic study which found that the FCPA had not had a negative impact on US export trade⁵³.

To avoid any conflict with the law, some US companies have developed their own guidelines. DuPont Co. had adopted its own code of ethics before the FCPA became law in 1977 and, according to company officials, it is said to be even more stringent. Other companies that have spelled out in detail what employees can or cannot do include General Motors and Lockheed Corp". Companies with a clear technological lead such as IBM typically do not have to make payoffs to sell their products". And one official at a US aircraft company stated that since the passing of the FCPA in 1977 the requests for payoff were down by 80%⁵⁶. The Omnibus Trade and Competitiveness Act of 1988 amended the FCPA to clarify the level of detail and assurance a company should take to avoid illegal payments. The revision also increased the civil and criminal penalties for violation of FCPA".

Rejection of a request for a payoff often puts the executive in a difficult position. One strategy is to transform the private payoff into a public gift of funds for a hospital, services for the public good, or jobs for the unemployed. These actions may satisfy the request for funds while not violating the provisions of the FCPA⁵⁵.

:" the level, rm . - rid Nigeria has been cited as the paradigm of naked and
•r.nnelcd o nipn.-n According to New York Times, six per cent was the normal
c. s- iddca n corrupt n when Mr Shagari took over in 1979 after thirteen years of
military rule but b>)-J3 Mr Shagan was tolerating officials who took cuts of
between 2 and 14 per cent in exchange for their help⁵⁹. The magazine also said:

But irnipti« n-or "dash" to use a local name-has clearly exerted
a severe -train on the Nigerian economy in recent years. And
even many of those Nigerians and Westerners who do not
consider rruption immoral do consider its Nigerian variant
excessive.

! 'tic tell you something.'" said a western businessman with
Icrm cars t experience in Africa. "I like an atmosphere of
c rrupti.>n ! ..an make alot of money in that kind of environment.
Bui what - 'xen going on here, this-this was just ridiculous."

: he situation, businessmen here say, had degenerated to the
point where they had to bribe in order to be introduced to a key
Government official or bureaucrat, pay another upon the signing
f The .ri/ract. then kick back once more to get paid on time for
;hc rnxluct r .service they were providing and then bribe again in
order o have heir locally earned currency into foreign exchange.

I" e Government routinely issued import licenses to political
backer- wh. then sold them, often for more than the value of the
product to be imported⁰⁰."

Laws Regulating Competitive Behayjom:

Many countries have adopted laws that govern the competitive behaviour of their firms. In some cases, as for the European Community (EC), supranational bodies enforce their own laws. Unfortunately for international companies, these antitrust laws are frequently contradictory or differently enforced, adding great complexity to the job of the international executive and trader. The US, with its long standing tradition of antitrust enforcement, has had considerable impact on the multinational operations of the US companies and increasingly on those of foreign-based companies operating in the United States.

But foreign companies entering the US market may also have to deal with US antitrust legislation. When Nippon Sanso attempted to buy Semi-Gas Systems, the San Jose California manufacturer of semi conductor equipment, the US Justice Department blocked the takeover. The government said that the purchase would give Nippon Sanso 48% of the US market, therefore reducing competition³¹.

In other countries, antitrust legislation may be enforced differently than in the US. For example, the Office of Fair Trading in the UK has investigated antitrust practices in the UK copier market a number of times in the recent past. Practices such as requiring customers to only buy toner from the manufacturer and not selling same parts to parties who repair and service machines, may be why the top suppliers have 66% of the market⁶². Though member countries of the EC have some antitrust laws, the Common Market Commission also called the European Economic Commission . which functions to some extent as a government, enforces its antitrust legislation on a

European level. Starting rather slowly, enforcement and convictions increased in the early 1970s to reach about twenty convictions each year⁶³. According to the EC agreement companies are not allowed to abuse the dominant market position in either the entire EC territory or a significant part of it. Several large companies have been convicted for various violations in the areas of pricing, distribution policies, or mergers. A detailed examination of the European Union Competition laws will be made in Chapter 2.

One of the firms under investigation was International Business Machines Corp., which came under attack for some of its marketing practices⁶⁴. Several US and European computer firms selling plug-compatible equipment¹ for IBM customers complained to the European Commission that IBM suddenly changed its selling practices. IBM had been restricting operating information on how to connect computer units and had been inducing its clients to buy only IBM software by refusing to price memories and software separately from the overall cost of a computer. The case was settled in 1984 and IBM was required to publish within four months of a new product announcement any information required by competitors to develop compatible equipment⁰⁵. In another case European manufacturers brought a complaint against Korean car radio manufacturers, claiming they were dumping car radios in Europe at prices below their Korean home market. Korean imports into Europe had increased from 1.1 to 5.8 million while European manufacturers' share of market had dropped from 49% in 1985 to 23 % in 1988. The European Commission has evaluated the case⁶⁶.

Product Liability

Though there are laws and regulations that directly affect all aspects of international trade, regulations on product liability are included here because of their enormous impact on all firms.

Regulations on product liability are relatively recent and started first in the United States. Other countries have laws on product liability as well; one of the major problems for international traders involves the differences in laws in different countries or regions. In the United States, product liability is viewed in the broadest sense, or along the lines of strict liability. For a product sold in defective condition that becomes unreasonably dangerous for the user, both producer and distributor can be held accountable.

Product liability laws changed in Europe as well. In the mid-1970s, the European Commission proposed a set of regulations that was to supersede each member country's laws. Traditionally, the individual country laws had been rather lax by US standards. The new regulations have been described as even tougher than those in the US⁶. In the US, the plaintiff must prove that the product was defective at the time it left the producer's hand, whereas under the EC guidelines it is the manufacturer who must prove that the product was not defective when it left his control. Nevertheless, there are differences due to the different legal and social

systems. In the EC, trials are decided by judges and not common jurors. And the existing extensive welfare system will automatically absorb many of the medical costs that are subject to litigation in the US. Furthermore, it is typical for the loser in a court judgment in Europe to bear the legal costs. In the case of product liability cases, if a company is found to owe damages to a plaintiff, then it also will have to pay the plaintiff's legal costs according to typical fee standard?. This differs substantially from the US system in which a winning plaintiff's lawyer typically is compensated through a predetermined percentage of the awarded damages, a practice that in the eyes of many experts has raised award damages and, as a result, liability insurance costs.

The rapid spread of product liability litigation, however, forces companies with international operations to carefully review their potential liabilities and to acquire appropriate insurance policies.

Although an international trade manager cannot be expected to know all the respective rules and regulations, executives must nevertheless anticipate potential exposure and, by asking themselves the appropriate questions, make sure that their firms consider all possible aspects. Inexorably competition is affected as product liability considerations increase the cost of products.

Patents and trademarks

Patents and trade marks are used to protect products, processes, and symbols. Patents and trademarks are used by each individual country, so traders must register every product in every country they intend to trade with. This labyrinthine requirement makes the conduct of liberalized trade rather uncertain and this may affect international trade and competition. The WTO Agreement on Trade Related Aspects Of Intellectual Property Rights (TRIPS) was one of the agreements reached at the conclusion of the Uruguay Round in December, 1993. It seeks to promote effective and adequate protection of intellectual property rights internationally. However, in view of the fact that few Intellectual Property Rights emanate from the developing world. TRIPS may work against competition in developing countries.

Due to its vast technological advantages, the United States of America leads in the area of registration of Patents and Trade Marks. For example, The firms receiving the most US patents in 1988 were Hitachi, Toshiba, Canon, GE, Fuji Film, Philips, Siemens, IBM, Mitsubishi, and Bayer. The US firms in the top 10 were GE and IBM. It does not seem that some of the biggest US trading partners have as open and accessible patent systems as obtain in the US. For example, Allied Signal took eleven years to get its patent on amorphous metal alloys approved in Japan. Allied Signal alleges that the Japanese patent office dragged its feet while the Ministry for Trade and Industry (MITI) launched a catch-up program with thirty-four Japanese companies⁶⁹. This is apparent discrimination and may affect competition. The US Trade Representative watches its trading partners to assure they are protecting intellectual property. Countries on the priority watch list-that is, subject to scrutiny-are Brazil, India, China and Thailand⁷⁰.

Infringement of Intellectual Property Rights, became a significant problem since the 1980s, affecting computers, watches, designer clothes, and industrial products. The sale of counterfeit goods ranging from Louis Vuitton bags and Rolex watches to car parts and medicines is estimated to be a hefty \$150 billion a year. The United States and other industrialised countries are working together to stop this illicit trade. It is because of the importance of Intellectual Property Rights to America that Washington, almost single-handedly, forced a proposal for trade-related aspects of intellectual property (TRIPS) on the agenda of the Uruguay round of GATT talks. The Western countries pushed the TRIPS proposal to be approved to strengthen the regulation and enforcement of intellectual property rights¹.

Development countries such as Kenya are placed on the receiving end as they have no serious Intellectual Property Rights they can talk about. This explains why I have mainly used examples from the United States of America. It is, however, quite clear that the protection of Intellectual Property Rights is by its very nature anti-competitive in that it seeks to exclude untrammelled use of such rights in the market place.

International Court Judgments

One of the great difficulties with international law and international trade is the task of determining which law applies where. In the US. state courts will enforce

each other's judgments automatically. This is normally not the case with international judgments. One exception, however, involves judgments within the European Community. A French court will uphold a decision of a German court and can enforce it even though the legal basis for the judgment may be different. How far this can go is illustrated by a suit filed in Austria against Jean-Claude Killy, the former French skiing champion. According to both German and Austrian law, anyone who has any amount of personal property, however small, in those countries can leave himself or herself open for a suit. When Jean-Claude Killy left a pair of shorts once in an Austrian ski resort, it was sufficient to be able to bring a suit against him in an Austrian court. Such a judgment has to be enforced by other European courts that can attach property. In the case of a US firm, it can mean that a judgment against it in Italy, for example, can be enforced against property the firm owns in Germany. To avoid being subject to often much stricter European law, the US government concluded a treaty with the British government to recognize each other's courts judgments. As a consequence, UK courts do not have to enforce EC judgments against US firms made in other EC member states".

The International Court in The Hague, Netherlands, will render judgments on international business disputes but its judgments are not automatically binding to the parties involved. The European Court situated in Luxembourg, renders judgments that are only binding in the EC member states. To deal with this lack of a generally accepted and binding court, companies frequently use a predetermined format of arbitration panels. They may consist of specially appointed representatives, or the firms may use panels available from the International Chamber of Commerce. In any

event international traders are advised to include in major contracts specific rules of how they expect to solve contract disputes. A simple dependence on national courts is often insufficient. Lack of a general system of enforcing international trade judgments is an impediment to free trade and hence, international competition. This is because firms which can not receive prompt payments for their products may go bankrupt, thereby lessening competition internationally. This will have the effect of also affecting competition in the national markets.

Global Trends in Politics Affecting Trade

The impetus for the single European Market was to protect Western Europe from the Soviets. The prospect of 1992 and a fortified Europe encouraged the US-Canada Trade Agreement, which has been followed by similar talks between the US and Mexico, Chile and Colombia. Ecuador and Bolivia. This can lead to a strong American bloc.

The third trading bloc will encompass the Pacific-Japan. Hongkong, Singapore, Taiwan, South Korea, and maybe North Korea. The world may be moving toward these three strong trading blocs which will encourage free trade within the blocs, while protectionism faces the countries outside the bloc. The recent Uruguay round of GATT talks indicated a major problem with eliminating these strong regional interests in place of a global move to free trade. While GATT has helped

reduce the average tariff from 40% in 1947 to less than 5% in 1990, there are still strong protectionist tendencies. In the United States where exports account for 70% of manufacturing growth and 12% of GNP, there still appears to be a need to protect domestic production. The share of total imports into the US subject to quotas or restraints went from 9 percent in 1980 to 15 percent in 1990⁴.

1.11 CHAPTER SUMMARY

This work is a comparative study of the competition law regimes of Kenya, The USA, and the European Union. In this Chapter, the study has discussed the need for antitrust measures. The historical foundation of antitrust has also been addressed.

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It has been seen that antitrust in its present form was introduced in the USA by the Sherman Act, 1890. The Sherman Act experiment was seminal in the area of antitrust and interesting hybrids have since sprouted around the world. In all cases, the aim is clear in concept: to bring about the optimal degree of competition in the world. The American system is the substructure upon which the European and Kenyan antitrust positions are superstructured.

The economics behind the need for competition has been looked at in fair detail. The theory of comparative trade has been examined and it has been shown that competition at the international level is important to world trade and can impact upon national trade. It has further been shown that what matters is comparative advantage and not absolute advantage. Any attempt to suppress trade which is predicated upon

the theory of comparative advantage inexorably leads to pernicious results. The example of the Great Depression has been given to illustrate this point.

It has been demonstrated that the Great Depression was precipitated by the intransigence of the American Congress and President Hoover who sought to overprotect American manufacturers, farmers and other businessmen from foreign competition. The rest of the world retaliated and as a result world trade fell and the deleterious effects of this fall led to the Great Depression.


It has been shown that there were feelings, postulated mostly by American leaders, that the cause of the second world war may have been partly fuelled by the failure of the international trading system. This realization, coupled with the experience that the USA had undergone during the Great Depression, spurred the USA to spearhead the establishment of an international organization to promote competition in international trade.

Although the proposed International Trade Organization was not given ratification by the USA senate, which action led to its demise, 23 states, America included, acceded to the General Agreement on Tariffs and Trade (GATT) in 1947. The GATT established international machinery to promote competition. The USA, the European Union and Kenya are all participants in GATT rounds and fully participated in the most recent Uruguay Round whose Final Act was signed in Marrakesh, Morocco, in April, 1994. All existing GATT members including the USA, the European Union and Kenya, acceded to the World Trade Organization (WTO) which succeeded GATT in January, 1995.

The Chapter has also examined international perspectives that impact upon international trade. These include diverse laws regulating competitive behaviour, product liability laws, bankruptcy laws, international court judgments and global trends in politics affecting trade. To the extent that these perspectives can affect international trade, they are important both to international and national competition. This, once again, is borne out by the effect of the Great Depression on international trade and national economies.

1.12 PROGRAMME OF WORK

Having examined the origins of antitrust, its historical foundations, and also having examined GATT [now WTO] and other international competition perspectives in this Chapter, we shall now proceed to explore in detail the anti-trust positions of the United States of America, the European Union and of Kenya in the next Chapter. In Chapter 3 we shall appraise the antitrust positions that will be dealt with in Chapter 2. Chapter 4, will deal with the Summary, Observations and recommendations.



CHAPTER 2

THE ANTITRUST POSITIONS OF THE USA, THE EU AND KENYA

2.1 ANTITRUST POLICY IN THE USA

2:1:1 Introduction

As seen in chapter 1, antitrust policy is the term used to describe government policies and programs designed to control the growth of monopoly and prevent firms from engaging in undesirable practices. The federal government's right to regulate business in the US is based on the commerce clause of the Constitution. The commerce clause is Article I, Section 8; which states that "The Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Three laws currently define the government's approach to antitrust policy:-

1. Sherman Antitrust Act (1890)- Section 1 outlaws contracts and conspiracies in restraint of trade.

Section 2 forbids monopolization and attempts to monopolize.

2. Clayton Antitrust Act (1914) - Section 2, as amended by the Robinson-Patman Act (1936), bans price discrimination that substantially lessens competition or injures particular competitors. Section 3 prohibits certain practices that keep other firms from entering an industry or competing with an existing firm. Section 7, as amended by the Celler-Kefauver Act (1950), outlaws mergers that substantially lessen competition.
3. Federal Trade Commission Act (1914) - Section 5, as amended by the Wheeler-Lea Act (1938), prohibits unfair methods of competition and unfair or deceptive acts.

As demonstrated in Chapter 1, Economic Theory presents sufficient evidence against monopoly to justify the presumption that impairments to competition are harmful. A monopolist does not operate at the bottom of the average-total-cost curve, does not set a price that

is equal to marginal cost, and earns economic profits in the long-run.

How does a firm become a monopolist? Is large size necessarily evil? How are we to judge whether a firm's actions favour competition or limit-competition? If large firms become large because of unfair practices against rivals, then large size is harmful to society. But if large size results from economies of scale, society may be better off with the large firm than with many smaller firms. Determining whether a firm's actions are beneficial for society and whether large size is harmful to society is one of the aims of antitrust policy. It is the legal clothing of public policy arising out of the economic realities that competition is beneficial to the public interest. It aims at policing the business environment to assure fair business practices, to protect the business environment from incipient and insidious predatory infractions thus providing potential proactive deterrence and to restore rights that are taken away through abuse of fair and competitive policies in the business environment..

The government tries to distinguish beneficial from harmful actions by focusing on unreasonable monopolistic restraints. An illustration of the need to distinguish beneficial practices from harmful practices is reported by the Daily Nation with regard to trading practices by Microsoft¹. Microsoft had required that computer manufacturers install its Internet Explorer browser along with the company's dominant Windows 95 operating system. That tactic, the US Justice Department charged, was aimed at enabling Microsoft to use its dominance in the operating systems market to stake out a monopoly in the separate browser sector.

The Government deemed Microsoft's move to be antitrust and the Justice Department asked that Microsoft be fined \$1million a day for its failure to honour a preliminary injunction issued on 11/12/97. Microsoft on the other hand countered that the browser and the operating system could not be separated without harming the operation of windows 95. Microsoft felt that the Government was discouraging industrial incentive as evidenced by its research breakthroughs and therefore discouraged competition in this area. The antitrust suit was settled by consent in November, 2002.

What is unreasonable? The answer has varied as the interpretation of the statutes by the courts and government authorities has changed.

There have been three distinct phases of antitrust policy in the US as shown in figure 2.1 below.

Figure 2.1 - Phases of Antitrust Interpretation(USA)

1890	Sherman Act	Rule of Reason Lax Enforcement
		li
1914	Federal Trade Commission Act/ Clayton Act	Per Se Rule Tight Enforcement
		u
•1980s		Rule of Reason Loose Enforcement

SOURCE : W. BOYES AND M. MELVIN,
ECONOMICS(BOSTON:KMC, 1991)

As seen from figure 2.1, the interpretation of antitrust policy has varied over the years. With the Sherman Act of 1890 the government formally began an antitrust policy. But enforcement was lax until 1914. Between 1914 and the early 1980s on, enforcement has relaxed and a rule of reason has prevailed.

The first began, with passage of the Sherman Antitrust Act in 1890 and lasted until about 1914. Initially the feeling was that the Sherman Act was absolute, thus prohibiting "every" monopoly and trade restraint. In this period, litigation was infrequent. Subsequently, the courts used a rule of reason to judge firms' actions: being a monopoly or attempting to monopolize was not in itself illegal; to be illegal, an action had to be unreasonable in a competitive sense and the anti-competitive effects had to be demonstrated. This was done in 1911 by Chief Justice White who read a "a rule of reason" into both sections of the Sherman Act in *Standard Oil Co. of NJ v. U.S.*² and *U.S. v. American Tobacco Co.*¹. -Standard Oil and American Tobacco were found guilty for monopolizing unreasonably: for being 'bad' trusts, not just having monopolized. This enervated

antitrust for several decades, because it reversed the burden of proof. Agencies had now to prove both;-

- (a) that a monopoly or restraint existed, and
- (b) that it had 'unreasonable' origins or effects.

The 'rule of reason' spirit, has persisted despite its bold rejection in 1945 in the Alcoa case[U.S.v Aluminium Co. of America⁴].

The second phase of antitrust policy began in 1914 with the passage of Clayton Antitrust Act and the Federal Trade Commission Act. Operating under these two acts, the courts used the per se rule to judge firms' actions: actions that were potentially monopolizing tactics were illegal. This was the jurisprudential substructure upon which judgments in U.S. v Aluminium Co. Of America (the Alcoa Case)⁵ and Erown Shoe Co. V U.S⁶were predicated.

Since the early 1980s, the courts have returned to the looser rule-of-reason standard⁷. The only tactic currently deemed intrinsically illegal is collusion, or price fixing⁸.

The most recent phase began without support from the majority of economists and with the support of only a

small minority of the legal profession⁹. Although support for the rule of reason has grown in recent years, many economists continue to believe that entry by new firms into markets is not as free and easy as recent antitrust enforcement would seem to indicate^{11*}. A significant fraction of economists believe that dominant firms do act in anti-competitive ways. Nevertheless, for the past decade, the antitrust agenda has been set by the economists who believe that most business actions are not anti-competitive".

2.1.2 Procedures

Action against alleged violators of the antitrust statutes may be initiated by the US Department of Justice, by the Federal Trade Commission (FTC), and by private plaintiffs.

The Justice Department focuses on the Sherman Antitrust Act, and the FTC on the Federal Trade Commission and Clayton Antitrust Acts. Private plaintiffs may sue on the basis of any of the statutes except the Federal Trade Commission'Act.

The Justice Department concentrates on collusion, restraints, monopolization, and mergers. Its suits are filed in federal district courts. Since passage of the Sherman-Act in 1890, the Justice Department had by 1991 filed nearly 1,800 cases². A classic case, the ATT case resulted in the breakup of AT&T into the seven smaller telephone companies known as 'Baby Bells'³." The case was filed in 1974 and settled in 1982. The lengthy period of eight years between the filing of the case and its final determination should be noted as delay impinges upon the efficacy of antitrust measures.

The Federal Trade Commission is headed by five commissioners appointed by the president. Unlike the Justice Department, the FTC has no direct responsibility for enforcing the Sherman Act. Rather, the Clayton Act, the Federal Trade Commission Act, and the various amendments to these statutes get most of the FTC's attention. Almost all formal FTC proceedings are initiated by an administrative complaint issued to one or more alleged offenders; lawsuits are not filed in federal district courts. Since 1941 the FTC and the Justice Department had by 1991 together filed nearly 2,800 cases⁴.

Private plaintiffs (that is, consumers or other businesses) who are injured by antitrust offenders may sue them under any of the -statutes except the Federal Trade Commission Act. Private parties can be awarded treble damages, amounts totalling three times the proven damages, if they win the suit.

The notion of treble damages, deemed anathema by British authorities, led to the enactment of the British Protection of Trading Interests Act 1980 following protracted litigation in *Westinghouse Electric Corp. v Rio Algom Ltd.* The seeking of treble damages under the Clayton Act amounting to six billion dollars by the plaintiffs threatened the survival of industries critical to the well-being of foreign nations leading to the British enactment of the Protection of Trading Interests Act 1980. Over the last 20 years, private suits have outnumbered those filed by the Justice Department and the FTC combined¹⁵. Most private suits are filed by wholesalers or retailers who have disputes with manufacturer-suppliers'. Most of them end in voluntary dismissals or pretrial settlements¹⁸.

2.1.3 Remedies

Only private plaintiffs who prove their injuries can sue for treble' damages. The Justice Department and the FTC do not obtain treble damages but can impose substantial penalties. They can force firms to break up through dissolutions or divestitures, and criminal actions can be filed by the Justice Department for violations of the Sherman Act: The ATT case (Supra] is apposite. A guilty finding can result in fines and prison sentences.

2.1.4 Demonstration of Antitrust Violations

The only activity consistently judged illegal by the courts since 1390 is collusive restraint of trade by price fixing¹⁹. Section 1 of the Sherman Act forbids any "contract, combination, ... or conspiracy in restraint of trade." If prices are being fixed, the courts do not try to determine whether the prices are reasonable. Price fixing is by definition illegal - there is no justification for it. If sellers form a cartel, the courts do not try to determine whether the cartel had an

influence on the market. Their action is illegal because it results in a "combination ... in restraint of trade," regardless of whether they control 5, 10, or 80 per cent of the market. In short, the courts, do not consider motives, circumstances, or even any resulting improvements in economic efficiency.

Other aspects of the antitrust statutes are not so clear-cut. For instance, section 2 of the Sherman Act outlaws "monopolization" but does not forbid monopolies. A firm that is the first to market- a new type of VCR will have a monopoly because it is the sole occupant of a market that it created. Monopoly itself is allowed. To monopolize or to attempt to monopolize constitutes a violation. If the firm attempts to preserve its monopoly in the special VCR market by activities that restrict entry, then the firm may be guilty of a section 2 violation.

Firms that "monopolize" or "attempt to monopolize" are typically larger or dominant firms that possess substantial power. The aim of the statute is to stop big business from unfairly driving smaller firms out of business and to stop big business from barring entry by

others. For conduct to violate the Sherman Act, a firm must wield substantial market power and must have the intent to monopolize.

2.1.5 Market Power

The key indicator of market power is the share of the market held by the alleged monopolizer. The most commonly used indicators of market power are concentration ratios and the Herfindahl index.

A concentration ratio is the percentage of industry sales (output, employment, or assets could also be used) that is accounted for by a certain number, usually four, of the industry's largest firms. The four-firm concentration ratio is calculated by summing the sales of the largest four firms in an industry and dividing by the total sales in that industry. If, for instance, the top four firms in a given industry have sales of \$100 million and total sales in the industry are \$1 billion, then the four-firm concentration ratio is 10 percent. Low ratios indicate that pricing and output decisions are made by a few firms.

The Herfindahl index is defined as the sum of the squared market shares of each firm in the industry²⁰. ••

Thus: -

$$\text{Herfindahl index} = (S_1)^2 + (S_2)^2 + \dots + (S_n)^2$$

where S refers to the market share of the firm, the subscripts refer to the firms, and there are n firms.

The Justice Department relies on the Herfindahl index because it provides a measure of the concentration of the entire industry²¹. In 1982, the Justice Department issued its guidelines on market concentration. Industries with Herfindahl indexes below 1,000 are "highly competitive." Those with indexes between 1,000 and 1,800 are "moderately competitive," and those with indexes above 1,800 are "highly concentrated." These designations are arbitrary but useful. They help businesses decide whether to pursue a merger or some other activity that falls under the jurisdiction of the Justice Department. The Justice Department has made it clear that attempts by any firms to merge within an industry that has a Herfindahl index greater than 1,800 will be seriously

questioned. A merger that would raise the index by 50 points would also be questioned.

It should be noted that before the Herfindahl index for a particular firm is determined, the market share of the firm or the concentration of an industry as a whole must be calculated first. Before the market share of a firm or the concentration of an industry can be calculated, however, there must be some definition of the market. In a \$100 billion market, for instance, an \$80 billion firm would have an 80 percent market share. But in a \$1,000 billion market, an \$80 billion firm would have only 8 percent market share. The Herfindahl index for the former would exceed 2,000, but for the latter it would be less than 1,000. Obviously, antitrust plaintiffs (those accusing a firm of attempting to monopolize a market) would want the market defined as narrowly as possible so that the alleged monopolizer would be seen to have a larger market share. Conversely, defendants (those accused of monopolization) would argue for broadly defined markets in order to give the appearance that they possess a very small market share.

An attempt by the Coca-Cola company to purchase Dr Pepper Company illustrates the problem of defining markets²". Coca-Cola, Dr Pepper, PepsiCo, and Seven-Up are usually identified as producers of carbonated soft drinks (CSD). The firms provide bottlers with the concentrate that is used to make the drinks. The principal question in the analysis of the merger was whether CSD was the appropriate market in which to assess the competitive consequences of the merger or whether the market should be more widely defined, perhaps to encompass all potable liquids.

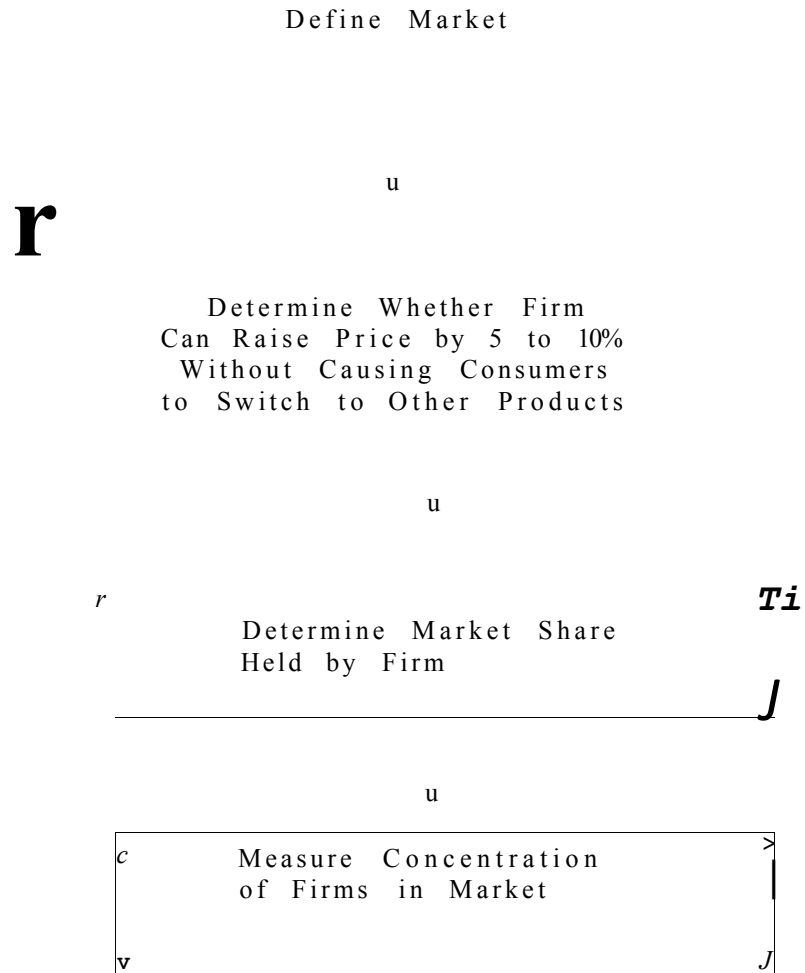
How was the market definition determined? CSD company executives indicated in interviews that they believed their primary competitors were other CSD producers. They maintained that they fashioned their pricing and marketing strategies with other CSD producers in mind - not, as claimed by the defendant, by considering how the sellers of all potable drinks (fruit juices, milk, coffee, tea, etc.) would react. The interviews also revealed that many CSD industry executives thought they could collectively raise the retail prices of carbonated soft drinks by 10 percent with no fear of consumers' switching to other beverages.

That argument had implications for the definition of the market.

If sellers can collectively raise the price by 5 to 10 percent without causing consumers to switch to other products, then those sellers represent the lion's share of the market. However, if consumers will switch, then the market must be more broadly defined to include the substitutes consumers move to. Once the market is defined, the market shares and concentration measures can be determined. If the market share or the concentration ratio is small, merger actions are usually ignored. If the market share or the concentration ratio is large, merger actions are carefully scrutinized.

In the Coca-Cola case, a narrow definition of the market prevailed and the merger was not allowed because the combination of Coca-Cola and Dr Pepper would have resulted in too great a level of concentration. The steps used to define market power are summarized in Figure 2.2 below.

Figure 2.2 - Determination of Market Power



SOURCE

PREPARED BY THE WRITER

2.1.6 Intent

When the market and market shares have been defined, the next task is to establish intent. The problem gets no easier at this stage. As noted previously, there have been three distinct interpretations of Section 2 of the Sherman Act regarding intent. In the early days, intent was established simply by demonstrating that actions led to abuses. From about 1914 to the early 1980s, the mere existence of certain practices " was sufficient. to establish intent to monopolize. By the early 1980s, the Supreme Court had begun to accept the possibility of competitive justifications for almost any action taken by competitors.

No area has undergone more fundamental revision in the eyes of policy makers than vertical relationships-the exchange of goods and services between a supplier and its distributors, between a franchiser and its franchisees, or, in general, between a firm that supplies resources or goods to other firms and those other firms³. They also engender relationships between a manufacturer and its distributors involving price, quantity or territory. Vertical relationships include vertical mergers, vertical pricing practices, and non-price vertical restraints⁴.

Until the 1980s, vertical practices dominated the antitrust agenda. In recent years, vertical relationships have been of little concern to antitrust officials²⁵.

A vertical merger occurs when two or more firms, one of which supplies resources to the other(s), are combined into one firm. Vertical mergers are rarely challenged.

4.

Vertical pricing practices include price discrimination and resale price maintenance. Price discrimination, the sale of an identical product at different prices to distinct sets of customers, has not been a major concern of antitrust officials in recent years²⁶. Resale price maintenance occurs when a manufacturing concern requires its distributors to sell a product at a particular price²⁷. An example is the relationship between Spray-Rite Service Corporation and Monsanto²⁸. In the 1960s, Spray-Rite, a distributor of Monsanto's corn herbicide, had to resell the Monsanto product at the price set by Monsanto. When it did not, Monsanto cancelled its distributorship. Spray-Rite sued Monsanto, and the trial went through several appeals before finally ending on the side of Monsanto. Until the

1970s, resale price maintenance was generally held to be illegal. It now is permitted under most circumstances²⁹.

Non-price vertical restraints include product restraints, territorial restraints, and customer restraints. 'Exclusive dealing' refers to a situation in which a distributor must sell only the product for which it has a distributor contract. In the USA, for example, many autoparts distributors, carry Napa, Autolite, STP, and other brands of products. An exclusive dealership would carry only one product line.

Manufacturers may assign exclusive territories to distributors. Each dealer is assigned a particular territory and cannot sell outside of the assigned territory. For instance, if a Chevrolet dealership moves into an area already assigned to a different Chevrolet dealership, the relocating dealership is infringing on exclusive territory.

Manufacturers may also place certain customer restrictions on a distributor. Customer restriction clauses may prevent a dealer from selling its products to a certain group of customers. For instance, Kodak sells

co two types of customers-distributors and certain photofinishing labs. Kodak places the labs off-limits to the distributors. Any Kodak distributor that sells to these labs is violating the Kodak customer restriction. Tying is another customer restriction. Under tying arrangements, a certain product can be purchased only if another product is also purchased. For instance, a copying lab might need chemicals and paper. If the lab must purchase Xerox chemicals in order to purchase Xerox paper, then those products are tied.

At first, vertical restraints were thought to impair entry and competition³⁰. If Kodak required dealers to carry only Kodak, then Fuji and Mitsubishi would face huge costs in getting their own network of dealerships started. As a result, entry would be much less likely than if Fuji and Mitsubishi could use the Kodak dealership network. In a reversal, however, arguments that such actions by a manufacturer actually enhance competition eventually prevailed. The reasoning is that a manufacturer cannot guarantee quality service and quality products from all distributors unless it can require that the distributors carry out certain actions. If distributors are competing with each other, they may be

devoting time and actions that are duplicative from the manufacturer's perspective. Moreover, competition among distributors, can actually harm a manufacturer. If one distributor lowers the price of a product in order to gain market share from another distributor, consumers might lose faith in the product or begin to think it a lower-quality product. Since about 1980, such arguments have convinced the courts to allow virtually all non-price vertical restraints.

t

Several other traditional concerns of antitrust policy have virtually disappeared from the agenda of the agencies enforcing the law and from the courts in the past decade or so. Price discrimination and predatory pricing have not been challenged in recent years, and the only type of mergers questioned by officials are horizontal mergers-mergers of competitors'¹.

Regardless of the nature of the case, the steps of the antitrust process in the United States follow the sequence shown in Figure 2.3 below.

Figure 2.3 - The Steps of Antitrust Enforcement(USA)

Suit or Complaint Filed
by Government or
Private Plaintiff

J

Market Defined
v.

u

Anticompetitive Activity
and Intent Identified

C Damages Measured

u

Remedies Administered

SOURCE : PREPARED BY THE WRITER

Figure g.3 shows that antitrust enforcement beq
with the alleged violation and the filing of a suit
the government or by private plaintiffs. Then it
necessary to define the market and market share a.
identify the anticompetitive act. The measurement

damages and the outcome of the action and the case are the last steps.

After the action is recognized, a suit or complaint is filed, the market is defined, the anticompetitive activity is identified, the damages of the activity are measured, and remedies are determined'. This general process (of interpreting and enforcing antitrust statutes) occurs in the EU, in Kenya, and in other countries although the specifics of each step differ from one country to another.

1.7 Extra-Territorial Relations

The extra territorial jurisdictional reach of US antitrust laws has undergone considerable change over the years. In his 1909 opinion in *American Banana Co. v. United Fruit Co.*³². Justice Holmes ruled that the Sherman antitrust statute did not apply at all to acts done outside the US. Subsequent cases held that there was subject matter jurisdiction where acts committed abroad as well as within the United States had an impact in the country. Then in the *U.S v Aluminium Co. Of America (the U-coa Case)*³³ (Supra), Judge Learned Hand ruled that the

statute covered purely extra-territorial acts which were attended to, and did in fact, affect American imports.

The *Timberlane Lumber Co. v Bank of America*, case³⁴ introduced the so-called jurisdictional rule of reason which has been used in various formulations by courts. In articulating this test, *Timberlane* said:-

The elements to be weighed include the degree of conflict with foreign law, or policy, the nationality or allegiance of the parties and the locations or principal places of business or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is an explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The advantage of this 'rule of reason' is that it allows a court to take into account all the factors which under international law and conflicts of law principles, may affect the propriety of applying American law abroad. In a related comparison, extra-territorial jurisdiction

European Union antitrust law was recognized in the
c pulp Cartel Case³⁵.

THE EUROPEAN UNION ANTITRUST POSITION

1 Introduction

Articles 81 and 82 (now 101 & 102) of the EC Treaty
form the pillars of the European Community antitrust
policy. Each of these articles "addresses" different forms
of antitrust behaviour. Article 81 prohibits agreements
and concerted practices among private commercial bodies
which affect trade between Member States and distort,
prevent or restrict competition. Article 82 prohibits
commercial practices by one or more enterprises where
such practices amount to an abuse of a dominant position
within the Community. These two provisions therefore seek
to achieve separate objectives.

Article 101 attempts to eradicate unfair commercial
practices which result from collaboration between
enterprises while article 102 strikes at companies taking
advantage of dominant or monopoly positions in the market
place.

2.2.2 European Union Policy Towards Restrictive

Trade Practices-Article 81 of the EC Treaty

[a] The subjects of European Community Law

Both Articles 81 and 82 apply to 'undertakings' although this term is not expressly defined. The European Court has, however, defined an undertaking as:-

a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a long term economic aim': Mannesmann v High Authority³⁵.

This definition embraces all natural and legal persons engaged in commercial activities, whether profit making or otherwise. The fact that an entity is a non-profit making organization is irrelevant for the purpose of identifying an undertaking: Heintz v Van Landwyck Sari v EC Commission³⁷. The critical characteristic is whether or not the entity is engaged in economic or commercial activities.

The application of European competition law is not restricted to undertakings located within the Community, but extends to undertakings whose registered offices are

situated outside the Community. This is because European competition law is not concerned with the behaviour of the entities but rather the effects of such behaviour on the competitive environment within the Community. See Woodpulp Cartel Case³⁸.

[b] Commercial practices prohibited by Article 81 of the EC Treaty

Article 81(1) of the EC Treaty addresses different forms of concerted behaviour between two or more undertakings and specifically provides:-

'The following, shall be prohibited within the common market: all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member states *and* which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which :

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical developments, or investment;

c) share markets or sources of supply;

a) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their

nature or according to commercial usage, have no connection with the subject of such contracts.'

All agreements, decisions and practices prohibited under Article 81(1) are automatically void unless exempt from the scope of this sub-section by virtue of Article 31(3). The Article itself enumerates a number of examples of anti-competitive behaviour in order to illustrate the types of conduct which the provision is intended to limit.

i) Price fixing

Practices which have the effect of directly or indirectly fixing buying or selling prices for products are incompatible with competition policy. This includes arrangements whereby undertakings agree on the particular trading conditions which are applicable to their business dealings, such as discount or credit terms. Another example of prohibited practices is agreements to fix prices and to apportion markets : Re Italian Flat Glass Suppliers³⁹.

ii) Limitation or control of production

Quotas on production and supply cartels are contrary to competition policy, as are arrangements to control marketing, technical development or investment. An illustration of this type of practice is the setting of volume targets for production: *VC Cartel case*⁴⁰.

iii) Allocation of markets

Practices which allow potential competitors to apportion a market in a particular product amongst each other on a mutually exclusive basis are prohibited. This practice is condemned when the apportionment is made on the basis of either geography or product ranges: see *Siemens-Fanne*⁴¹ and *ACF Chemiefarma NV v EC Commission*⁴¹.

iv) Application of dissimilar conditions

By applying dissimilar sales conditions to identical transactions one undertaking may place another at a competitive disadvantage. For example, an agreement to provide one purchaser with more advantageous

purchasing conditions than another purchaser would result in unfair discrimination.

v) Imposition of supplementary obligations

Agreements requiring the fulfillment of supplementary obligations which, by their nature of commercial usage, have no connection with the original subject matter of a contract, are prohibited. For example, agreements which require a buyer of one product or service to purchase another product or service unconnected with the first transaction would amount to the imposition of a supplementary obligation.

The above list of anti-competitive behaviour is intended to illustrate the most common forms of conduct which will infringe Article 81 and is not intended to be exhaustive.

[C] Agreements, decisions by associations of undertakings
concerted practices

Article 31 identifies three separate arrangements which may contravene competition law. These are:-

- agreements,

- decisions, and
- concerted practices.

Each" of these concepts refers to a different form of commercial practice among undertakings.

i) Agreements

The term "agreements" includes all contracts in the sense of binding contractual obligations , whether written ,verbal, or partly written and partly verbal. Furthermore, an arrangement between two or more parties may constitute an agreement for the purposes of Article 85(1) even although the arrangement in question has no binding legal effect: see *Atka A\S v BP Kemi A/S*⁴³. Even unrecorded understandings, the mutual adoption of common rules , and so-called 'gentlemen's agreements' are also agreements for the purpose of competition law :*Boehringer v EC Commission*⁴⁴.

Agreements which prevent , distort or restrict competition are classified either as horizontal agreements or vertical agreements. Horizontal agreements

are arrangements made between competitors or potential competitor's while vertical agreements are arrangements between undertakings at the differing stages of process through which a product or service passes from the manufacturing to the final consumer. Illustrations of horizontal agreements include agreements dividing markets among competitors, price fixing, export and import bans, cartels, and boycotts. Examples of vertical agreements include exclusive distribution agreements, exclusive patent licensing agreements, exclusive purchasing agreements and tying.

ii) Decisions of associations of undertakings

The concept of decisions of associations of undertakings refers to the creation of rules establishing trade associations, as well as any other formal or informal decision or recommendations made under such rules. Prohibited decisions of trade associations would include recommending prices, fixing discounts, collective boycotts and the negotiation of restrictive contract clauses. A recommendation by a trade association may constitute a decision, even although such acts are not binding under the constitution of the association iff

question: see *Vereening van Cementhandelaren v EC Commission*⁴.

iii) Concerted practices

The term 'concerted practices' refers to commercial cooperation in the absence of a formal agreement. The European Court has defined a concerted practice as: "a form of coordination between enterprises that has not yet reached the point where it is a contract in the true sense of the word but which, in practice, consciously substitutes practical cooperation for the risk of competition, : *Imperial Chemical Industries v EC Commission*¹".

Manufacturers and producers are, of course, entitled to take into consideration prices set' for similar goods by competitors. It is only when potential competitors deliberately and intentionally agree to coordinate pricing policy that a concerted practice arises. Commercial cooperation will likely amount to a concerted practice if it enables the entities under investigation to consolidate their market positions to the detriment of the principle of free movement of goods within the community and the freedom of consumers to

select products : Cooperative Vereening 'Suiker Unie' UA
v EC Commission.⁴ .

It is contrary to the rules on competition contained in Article 85 for a producer to cooperate with its competitors in order to determine a coordinated course of action relating to pricing policy , particularly if this cooperation ensures the elimination of ail uncertainty among competitors as regards matters such as price increases, the subject matter of increases, and the date and place of increases.

[d] Effects of trade between member states

No agreement, decision or concerted practice may be held contrary to Community competition law unless it affects patterns of trade between member states. The European court has observed:-

'It is only to the extent to which agreements may affect trade between Member state? that the deterioration in competition falls under the prohibition of the Community law contained in Article 85 (now 81);

otherwise it escapes the prohibition':
Cansten and Grunding v EC Commission⁴⁷.

This requirement is intended to enable a distinction to be drawn between unfair commercial practices which have only national ramifications and those practices which have community implications. The effect of an agreement on trade between Member States is ascertained by reference to the principle of free movement of goods and, in particular, the realization of the objective of creating a single market among the Member States of the Community. An agreement, decision or practice will affect trade between Member States if it is capable of constituting a threat, either direct or indirect, actual or potential, to the freedom of trade between Member States in a manner which might harm the attainment of the objective of a single market : Remia BV v EC Commission⁴⁹.

Actual harm need not be established. It is sufficient that the agreement is likely to prevent, restrict or distort competition to a sufficient degree : Society Technique Miniere v Ma'schinenbau 'Jlm GmbH⁵⁰. The Court said:

It should also be noted that there is no need for there to be any overt cross-border element in the transaction for an arrangement to affect trade between Member states. Thus, arrangements between producers to set target prices for the sale of products, even although they applied in only one Member State, have been considered by the commission to infringe Article 85(1) : Vereening v EC Commission [1972] ECR 977. There is no violation of Article 85 (now 81) if an agreement or practice has only a negligible effect on trade between Member States. Early in the jurisprudence of competition law, the European court held that: 'An agreement falls outside the prohibition in Article 85 when it has 'only an insignificant effect on the markets, taking account -of the weak position which the persons concerned have on the market of the product in question' : Frans Volk v Vervaerjce [1969] ECR 295."

Insignificant agreements escape the prohibition of Article 85 because their relative effect on trade between Member States is negligible.

[e] The object or effect of preventing, restricting or distorting competition within the Community

Agreements, decisions and practices are only prohibited under Article 81 if, in addition to satisfying all other relevant criteria, they have as their object or effect the prevention, restriction or distortion of competition within the community. Such arrangements may

have either the object or the effect of distorting competition. These options are clearly intended to be alternative, not cumulative, tests. An agreement will have the object of distorting competition if, prior to its implementation, it can be determined that the agreement would prevent or restrict competition which might take place between the parties to the agreement : Consten and Grundig v EC⁵¹. If an agreement does not have the object of restricting competition, whether or not an agreement has the effect of distorting competition may be determined by market analysis.

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[f] Activities outside the scope of Article 31(1)

An agreement, decision or practice may be excluded from the scope of Article 81(1) on four principal grounds: (i) where an agreement has been given negative clearance by the Commission; (ii) where an agreement is of minor importance; (iii) where an agreement regulates relations between undertakings to which the competition rules are inapplicable; and (iv) where agreements and practices benefit from the exemptions under Article 81(3).

i)' Negative clearance

An undertaking proposing to enter into an agreement or engage in a practice which might be considered to restrict, prevent or distort competition may apply to the Commission for negative clearance in respect of the arrangement. Negative clearance is a determination made by the Commission that, on the basis of the facts in its possession, it believes that there are no grounds under Article 81(1) for action to be taken against the submitted agreement, decision or practice. In order to obtain negative clearance, the undertakings submitting the application must prove that the agreement, decision or practice is excluded from the scope of the applicable competition provision. Negative clearance is therefore not strictly a separate ground for exclusion from the competition provisions of the EC Treaty, but rather certification that an agreement or practice, in the opinion of the Commission, falls outside Community competition law. Frequently, instead of making a formal decision on a matter, the Commission may notify the undertaking by correspondence that no action is required to conform to the terms of Article 81(1). Such

correspondence is known as a 'comfort letter'. It offers no absolute protection " from investigation by the Commission, particularly where the facts submitted by the undertaking vary from the true facts of the case.. But, if an investigation is subsequently initiated, the statement may be pleaded in mitigation should an infringement be established.

ii) Agreements of minor importance

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Agreements which would otherwise be caught by Article 31(1) may nevertheless be exempt from its scope if they are incapable of affecting trade between Member States or restricting competition to any appreciable extent. This principle is known as the de minimis rule and was originally conceived by the European Court in the Volk Case above. Agreements fall outside the prohibition of article 81(1)-(now 85(1)) if they have an •insignificant effect* on the market in such products. The Commission has published a notice intended to establish guidelines for the application of the de-minimis rule, the basis of which is the jurisprudence of the European Court in this subject. The Commission has

indicated that, in normal circumstances, agreements would fall outside Article 31(1) by virtue of the de minimis-rule, if two conditions can be established:-

1. Market share : the goods or services which are the subject of the agreement and its immediate substitutes do not constitute more than 5 per cent of the total market for such goods or services in the area of the common market affected by the agreement; and
2. Turnover : the aggregate annual turnover of the undertakings participating in the arrangement does not exceed 200 million ECU (approximately S 135 million): Commission 'Notice Concerning Agreements, Decisions and Concerted Practices of Minor Importance (1986).

The intention of the notice is to allow small and medium sized undertakings to benefit from the rule exempting minor agreements from the rigours of Article 81(1). The Commission has published a proposal to reform the de minimis rule. According to the terms of the draft Notice, agreements between undertakings engaged in

the production or distribution of goods and / or services are excluded from the prohibition contained in Article 81(1) if the joint market shares held by all the participating undertakings do not exceed:

- a 5 per cent threshold, where the agreement is made between undertakings operating at the same level of production or marketing (horizontal agreements); or
- a 10 per cent threshold, where the agreement is made between undertakings operating at different economic levels (vertical agreements).

In the case of mixed horizontal / vertical agreements, or where a particular agreement is difficult to classify as horizontal or vertical, the draft Notice indicates that the 5 per cent threshold is applicable. Equally, certain types of agreements will not be excluded from Article 95(1) under the draft Notice even if these thresholds are not met. These are particularly anti-competitive arrangements such as price fixing agreements and cartel arrangements.

iix) Commercial relations to which competition rules do not apply

The competition rules established under Article 81 do not apply to two particular commercial relationships: between principals and agents; and between parents and subsidiaries-. From the beginning of Community competition policy administration contracts entered into between principals and commercial agents have been traditionally excluded from the scope of Article 81(1) so long as the agent is concerned with the simple negotiation of transactions on behalf of the principal: Commission Notice Relating to Exclusive dealing Contracts with Commercial Agents (1962). While the non-application of Article 81(1) to such relationships legally has the form of a group negative clearance, the application of competition rules to such relations is clearly contrary to the policy of promoting competition throughout the Community.

A subsidiary which is under the control of a parent company is not considered to be capable of anti-competitive behaviour in relation to its parent since it has no autonomous decision-making capacity. Restrictive agreements and anti-competitive concerted practices between parents and non-autonomous subsidiaries are therefore not subject to the rules of Community

competition law. As the European Court has explicitly ruled:

'Article 85 (now 81) is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within, which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings': *Hydrotherm Gerabau v Audreoli*"².

Two conditions are therefore required in order to avoid the application of Article 81(1) on this basis:

- The subsidiary cannot have any real freedom to dictate its own course of action in the market place. Control over the conduct of a subsidiary is determined by reference to the size of the shareholding held by the parent.
- The restrictive agreement itself must relate only to the allocation of responsibilities and tasks between the parent and the subsidiary.

iv) Exempt agreements and practices

Article SI(3)-(now 85(3)) specifically creates criteria for exempting agreements, decisions and concerted practices from the effects of -Article 83(1). Agreements and practices which satisfy the exemption criteria established by Article 35(3) are not void under Article 81(2) nor subject to the imposition of fines. Two positive and two negative tests must be satisfied for an agreement to be exempt and the onus is on the applicant to establish these conditions are present:

*

- - the agreement, decision or practice must contribute to improving the production or distribution of goods or promoting technical or economic progress;
- - a fair share of the resulting benefit must accrue to the consumer;
- - the agreement or practice must not impose any restrictions which go beyond the positive aims of the agreement or practice; and

- - these restrictions must not create a possibility of eliminating competition in respect of a substantial part of the products in question.

Two types of exemption are granted on the basis of the authority of this provision:

- (1)- individual exemptions which are issued on the basis of an individual application; and
- (2) block exemptions which are applicable to categories of agreements.

Subject to 'review by the Court of First Instance and thereafter the European Court itself, the European Commission has exclusive authority to create exemptions on the basis of Article 81(3).

The procedure for obtaining an individual exemption is specified in Council Regulation 17/62. Individual exemptions are granted in the form of Commission decisions. These decisions are issued for a limited period and may be conditional on the fulfillment of certain obligations. A decision may be renewed if the

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relevant: conditions continue to be satisfied. The Commission may revoke or amend a decision granting an individual exemption in the event of a change of circumstances. Naturally an- individual exemption will only be granted if the four conditions of Article 81(3) are satisfied.

To reduce the bureaucratic burdens imposed by applications for individual exemption, the Commission is empowered to establish group exemption categories: Council Regulation 19/65 and Council Regulation 2921/71. The Commission has enacted a number of Regulations in order to grant group exclusive distribution agreements, exclusive purchasing agreements, specialisation agreements, research and development agreements, franchising agreements and technology transfer agreements.

If an agreement falls within the scope of a group exemption under a Commission regulation, the parties to the agreement are not required to notify the Commission of the agreement and the parties cannot be fined by the Commission for violating competition law on that basis. The Commission has, in its Green Paper *on Vertical*

*Restraints*², announced its intention to carry out an extensive review of the present block exemption regime applied to vertical restraint agreements. These are agreements between -producers and distributors, in the wide sense of these terms. The review will therefore extend to the block exemptions on exclusive distribution, exclusive purchasing and franchise agreements.

In its Green Paper on Vertical Restraints, the Commission has suggested four options as the possible outcomes from the review:

1. Retain the existing current system in its present shape.
2. Introduce less onerous block exemptions: this option would require the Commission to amend the present block exemptions to adapt them to more commercial situations. The result would be a mere flexible system.
3. Restrict the application of block exemptions: this would involve limiting the benefit of

block exemptions to companies with market shares below certain thresholds. A maximum threshold of 40 per cent of a relevant market' has been suggested.

4. Reducing the scope of Article 81(1): this option would entail abolishing the present system of block exemptions and introducing a rebuttable presumption of compatibility called 'negative clearance presumption'¹ that would link vertical restraints to the economic and commercial circumstances of the parties defined in relation to specific product markets.

The Commission has initiated the review because of the changing structure of the EU market. One factor of specific importance is the near-completion of the single internal market which required that the Commission give greater emphasis on the economic impact of vertical restraints on the structure of the individual product market.

A Green Paper is issued in order to generate discussions. It is indeed a discussion paper. The discussion it

[g] Remedies Through the National Courts

Articles 81 and 82 of the EC Treaty have direct effect and may be relied on by private individuals against other private parties in the national courts. Three remedies in particular should be noted:

- i) These provisions may form the basis for an action of damages against the party indulging in anti-competitive practices for injury caused to the business activities of the plaintiff : Garden Cottage Foods Ltd v Milk Marketing Board⁵³.
- ii) Article 81(2) declares that any agreement contrary to Article 81(1) is void. The European court has however applied the doctrine of severability to this provision and only those terms of an agreement which are contrary to the Article are void and the rest

generates informs the policy and decision making process.

remain in force : Delimitis v Henninger Brau AG⁵⁴.

- iii) An infringement of Article 85(1) may also form the basis of an action of injunction to prevent the party allegedly infringing competition law from continuing to do so.

In order to develop co-ordination between the Commission and the national courts in this area, the Commission has published a Notice to National Courts on the Application of Articles 85 and 86 (now 81&32) (1993). This notice sets out in detail the procedure which National courts should follow if an allegation of an infringement of Community competition law arises before them.

In fact, the Commission has adopted a deliberate policy of encouraging private parties to use domestic court procedures rather than complaining direct to the Commission by declining to investigate complaints unless there are important Community considerations to be taken into account. This policy has been supported by the European Court: see *Automec v EC Commission*".

2.3 EUROPEAN UNION ANTITRUST POLICY TOWARDS MERGERS AND ABUSE OF DOMINANT POSITIONS - ARTICLE 32 (old 86) OF EC TREATY

2.3.1 Introduction

Article 82 prohibits commercial practices by one or more enterprises where such practices amount to an abuse of a dominant position within the community. This is in contradistinction with Article 81 which deals with restrictive trade practices.

2.3.2 Fundamental principles addressed by Article 82

a) Commercial practices prohibited by Article 82 EC Treaty

Article 82 of the EC Treaty prohibits practices which constitute an abuse of a dominant position within the Community market. Article 82 expressly provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. limiting production, markets or technical developments to the prejudice of consumers;
3. applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage;
4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature and according to commercial usage, have no connection with the subject of such contracts.'

Article 81(1) and 82 are not mutually exclusive. The Commission has discretion in choosing the appropriate instrument to enforce competition policy. Consequently the possibility that both Article 81 and 82 may be applicable to a particular case cannot be ruled out. : Ahmed Saeed v Zentrale zur Bekämpfung³⁰.

The existence of a dominant position per se is not prohibited under Article 82, only any abuse of the market power which usually accompanies such a position. Article 82 is not intended to penalize or punish independent forms of economic behaviour. On the contrary, Article 82 seeks to discourage the acquisition or maintenance of a dominant position through anti-competitive practices which create artificial competitive conditions.

b • The existence of a dominant, position

The concept of a dominant position is not defined in the EC Treaty but, in effect, is analogous to the existence of a monopoly in a particular sector of the economy. The European Court has defined dominant position in the following terms:

'Undertakings are in a dominant position when they have the power to behave independently, which put them in a position to act without taking into account their competitors, purchasers or suppliers. That is a position when, because of their share of the market, or their share of the market combined with the availability of technical knowledge, raw materials or capital, they have power to determine prices or to control production or distribution' for a significant part of the products in question' : Continental Can Co v EC Commission³ .

Article 82 does not, however, only apply to the activities of single companies. For example, in *Re Italian Flat Glass Suppliers*⁵⁸ the European Court held that the provision could be applied to three Italian glass producers . The number of parties is not the critical factor although in investigations under Article 82 this number does tend to be small. The important

element is the position of the parties in the relevant market and their behaviour.

The two key[^] relevant concepts in establishing the existence of a dominant position are:

i) Definition of the relevant market

The relevant market is defined in terms of both the relevant product market and the relevant geographical market. To identify a product market it is necessary to isolate the product under investigation from similar products in the market. For this purpose, the Commission identifies the relevant product together with all other products which may be perfectly substituted for the product under investigation. Jointly these products constitute the relevant product market : see, for example, *AZKO Chemie BV v EC Commission*⁵⁹. The test for ascertaining substitutable products depends on whether or not :

*There is sufficient degree of interchangeability between all the products forming part of the same "market in so far as a specific" use of such products is concerned': *Hoffmann La Roche & Co. AG v EC Commission*⁶⁰.

The relevant geographical market has been defined by the European Court as the area:

'where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be evaluated': United Brands v EC Commission".

In general, the relevant geographical market will be assumed to be the whole of the Community. Only if the existence of the impediments to cross-border trade, such as physical, technological, legal or cultural non-tariff barriers, can be established will the geographical market be reduced. Further, as the single internal market program proceeds, it is less likely that such artificial barriers will be permitted to reduce the geographical market from the whole territory of the Community.

ii) Calculation of Market Share

No particular share of a market is required to prove the existence of a dominant position. In the United Brands case above, the European Court stated that the fact that an undertaking 'possessed around 40% of the relevant market was not itself sufficient to establish

market dominance. Other factors contributed to the determination that United Brands maintained a dominant position, including the facts that the company controlled its own shipping fleet, could regulate the volume of the product entering the Community regardless of weather conditions and subjected distributors to rigorous restrictive covenants.

On the other hand, in the Continental Can case, the Commission decided that a Company with a share of approximately 50% of the relevant market occupied a dominant position.

iii) Investigation Period for
Determination of Market Share

The period selected for the calculation of the market share and the determination of a dominant position must be sufficient to facilitate the proper appraisal of market conditions, dominant position and the alleged abusive practice. Failure to properly assess these conditions may lead to the partial or complete annulment of any Commission measures designed to penalise finding

of abuse: see 3P3 Industries & British Gypsum v EC Commission^{6^}.

c) Abuse of dominant position

Abuse is an objective concept which relates to the behaviour of the undertaking alleged to be in a dominant position. It is behaviour which modifies the structure of a market in a such a way as to reduce the levels of competition- or retard the growth of competition in a particular economic area.

Article 82 lists a number of practices which are specifically identified as perpetrating such abuse, including:

- i) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions : see, for example, Bodson v Pompes Funebres[^].
- ii) Limiting production, markets or technical developments to the prejudice of consumers.

- iii) Applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage: see, *San Peliegrino SPA v Coca-Cola Export Corp*⁶⁴.

- iv) Making the negotiation of contracts subject to acceptance by the other parties of the supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts .

This catalogue is intended to be illustrative and, in common with the list elaborated in relation to Article 31(1), is not exhaustive.

It should also be noted that refusals to act can be just as anti-competitive and are equally as liable to be found in violation of Article 32: See *Independent Television Publications Ltd. V. EC Commission*".

- D) Merger Control in the European Community- the original provisions

The community competition provisions make no express reference to the control of mergers among undertakings in the community. Notwithstanding this omission, the Commission has been prepared to apply both articles 81(1) and 82 to mergers and take-overs.

1. A dominant position in the manufacturing or distribution of a product or service may also lead to abuse where one producer or supplier is able to absorb competitors by way of an acquisition or merger: Tetra Park Rausing SA v EC Commission (No 1)^{ob}.

><?.. Article 81(1) may be applied to acquisitions of shareholdings where a company acquires a minority stake in a competitor as leverage for the coordination of marketing strategy between the two undertakings: British American Tobacco & RJ Reynolds Industries Inc v EC Commission".

3. Article 81(1) may also be infringed if a company enters into a joint venture or acquires an interest in a third company where the other principal shareholder is in a related field of business.

4. Consortium bids may also violate Article 81 if the consortium involves competitors seeking to acquire a competitor or attempting to influence its behaviour.

Notwithstanding the "application of these provisions to individual cases,, until 1990, the European Commission had no specific mandate to investigate mergers or acquisitions within the community.

- e) Merger control in the European Community - the Merger Control Regulation 1990'

The Council of Ministers has adopted Community legislation conferring authority on the commission to investigate takeovers and mergers above a certain threshold. Council Regulation 4064/89 (1989) was enacted for this purpose and came into force in September, 1990.

The Regulation uses the term 'Concentration' to refer to mergers or takeovers. A concentration arises where either:

- (a) two or more previously independent undertakings merge into one; or

- (b) one or more persons already controlling at least one undertaking acquire) whether by purchase of securities or assets, direct or indirect control of the whole or part of one or more other undertakings.

Article 1 of the Regulation confers regulatory jurisdiction upon the Commission over all mergers involving a 'Community dimension.' A concentration has a Community dimension where;

1. the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and
2. the aggregate Community-wide turnover of each of the undertakings concerned is more than ECU 250 million.

Aggregate turnover is calculated on the basis of amounts derived by the undertakings concerned in the preceding financial year from the sale of goods or the supply of services during the course of ordinary trading activities. Deductions are permitted for sale rebates,

value added tax and other taxes directly related to turnover.

Certain types of mergers are expressly excluded from the jurisdiction of the Commission by virtue of the regulation itself. A concentration has no Community dimension where, despite satisfying both the necessary criteria, all of the undertakings involved make more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. In such cases, the concentration has no community dimension.

Even if a merger is approved by the Commission, Member States retain a veto over mergers in particularly sensitive sectors of their national economies. Member States may take appropriate measures to protect legitimate national interests such as public security, the plurality of the media and the maintenance of the prudent rules for the conduct of commerce. However, such measures are subject to the requirement that they must be compatible with the general principles and other provisions of Community law.

Concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of a public bid, or the acquisition of the necessary controlling interest. If a merger is by consent, the notification must be made jointly by all the parties involved. In all other cases, including contested acquisitions, the notification to the Commission must be made by the acquiring undertaking.

The Commission is empowered' to impose fines on persons, undertaking or associations of undertakings if they intentionally or negligently fail to notify the Commission of a concentration with a Community dimension. These fines can range from ECU 1,000 to ECU 50,000.

Once a concentration with a Community dimension is notified, two options are available to the Commission:

1. The Commission can conclude that the concentration does not fall within the scope of the Regulation and must record such a finding by means of a decision.

2. It can find that the concentration falls within the scope of the Regulation. In such a case, it may adopt one of two alternative courses of action:

- declare that the concentration, while within the scope of the Regulation, is not incompatible with the common market and will not therefore be opposed; or
- find that the concentration falls within the Regulation and is incompatible with the common market in which case it is obliged to initiate proceedings.

In case of these cases, the Commission must make its decision within one month of the notification.

To appraise the compatibility of a concentration with the common market, the Commission must evaluate the implications of the concentration in the light of the need to preserve and develop effective competition within
/
the common market., taking into/ consideration, inter alia, the structure of all the relevant markets concerned and the actual or potential competition from other

undertakings both within and outside the community. In making this assessment, the Commission must consider the market position of the undertakings concerned, their economic and financial power, the opportunities available to both suppliers and consumers, access to supplies and markets, the existence of legal and other barriers to the entry of the product into particular markets, the interest of intermediate and ultimate consumers, as well as technical and economic development and progress.

f) Determination of Infringements of European Competition Law

The Commission may investigate alleged anticompetitive behaviour either on an ex proprio motu basis, or at the instance of interested parties. Interested parties permitted to notify the Commission of anticompetitive behaviour include Member States, undertakings and individuals who are affected by the alleged infringement of the competition rules: see *BMW Belgium SA v EC Commission*⁵⁸.

In conducting its investigations, the Commission has a right to obtain all necessary information from the

competent authorities of Member States as well as from undertakings and associations subject to investigation. The owners of undertakings or, in the case of companies, the persons authorized by the articles of association to represent incorporated bodies, are obliged to supply such information.

a) Commission's Powers to Conduct Investigations

The Commission's powers to investigate are contained in Council Regulation 17/62 and can be broadly classified as follows:

1. Power to obtain information from the parties involved in the investigation.
2. Power to conduct inspections;
3. Power to convene hearings; and
4. Power to grant interim relief.

1. Power to Obtain Information - Under Article 11(1) of the Regulation, in carrying out its duties, the Commission may obtain 'all information necessary' for

the purposes of the investigation from interested private parties and the governments and 'competent authorities of the Member States. The scope of information 'necessary' for the purposes of conducting the investigation falls broadly within the discretion of the Commission to decide: *Samenwerkende Electriciteits Productie-bedrijven NV (SEP) v EC Commission**⁹.

2. Conduct of Inspections - Again the Commission's powers to conduct on-the-spot investigations are extensive.

Article 14(1) of the Regulation allows Commission officials to:

- (i) Examine the books and' business records;
- (ii) To take copies of books and business records;
- (iii) To ask for oral explanations on the spot; and
- (iv) To enter any premises, land or

means of transport of parties
under investigation.

The Commission -exercises these powers in two stages. First, Commission officials visit premises with a simple mandate from the Commission authorizing inspection. If these officials are refused access to premises or records, the commission may adopt a decision under Article 14(3) requiring companies to submit to investigations authorized by the decision. The Commission may proceed with a search after obtaining the necessary permission from the national authorities and can impose fines on companies for failing to comply with the Commission's requests. The European Court has held that such searches must be subject to procedural safeguards. In particular:

*If the Commission intends, with the assistance of national authorities, to carry out an investigation other than with the cooperation of -undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law': Hoechst AG v EC Commission¹⁰ .

Power to Convene Hearings - The Commission is required to allow interested parties an opportunity to present

their arguments and views directly to its officials. The procedures for the convening of hearings to discharge this obligation are regulated by Commission Regulation 99/63 (1963). The main purpose for holding such meetings is to allow parties to make representations in their favour at various stages in the proceedings.

Power to 'grant interim relief' - No such power is expressly conferred in Regulation 17/62, but the Commission has been deemed to possess an inherent power to issue decisions providing interim relief to complaining parties to prevent injury caused by the anti-competitive practices of business competitors: *Camera Care v EC Commission*⁷¹. The Court of First Instance has recently confirmed that the Commission can adopt interim measures of protection if the following three conditions were satisfied:

- (i) The practices against which a complaint was lodged were prima facie likely to infringe Community law;
- (ii) Proven urgency existed; and

(iii) There is a need to avoid serious and irreparable damage to the party seeking relief: *La Cinq v EC Commission*⁷¹.

h) Power to fine

According to article 15 of Council Regulation 7/62, as amended, the Commission may impose fines ranging from ECU 1,000 to ECU 1,000,000 or a sum in excess of this limit but not exceeding 10 percent of the turnover, against any undertakings found in violation of Articles 81(1) and 82. In addition, fines can be imposed for the supply of false or misleading information, for the submission of incomplete books or other documents or for refusal to submit to an investigation.

The policy of the Commission towards fining is a matter which is influenced by many factors. However, the following factors are considered most relevant to such a determination:

1. The size of the companies engaged in the anticompetitive behaviour: see *Beiasco v EC Commission*⁰.
2. The steps taken by the party to mitigate the infringement prior to the decision imposing fines has been rendered: see *National Panasonic v EC Commission*⁴.
3. The nature of the infringement. For example, the Commission considers certain practices, such as predatory pricing, to be particularly repugnant to Community competition policy:- see *Tetra Park Reusing S v EC Commission (No 1)*^b.

The Commission has adopted a Notice on reduced fines for cartel informers designed to encourage participants in cartels to offer evidence of such activities to the commission. The Notice is not a codification of the Commission's previous practice but a statement of the future policy which will be pursued in the future by the Commission against cartels.

The Notice gives much greater discretion to the Commission as to how it will treat cartel informers. The two main guidelines set down are as follows:

1. Total immunity from fines for companies reporting cartels is subject to the broad discretion of the Commission. However, as a general rule, such companies will benefit from a minimum reduction of 75% of the fine which would have been imposed had the company not come forward.
2. Companies first reporting cartelistic behaviour immediately after an investigation has been opened by the Commission may obtain a reduction of between 50% and 75% of the final fine, again subject to the discretion of the Commission.

In both cases, reporting companies must satisfy a number of pre-conditions before being granted immunity, first, the informing company must not have been a ringleader in setting up the cartel. Second, the company must be the first to come forward to the Commission with

substantial evidence of the cartel. Third, the company must: pull out of the cartel no later than the time disclosure is made to the Commission. Fourth, it must provide the Commission with all information it possesses in relation to the activities of the cartel and must maintain continuous and complete cooperation with the Commission throughout the investigation. Failure to meet these requirements may mean the withdrawal of exemption.

The Commission also has authority to require undertakings to adopt particular courses of action including:

«

1. discontinuing infringements of Articles 81(1) and 82;
 2. discontinuing actions prohibited under Article 8(3) of Regulation 17/62;
 3. supplying completely and truthfully any information requested under Article 11(5);
- and

4 . submitting to any investigation ordered under investigative powers of the Commission..

While the Commission has authority to fix the amount of the fine, the national authorities concerned enforce the decision by virtue of Article 192 EC Treaty in accordance with their rules of civil procedure.

Figure 2.5 illustrates procedures relating to the enforcement of antitrust policy in the European Union. The primary enforcement role of EU competition laws is vested in the European Commission. The commission is composed of twenty Commissioners- two from each of the five largest member states together with one from each of the smaller member States.

Article 87(1) of the EC Treaty authorises the Council of Ministers to delegate responsibility for the administration of competition policy to the Commission.

Figure 2.4 - Enforcement-European Union
Law(Articles 81 and 82 EC
Treaty)

COMPLAINT	(i) By Interested Parties (ii) Commission
U	
INVESTIGATION By Commission	-Obtaining Information, -Inspections -Hearings -Interim Relief
u	
DECISION (By Commission)	-Orders to discontinue infringements -Fines -Refusal to Allow Mergers -Vindication of Infractions
u	
COURT OF FIRST ' INSTANCE (CFI)	(i) Upholds or vary's Commission's orders (ii) All Relief under Law
EUROPEAN COURT OF JUSTICE	(i) Appeals from CFI (ii) Custodian of Treaty Law (Article 164)

Note : Procedures for Enforcing Antitrust Laws
under Articles 81 and 82 are similar.

SOURCE : BY THE WRITER.

In the discharge of this function, the Commission has authority, in certain circumstances, to investigate complaints, to impose fines, and to require member States

to take appropriate action to prevent or terminate infringements of competition policy.

2.3.3 Extra-Territorial Relations

Members of the European Union are all GATT [now WTO] members. As competition matters fall within the competence of the European Community, European Commission officials represent the community in GATT negotiations, including the Uruguay Round which was started in 1986 and was concluded in February, 1994. In trade matters, with a view to promoting competition, the European Union has established a free trade area With the European Free Trade Area[EFTA]. In relations with developing countries, mixed agreements have been used extensively to implement numerous treaties between the community and the contracting developing countries, namely Yaounde I[1964], Yaounde II[1969], Lome I[1975], Lome II[1979], Lome III [1984], and Lome IV[1989]⁶.

The European Court of Justice has given extra-territorial application to European Union antitrust law in the Re Wood Pulp Cartel case⁷. In this case the Commission found more than forty suppliers of wood pulp

in violation of Community competition law despite the fact that none of these companies was resident within the European Community. Fines were imposed on 36 of these companies for violation of competition law. They appealed on the ground that Community competition law was not capable of having extra-territorial effect. The Court upheld the Commission's decision basing the extra-territorial application of Community competition law on the territorial principle of jurisdiction.

2.4 THE KENYAN- ANTITRUST POSITION

2.4.1 The Historical Foundation of The Kenyan Antitrust Position

A historical look at the roots of economic relations in Kenya does not evince a palpable Culture of Competition that compares favourably with that one envisaged by the American system sired by the Sherman Act of 1890 and which has evolved over the years to spawn a motley of hybrids that have been adopted by states and supranational institutions in places as diverse as Japan, the United Kingdom and the European Union{whose system now subsumes the UK one). At the onset of the colonial rule, the predominant aim of the colonizers was conquest,

simple and clear. In this pursuit of conquest Kenya was in the ten years between 1895 and 1905 transformed from a footpath 600 miles long into a Colonial administration'⁸. These British conquerors ' were preoccupied with the Creation of a hierarchy of self interest out of the existing network of authority''⁹. There was no place for competition as envisaged by the modern antitrust regimes in the nascent government's agenda.

This reality notwithstanding, first and foremost, the imposition of colonial rule engendered the process of Capitalist penetration of African economies. Colonialism, then affected the articulation of indigenous modes of production with the capitalist mode of production and the integration of African economies into the Western capitalist system. The Capitalist mode of production is characterised by, first, the exclusive appropriation by one class of means of production that are themselves the product of social labour; second, the whole of social production takes the form of commodities and, third, labour power itself becomes a commodity which means that the producer, having been separated from the means of production, becomes a proletariat⁸⁰. Hence, with all the

disruptive revolutionary impact that it entailed, the advent of colonialism catapulted the African, albeit unwillingly, into a new world of economic relations. This new reality, embraced a dual mandate. J. M. Lonsdale and B. J. Berman have concluded that the colonial state:

"...had to organize the reproductive conditions not of one dominant mode of production but of a capitalist mode not yet dominant whose social integument included the other modes to which capital was articulated and whose own social relations' and ideological charters it therefore threatened... The colonial state indeed straddled not one but two levels of articulation: between the metropole and the colony as a whole as well as within the colony itself. It was at once a subordinate agent in its restructuring of local production to meet metropolitan demand, yet also as the local factor of cohesion over the heterogeneous fragmented and contradictory social forces jostling within. The very Dual Mandate defines the dilemmas of the colonial state⁰¹."

In the facilitation of the penetration of Capitalism, the colonial state favoured the settlers and relegated the Africans to an inferior position. The Africans were only allowed on an experimental basis to grow coffee in 1933. Settlers were able to expand because they could obtain credit from British Commercial and Merchant Banks established in the country and from private money-lenders some of whom were Indians, whereas

Africans could not³². As a consequence of the great depression, many settler farms sank into bankruptcy. By a show of extreme favouritism* the colonial state directly intervened in the provision of credit to settler farmers through the creation of the Land Bank in 1931, through the Land and Agricultural Bank ordinance No.3 of 1931, which was not allowed to lend to Africans⁹³. These were no doubt anti-competitive practices. In any case under the Credit to Natives Act, 1903, no credit of more than £10 could be given to an African trader unless approved by a District officer.

Through the formation of bodies such as the Kenya Farmers Association (set up to handle maize and wheat) and the Kenya Cooperative Creameries (set up to handle milk and butter) a movement by the settlers, supported by the state, to control the internal market of key commodities and cushion themselves against the vagaries of international commodity fluctuations was instigated, and later on entrenched⁸⁴. These Organizations succeeded in pushing the state to erect barriers against imports of commodities they handled. The Africans were not allowed to join these Organizations and were thus disadvantaged.

Unorthodox measures were employed to assure settler farmers of cheap labour which effectively thwarted competition from African farmers. The settlers considered that the protectorate's administration should apply legislative, administrative and financial pressure on the Africans to induce them to go to work on European farms³¹. In 1901 a Hut Tax was imposed, through the Hut Tax Regulations[1901], which was a financial inducement to work. Another example of these Unorthodox measures was the Promulgation of the Master and Servant Ordinance 1906, which imposed penalties of imprisonment or fine for negligent work on those already working. The Hut and Poll Tax Ordinance 1910 consolidated these measures. Another example was the Native Authority Ordinance 1912 which stipulated that commercial labour was compulsory for everybody, including men past working age, women and children. Its stipulations amounted to forced labour for government purposes in the reserves. Instead of doing unpaid compulsory work it offered incentives to Africans to go and work for settler farmers at cheap rates.

The whole colonial era is replete with examples of practices and measures which were anti-African and antithetical to a culture of competition in economic

relations. For example though most of the colonial states revenue went to develop the settler sector, by 1930 the Africans were responsible for 37 1\2 per cent of the colony's total revenue⁸⁶. Considering that additional revenue was indirectly collected from Africans' through customs and Excise duties, Local Native Council Levies and other indirect taxation, it is evident that Africans contributed much more than was acknowledged. N. Swainson, has estimated that together hut, poll tax and customs duties were responsible for 60 to 80 per cent of the colony's revenue³⁷. Paradoxically, the bulk of* this income was pumped into the settler sector, at the expense of the African majority population.

The enormity of the taxation measures imposed on Africans denied them the savings upon which they could build up adequate capital to undertake competitive economic relations against the white settler farmers. The same settlers who benefited from the taxes exacted upon Africans had opposed taxation on the basis that it was only relevant where there was" elective representation⁸⁸. As if the Africans were being represented at all, let alone in an electoral manner!

It is apposite to refer to two cases which show that egregious discrimination against Africans and other races was practised. Of course, in an atmosphere of discrimination, competition is trammelled. The first is the case of Mbiu Koinange V R³⁹. This case concerned an attempt to prevent Mbiu Koinange from planting coffee. The rules in Question conferred powers to limit the area within which certain crops could be grown. In blatant misuse of powers, the authorities sought to limit the classes of people who could grow the crops. This, is a clear example of an attempt to forestall competition among coffee farmers.

The other case concerned the power of the Commissioner of Lands to impose restriction on who could bid at auctions for sales of crown land, and their use thereafter⁹⁰. The Commissioner had advertised the auction of town plots at which only Europeans were to be allowed to bid and purchase and had stipulated that during the terms of the grant the grantee should not permit the dwelling house or outbuilding thereon to be used for the residence of any Asiatic or African who was not a domestic servant employed by him.

The Commissioner's powers to dispose of the land was derivea from the Crown Lands Ordinance of 1915. The Ordinance had made a distinction between the disposal of agricultural and urban land, and the power to.' impose racial restrictions or covenants was expressly granted only in the case of agricultural land. It was argued by the appellants that, therefore, there was no power to impose these restrictions on the disposal of land in towns. The Judicial Committee, saying they were concerned with law and not policy, -found for the Commissioner, holding that prima facie the rights of the Crown and its servants to dispose of Crown property were analogous to those of the private owners. They had to observe express terms of the statute, but apart from that they were free to impose what restrictions they choose. The learned Lords went on to argue that it would be valid to restrict the bidding to industrialists, or the trading community, in appropriate cases. Hence there was nothing wrong in extending this principle to racial groups!

By the time Kenya attained independence there had not developed a culture of competition as envisaged by modern antitrust regimes. The system of licensing, for example, was made use of to give leverage to British Capital so that it faced little or no competition. Indeed

licensing encouraged "the movement of capital into large oligopolistic units and a highly concentrated industrial structure emerged"³¹. With the advent of Independence the new ruling class took over the position hitherto occupied by the colonial ruling class and generally perpetuated the economic relations they inherited. The new ruling class was able to control directly and in great detail most of what went on in the country in the political, economic and social spheres⁹². Antitrust and other related policies were not an exemption! As Y. P. Ghai and J. * ?. McAuslan opine, "The Africans in Kenya came to political awareness within a legal system in whose rhetoric praised equality and justice but whose practice sharply distinguished between those with and those without power, wealth and influence... The law is seen solely as being a tool of the wielders of power who use it as they think fit, legalizing their own illegal exercises of power, and attempting to prevent the acquisition of power by, and the development, of the powerless"⁹³. Just as the Europeans had used the law to thwart African competition in economic relations, the new ruling class inherited their stance on attainment of Independence.

The employment of the law and the administration to stymie competition has continued well into the nineties as evidenced by the use of registration and licensing in a higgeldy-piggeldy way to decide whether investors will operate their businesses or not. An apposite example is the purported outlawing of the Star Newspaper, the Finance Magazine, and the Sunday Post Newspaper by the Registrar-General in July, 1958. The action was reported by the East African Standard on page 1 of its edition of 13th, July, 1958. The Books and Newspapers Act [Chapter 111 of the Laws of Kenya] allows the Registrar to maintain a register of Books and Newspapers but has no express provision regarding banning of Books and Newspapers.

2.4.2 Kenya's Antitrust Law

As said in chapter one, Kenya did not have an antitrust department, in the American and European Union sense, before 1st February, 1989 which was the commencement date for the Restrictive Trade Practices, Monopolies and Price Control Act [Chapter 504 of laws of Kenya]. Therefore the law sought to merely control prices

through the Price Control Act which was repealed by the 1589 Act.

It is worth noting that before 1932, section..27 of the Indian Contract Act operated to control contracts in restraint of trade. The Contracts in Restraint of Trade Act, was promulgated in 1932 and is still extant. It deals with the conundrum of the two "freedoms" of contract and of trade. This is called "the doctrine of restraint of trade". The doctrine allows- agreements, or contracts containing provisions restraining parties from exercising any lawful professions, trades, businesses or occupations to be valid, subject to the power of the High Court to void them. This means that in the area of agreements or contracts the doctrine ' licenses anticompetitive practices, while at the same time it allows the High Court to review and determine the legality of such agreements or contracts. Needless to say, the doctrine does not embrace the main generic areas of antitrust which are: Mergers and Takeovers, Restrictive Business Practices and Abuse of Dominance. However, in as far as it is applicable to commercial arrangements, since such arrangements are made through agreements and contracts, the doctrine has the potential

through the Price Control Act which was repealed by the 1983 Act.

It is worth noting that before 1932, section 27 of the Indian Contract Act operated to control contracts in restraint of trade. The Contracts in Restraint of Trade Act, was promulgated in 1932 and is still extant. It deals with the conundrum of the two "freedoms" of contract and of trade. This is called "the doctrine of restraint of trade". The doctrine allows, agreements, or contracts containing provisions restraining parties from exercising any lawful professions, trades, businesses or occupations to be valid, subject to the power of the High Court to void them. This means that in the area of agreements or contracts the doctrine 'licenses anticompetitive practices, while at the same time it allows the High Court to review and determine the legality of such agreements or contracts. Needless to say, the doctrine does not embrace the main generic areas of antitrust which are: Mergers and Takeovers, Restrictive Business Practices and Abuse of Dominance. However, in as far as it is applicable to commercial arrangements, since such arrangements are made through agreements and contracts, the doctrine has the potential

of creating bottlenecks during enforcement of competition law as enterprises will use the provisions of the Contracts in Restraint of Trade Act to justify anticompetitive practices.

The purpose of the Restrictive Trade Practices, Monopolies and Price Control Act is explained by its preamble as follows," An Act of parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power, ana prices and for connected purposes".

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2.4.3 Enforcement Institutions Created By The Law

Competition cases in Kenya are handled by four principal institutions. These are Legislature (Parliament), Office of the Minister in-charge of Finance, the Office of the Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya. Each one of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.

2.4.3.1 Legislature.(Parliament)

Parliament is the principal custodian of public interest in Kenya and it creates both the institutional and legislative frameworks for the promotion and protection of public interest.

In the competition area, Parliament enacted the current legal instrument, i.e. the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.5C4 of the Laws of Kenya. And because the market is dynamic, the Law that regulates the functioning of the market must be reviewed from time to time so as to align it with the dynamic changes in the market place. My submission here is that Parliament has a functional responsibility of ensuring the updating of the country's Competition Law so that the Law is able to support and promote effective competition so as to further the economic interests of the public and the efficiency of business.

2.4.3.2 Office of the Minister for Finance

The overall responsibility for competition P_o.l.x.y—in Kenya is in the hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act Cap.504 of the Laws of Kenya subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices, who, with a team of economists, financial analysts, lawyers and other necessary market analysts is the principal custodian of Kenya's Competition policy. The Commissioner, whose appointment is mandated under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations

are carried out by the Commissioner's staff in the Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out informal research into markets where¹ competition problems are thought or alleged to be present.

2.4.3.3 The Office of the Commissioner for Monopolies and Prices

The Commissioner for Monopolies and Prices is appointed in pursuant to the provisions of Section 3(1) of Kenya's Competition Law and he, in turn, directly and indirectly controls, manages and 'influences competition in exerci-se of the powers conferred upon him by the Law and such limitations as the Minister may think fit. The Law does not provide the authority that is responsible for the appointment of the Commissioner for Monopolies and Prices. However, once the Commissioner is appointed he is independent/and has a range of statutory duties and responsibilities. He heads the Monopolies and Prices Department of the Treasury and has responsibilities for efficient administration and enforcement of Competition Law. He has also responsibilities in the consumer protection field. He seeks to maximise consumer welfare in the long term, and to protect the interests of vulnerable consumers by:

- a) empowering consumers through information and redress.
- b) protecting them by preventing abuse.
- c) promoting competitive and responsible supply.

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes

with traders. However, he may be able to suggest who would be in the best position to help.

The writer wishes to point out that the government of Kenya has unequivocally stated that in the near future, Kenya's Competition Authority will, through a new legislation, be accorded operational and financial autonomy. This decision has been published in the "Economic Recovery Strategy, 2003" at pages 13 and 75. The new law is at the drafting stage. During the 2003/4 Financial Year the Competition Authority had a budget of K. Shs.30,000,000. It had 22 technical officers, all of whom had training in the requisite areas of apposite Law and Economics.

2.4.3.4 The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to Section 64(1) of the Restrictive Trade Practices, Monopolies & Price Control Act, Cap.504 of the Laws of Kenya, a quasi-judicial authority, that is the RTFT, is appointed every other five years since 9th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya of not less than seven years standing and four members. The members of the RTPT have a five years secure term of office and may be appointed for other terms of office at the expiry of the five years.

It must be stressed here that once constituted by the Minister for Finance, the RTPT is absolutely independent of the Office of the Minister and the Office of the Commissioner for Monopolies and Prices. The principal function of the Tribunal is to arbitrate our competition policy disputes resulting from ministerial orders made on the recommendation of the Commissioner for Monopolies and Prices. The RTPT has powers to overturn,

modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties.-

Orders and decisions *of* the Tribunal are only appealable to the High Court of Kenya and such appeals are only feasible within 30 days following the communication of the Tribunal's decisions/orders to the concerned parties.

2.4.3.5' The High Court of Kenya

All appellants to the RTPT in pursuant to the provisions of Sections 20(1), 251 and 31(1) in respect to ministerial orders made in pursuant to the provisions of Sections 13(1), 24(1). and 31(1) respectively who are dissatisfied with the decision of the **RTPT** may appeal to the High Court of Kenya against that decision within thirty days after the date on which a notice of that decision was served on him and the decision of the High Court should be final.

2.4.4 Legal provisions

The antitrust department is established by section 3 of the Act which:-

1. creates the post of Monopolies and Prices commissioner and allows the appointment of such other officers as may be necessary for the due administration of the Act.

modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties.-

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2.4.4 Legal provisions

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1. creates the post of Monopolies and Prices commissioner and allows the appointment of such other officers as may- be necessary for the due administration of the Act.

2. stipulates that 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. Allows the Commissioner to authorize any officer to exercise any of the powers conferred by the Act upon the commissioner subject to such limitations as the commissioner may think fit.

As said in the preamble, the Act seeks to encourage competition in the Kenyan economy by prohibiting restrictive trade practices and controlling monopolies and concentrations of economic power and prices and for connected purposes. "Restrictive trade practices" is defined by section 4 as referring 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 capital required in order to compete at fair market

prices in any field of production or distribution, reduces or eliminates their opportunities to participate: or

- (b) in respect of other persons able and willing to pay fair market prices for goods and services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.

The section also explains' that 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. Section 5 allows restrictive Trade practices which are sanctioned by parliamentary authority, professional licensing practices and certain trades which are licensed with the authority of parliament.

Section 6 enumerates what are deemed restrictive practices for the purpose of the Act and declares such agreements unenforceable. Section 7 applies the Act to restrictive trade practices conducted by or on behalf of a trade association. Section 8 deals with the 'issue of

refusal or discrimination in supply as a restrictive trade practice. Section 10 prohibits predatory trade practices to repress competition and section 11 prohibits collusive tendering. Section__13 declares bidding at auctions criminal.

When complaints relating to restrictive trade practices arise, any person who considers himself to be aggrieved as a result of a restrictive trade practice, is allowed by section -13 to submit a complaint to the Minister, through the Commissioner, in the prescribed form. Where the Commissioner considers a complaint to have merit, the Act allows the commissioner to investigate. The commissioner may also initiate investigations into alleged restrictive practices when-appropriate. A hearing may be required to be held following restrictive trade practices allegations. The complainant and the alleged malfeasor shall both be given reasonable advance notice of the holding of a hearing. Both may be represented by an advocate of each party's choice.

Upon 'the conclusion of the investigation, including the holding of a hearing, the commissioner is required by

section 17 to present his report together with recommendations for action by the Minister. The Minister may by notice in the Kenya Gazette, make an order requiring a person committing or deemed to have committed a restrictive trade practice to desist from the said practice and such a person may also be required to take certain positive steps to assist existing or potential suppliers, competitors, or customers, in order to compensate for the past-effects'of these practices. Under section 20 aggrieved persons may appeal to the Restrictive Trade Practices^ Tribunal and if not satisfied they may lodge a final appeal in the High Court.

Part III of the Act deals with control of monopolies and concentrations of economic power. Section 23 requires the minister to 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 outweighs the efficiency advantages, if any, of integration in production and distribution. In identifying unwanted concentrations of economic power, the minister is required to pay particular attention to specific factors which are enumerated by section 23.

The Minister has the power to 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. 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 relating to patterns of ownership and percentages of sales accounted for by leading enterprises in the sector. The commissioner may also require any person possessing "relevant records to give him copies of the records or alternatively to submit the records to him for copying.

After receipt of the Commissioner's report, the minister may order that inimical interests be disposed. This, the minister may do under powers contained in section 24 of the Act. Of course, an aggrieved party, either with matters relating to restrictive trade practices or monopolies and concentrations of economic power, may appeal to the Restrictive Trade Practices Tribunal in the prescribed form. A second appeal goes to the High Court whose decision shall be final.

Section 27 outlaws mergers between two or more independent enterprises engaged in manufacturing or distributing substantially ^similar commodities, or engaged in supplying substantially similar services unless there is an authorizing order from the minister. The takeover of one or more such enterprises by another such enterprise, or by a person who controls another such enterprise is similarly outlawed. No merger or takeover undertaken in contravention of section 27 is lawful or enforceable. Under section 28 any person is allowed to apply to the minister, through the commissioner, for an order authorizing a merger or a takeover. The commissioner is obliged by section 29 to investigate any application and he is required in his evaluation of the application to pay regard to the following criteria:-

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

Under section 31 the Minister, may, after considering the recommendation of the commissioner, make an order concerning the application for authorization of a merger or takeover. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

2.4.5 Procedures

There are three types of procedure followed to vindicate infraction of antitrust laws as follows:-

i

(a) Restrictive Trade Practices

In the case of restrictive trade practices any aggrieved person may submit a complaint to the Minister, through the Commissioner, in the prescribed form. The Commissioner investigates the complaint and may inform the person complained against about the allegations and the evidence adduced and invite the person to comment on the allegations and the evidence and to indicate what remedies the person would propose in order to bring his trade practices into conformity with the law. The Commissioner may also inform the person complained against that the weight of the evidence supports the allegations that have been made and request the person in question to take specific steps to discontinue the practice, and in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers,

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competitors or customers to participate fully in producing or trading in the goods or services to which the allegations relate.

In case there is no response to the commissioner's communication by the indicated date or any ameliorative action taken is deemed by the commissioner to be inadequate, the commissioner is required to invite the person to negotiate a consent agreement satisfactory to the commissioner binding the person to desist from specified practices and to compensate for their past effect. Such agreement is gazetted and copies sent to any person complaining of the said practice/s and to any other persons the Commissioner deems to be affected by the agreement.

Should the preceding measures not be effective, either because of lack of satisfactory steps or because of breach of agreement terms, the commissioner informs the person in question that he proposes to recommend that the minister make an order regulating the practices in question and that a hearing on the desirability will be held on a specified date. Upon concluding the requisite investigation under section 16, including the holding of

a hearing, the Commissioner presents his report together with recommendations to the Minister.

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b) Control of unwarranted concentrations of economic power

In the case of abuse of monopolies and dominant positions, the Minister directs the Commissioner to investigate any economic sector which features one or more factors relating to unwarranted concentrations of economic power. The Commissioner then reports back to the Minister who may make an order directing any person he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or supply of services as the Minister deems necessary to remove unwarranted concentration. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

c) Control of mergers and takeovers

Mergers and takeovers effected without an authorizing order from the Minister are illegal *ab initio* and not justiceable. Any person intending to effect a

merger applies to the Minister through the Commissioner for action by the minister. The minister may then make an order, by notice in the Gazette, requiring that ameliorative action, including specific requirements be undertaken within a given time which must be longer than twenty eight days of the publication of the order in the Gazette³⁴. The publication of the notice in the Gazette is an important act. This is because in the case of other infractions of antitrust law this matter is treated differently. In the case of control of unwarranted concentrations of economic power there is no requirement, whatsoever, that the Minister's order be gazetted³⁵. In the case of control of mergers and takeovers, the Minister is only required to cause an order to be published in the Gazette as soon as is reasonably practicable after it is made³⁶.

The commissioner investigates the applications and gives his recommendations to the minister, who may make an order of authorization either approving or rejecting the application. An aggrieved person has recourse to the Restrictive Trade practices Tribunal and finally to the High Court.

2.4.6 Intention

Kenya's antitrust position specifies the necessity of there being intention only in the case of predatory trade practices intended to repress competition. The intention to engage in the predatory practices may be an exclusive intention or an intention in common with other objects. The purposes covered are⁹⁷;-

- (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 outlets or outlet for the sale of services, or to deter a person¹ 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 such goods or services.

Any person committing predatory practices with the above purposes is guilty of an offence. Intention is not required in all other aspects of restrictive trade practices or in infractions of monopoly and dominant positions. In the case of mergers and takeovers, all unauthorized actions are prohibited per se.

2.4.7 Market Power

The Minister is given an imperative mandate to keep the structure of production and distribution of goods and services in Kenya under review in order to determine where concentrations of economic power exist whose detrimental impact on the economy outweighs the efficiency advantages, if any, of integration in production and distribution; and in identifying

unwarranted concentrations of economic power. The minister is required, by section 23, to 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 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 percent 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.

2.4.9 Remedies

(a) In matters concerning restrictive trade practices, the malfessor is required by the Minister to desist from the trade practices prohibited by antitrust law and the Minister may also require the malfessor to take specific steps to assist existing or potential suppliers, in order to compensate for the past effects of the particular infractions.

Interesting is a provision* akin to the provision of the Clayton Act, one of the key antitrust laws of the United States of America. The Restrictive Trade Practices Tribunal, if 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 under section 11 or 12 or subsection (1) of section 21, may order the convicted person, in addition to any other penalty which may otherwise be imposed, to pay a fine of two times such monetary value". This is analogous to the USA position with regard to suits instituted by private parties. See: *Westinghouse Electric Corp. V Rio Algon Ltd*". In the Clayton Act treble damages are provided for whereas in the Kenyan law, double damages are legislated for. Failure to comply with an order is also a criminal offence¹⁰⁰.

(b) In the case of unwarranted concentrations of economic power (i.e. abuse of monopolistic and dominant positions), the Minister may direct the malfessor to dispose of such portion of his interest in production or distribution or the supply of services as the Minister deems necessary to remove the unwarranted concentration¹⁰¹. It is also a criminal offence to



contravene or fail, to comply with the order of the Minister or any part thereof¹⁰³.

(c) In the case of mergers and takeovers, any action taken without the Minister's authority is void ab initio and unenforceable in legal proceedings¹⁰³. Any person contravening the law is also liable to imprisonment for a term not exceeding three years or to a fine not exceeding two hundred thousand shillings or both¹⁰⁴.

Figures 2.5, 2.6 and 2.7 here-below illustrate procedures relating to the enforcement of antitrust laws in Kenya.

2.5 - Restrictive Trade Practices (Kenya)

- 5MFLAINT .** (i) By Individuals
(ii)By Commissioner
- : e**
- 5MMISIGNER** -Investigations
-Consent Agreements
- u**
- HEARING** -Representations
-Recommendations
- U.**
- MINISTER** -Gazettement of orders
to desist
-Requirement to
Comoensate
- TRIBUNAL** -(i)Upholds Orders
-'(ii) Overrules Orders
- U**
- IGH COURT** -Final Determination

ote The Minister is required to
Gazette Order.

SOURCE : BY THE WRITER.

Figure 2.6 - Monopolies/Dominant Positions(Kenya)

DIRECTION BY
MINISTER TO
INVESTIGATE

COMMISSIONER

-Investigates
-Recommends/Reports

u

MINISTER

-Makes order to dispose
if necessary
-No Gazettement required

|

TRIBUNAL

-Upholds* Order
-Overrules Order

HIGH COURT

Final Determination

Note : The Minister is not required to Gazette Order.

SOURCE : BY THE WRITER.

Figure 2.7 - Mergers/Takeovers (Kenya)

APPLICATION	-Application for Merger by Proposer
U	
COMMISSIONER	-Investigates, -Evaluates -Recommendation to Minister
U	
MINISTER	-May Authorize -May Reject -Gazettes within Reasonable Time
TRIBUNAL	-Upholds Order or -Overrules Minister
u	
HIGH COURT	- Final Determination

Note :Unauthorized Mergers are illegal ab initio; Agreements unenforceable. The Minister is only required to Gazette Order within reasonable time.

SOURCE : 3Y THE WRITER.

2.4.9 Practical Operation Of Kenya's An-trust Department

As already seen, the Restrictive Trade Practices, Monopolies and Price Control Act became effective on 1st February, 1989 by converting the former Price Control

Department into the present Monopolies and Price Commission (MPC). It also authorized establishment of an autonomous Restrictive Trade Practices Tribunal (RTPT) to consider appeals against ministerial orders and the other ministerial actions as provided by the law.

In the developing world, Latin American countries were the first to establish such machinery, some doing so as early as the 1950s, modelling their legislation on United States antitrust law. In Asia, India and Pakistan adopted restrictive trade practices control laws in 1969-70, followed by Thailand in 1979 and South Korea and Sri Lanka in the 1980s. As at the end of 1992, Kenya was the only African country to have enacted a competition policy and to have established enforcement machinery, although several other African countries were examining the possibility and at least one (Ghana) was reported to be drafting requisite legislation^{104*}.

From 1989 to 2003, the Monopolies and Prices Commission has considered the following cases^{124b}:

TABLE 2.1

Cases Considered by the Monopolies and Prices Commission (1989-2003)

Year	Restrictive Trade Practices	Trade Cases
1989	7	6
1990	6	5
1991	6	10
1992	7	9
1993	7	7
1994	13	5
1995	15	14
1996	15	11
1997	10	1 ¹
1993	15	12
-1995	8	24
2000	18	37
2001	18	
2002	15	35
2003	19	20
Total	179	237

SOURCE : MONOPOLIES AND PRICES COMMISSION

It means that during the twelve year period spanning the years 1989-2000, the antitrust department handled an average of 10 cases per year in the area of restrictive trade practices. Although the 1982 report intimates that the government encourages dialogue in resolving competition cases, this is a very small number especially when it is considered that restrictive trade practices, under the Restrictive Trade Practices, Monopolies and Price Control Act, have been given a very

wide catchment area. In the area of mergers, the average is 13 mergers per year. As mergers and takeovers are ongoing businesses, this can not be said to be a very bad situation. The antitrust department, nevertheless, can not be said to be a very busy department either in the area of restrictive trade practices or mergers.

From the annual reports covering the twelve years, there was no indication that any merger or takeover application had been rejected by the Minister. However, in 1998, the Commission and the Minister had initially rejected the merger between PriceWaterhouse and Coopers but the government due to outside pressure rescinded the decision. This is the only case that has reached the Tribunal in Kenya. The explanation in the annual reports was that all mergers had been found in order, meaning that they were not antitrust.

The Annual Report for the four years ending 1992 indicated that during that period only one Consent Agreement and one Order of the Minister were Gazetted. Under Consent Agreement GN No 6126 of 17th December, 1991, a carbonated soft drink manufacturer agreed to refrain from exclusive dealing as well as from predatory

practices against the marketing of the competitors' products.

Under Order, GN No.5190 of 11th November, 1992, a distributor of tobacco products, was directed to continue supplying cigarettes to a particular stockist, and to any other stockists/traders he might have stopped supplying his allocated market.

One of the Restrictive Trade Practices Cases classified under exclusive dealing led to a High Court Case in 1991/92. A firm in the distilling sub-sector complained to the Commission of unfair business practices against it by a competing firm which had applied to the Minister for exemption from competition law under section 5 and which exemption had been granted inadvertently. The reports do not indicate that other cases have gone to the High Court since then.

It is clear from the annual reports that the area of control of unwarranted concentrations of economic power (monopolies) has not been activated. There was no explanation from the annual reports as to why this should be so. This is puzzling in view of the fact that control

ana regulation of monopolies is one of the key areas of antitrust regulation.

According to the report covering 1989/92, the Minister of Finance constituted the Restrictive Trade Practices Tribunal through Legal Notice Number GN No.503 of 21st January, 1991. On the same date the Minister for Finance appointed a Secretary of the Tribunal. Earlier, by Legal Notice No.179' of 18th April, 1990, the Minister for Finance had enacted the Restrictive Trade Practices, Monopolies and Price Consrol (Appeals) Rules, governing procedures for presentation of appeals and their consideration by the tribunal.

As at the end of 1992, the Tribunal had held three organizational meetings but cases had not yet been referred to it. All indications tend to the conclusion that the Tribunal has generally been moribund. Indeed only one case has been referred to it since its inauguration. This related to the year 1998 International Merger of accounting firms PriceWaterhouse ar.c Coopers. The case, however, did not proceed to its full hearing as the case was referred back to the Minister for Finance who approved the merger.

The 1996 Annual Report records the then Commission's Staff Complement as: The Commissioner, a Deputy Chief Economist, a Senior Assistant Commissioner and other officers of various cadres. In the later part of the year, a Deputy Commissioner replaced the Senior Assistant Commissioner.

The Commission, in the same year, saw the coming in of a Senior Principal State Counsel, to head the Legal Division, and also the posting of Seven Monopolies and Prices Officers and an executive officer. Other officers included, 9 Economists, 38 Monopolies and Prices Officers, 1 Statistical Officer, 1 Senior Assistant Secretary, an Accountant II, 1 Executive Officer and several Support staff (i.e. drivers, clerical officers, secretarial staff, etc.)¹⁰⁴⁰.

The annual reports covering the period 1997-2000 express a recurring theme which bemoans that the Monopolies and prices Commission lacks autonomy, top-notch lawyers, top-notch economists and skills in other areas deemed crucial to the effectiveness of a competition authority.

Interestingly, the Annual Report of 1995 recorded that a merger involving Transnational Bank Ltd. and Transnational Finance Co. Ltd., was authorized in an unorthodox way by the Minister of Finance through the provisions of the Banking Act instead of through the Restrictive Trade Practices, Monopolies and Price Control Act. In another interesting happening, the 1996 Annual report had an item recording Tetra Pak and Alfa Laval as having entered into a merger which was detected by the Commission through the daily newspapers. When Tetra Pak was asked to furnish the Commission with information relating to the merger, it argued that the merger was consummated outside the country. The merger was found, however, not to be detrimental to competition. It should, however, be noted that the Restrictive Trade Practices, Monopolies and Price Control Act, does not accord the Monopolies and Prices Commission powers to handle extra-territorial infractions of competition law.

2.4.10 Important Selected Cases

2.4.10.1 CASE ONE- MERGERS AND -TAKEOVERS

The following case is intended to demonstrate how Competition Policy and Law can be used to ensure the achievement

of intended public/political/governmental objectives. The new Kenyan Government had placed a premium on the creation of new employment opportunities and the protection of existing jobs when it took over power in January, 2003. To achieve this objective, the Monopolies and Prices Commission recommended conditional approval of the intended takeovers in order to protect existing employment. In a country where there is no competition law, the use of competition policy to achieve such public interest goals will not be possible.

TAKEOVERS OF THE ASSETS OF TRUFOODS LIMITED AND KABAZI CANNERS LIMITED BY PREMIER FOOD INDUSTRIES LIMITED

Introduction

Premier Food Industries Limited, an operating company of Industrial Promotion Services (Kenya) Limited applied to the Monopolies and Prices Commission on the 21st November, 2002 seeking approval to takeover the assets of Trufoods Limited and Kabazi Cannery Limited in accordance with Section 28 of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504.

Company Profiles

Premier Foods Limited

Premier Food Industries Limited is a limited local private company established on 28th December 1987 and is located in Eaba Dogo Street (Ruaraka), Nairobi. Its business operations involve manufacturing, processing and selling of processed fruits, vegetable products and beverages. The Company is owned 75% by Industrial Promotion Services (Kenya) Limited and 25% by the International Finance Corporation (IFC) which is an arm of the World Bank Group in charge of encouraging private sector activity in developing countries. Industrial Promotion Services is an investment company whose sole shareholder is the Aga Khan Foundation and its main activity is the promotion of projects development within the private sector including industrial and infrastructural projects. It is situated in the City Centre.

Trufoods Limited

Trufoods Limited is a limited local private company not quoted in the Nairobi Stock Exchange. The Company started operations in November 1958 and is in the business of manufacturing food products. It is situated along Jcgoo Road in Nairobi and sells its products in Kenya and the wider East African Community (EAC) market.

Kabazi Canners Limited

Kabazi Canners Limited is also a limited local private company and is also not quoted in the Stock Market. It is located in Bahati" Division of Nakuru District. The Company was established in November 1949. It also manufactures food products.

Rationale for the Takeovers

Some of the reasons- given by the applicants for the proposed takeovers include:

- (i) It is envisaged that the acquisitions will greatly benefit the Kenyan consumers and enhance export potential for processed foods to*EAC and COMESA markets. The acquisitions will also, as a consequence, contribute to the growth of the agricultural sector.
- (ii) Trufoocs and Kabazi face dwindling low market shares resulting in lower economies of scale. Growth potential for both -local and export markets is constrained and production costs and overheads are high for the two companies. This has prompted them to sell their businesses.
- (iii) To derive advantage through synergies to be spawned by combined operations with the resultant economies of scale being utilized to manufacture and process high quality products at competitive prices for the benefit of consumers. The resultant economies of scale will allow the acquiring entity to contract farmers directly and thereby improve the farmers income.

Research and Investigations

The Commission conducted the requisite research and the following was revealed about the parties involved' in this transaction and the entire sub-sector:-

- (a) There existed inter-locking directorships and shareholdings between Trufoods Ltd and Kabazi Canners. The directors and shareholders were the same for both firms. Fifty percent

(50%) of the two firms were owned by Someg Investments Limited-a Swiss firm. Someg Investments Limited did not have engagements in any other business activity hence dispelling any fear of occurrence of concentration of economic power. Twenty percent (20%) of the shares were held by one person while the rest of the shares were held by 16 individuals -with none of them owning more than two percent (2%) . The shareholders were all engaged in business activities which were substantially not similar to what Trufoods and Kabazi were involved in.

The specific products that Premier, Trufoods and Kabazi manufacture/process and sold could be divided into four broad categories, namely; spices and condiments, beverages, spreads, and canned products. Spices and condiments include Tomato Sauce and Tomato Ketchup; Beverages are juices, fruit drinks and concentrates; Spreads comprise jam and marmalade; and Canned products include corn, beans, peas and other vegetables.

Premier sold its products both in the local market - 4104 metric tonnes (Kshs 163 million) and export market - 213 metric tonnes (Kshs 12 million) in Tanzania, Zanzibar, Somalia, UK and Uganda. Trufoods sold a value of Kshs 179,126,745 in the local market while Kshs 8 million was sold in the foreign markets (EAC). Kabazi's export sales were negligible while its local sales were estimated to be about Kshs 120 million. The negligible exports, alluded to herein, went to the EAC market.

The three firms had a very wide distribution network which involved over 200 distributors spread across the country. The companies also had numerous competitors in the same market. Notable among these were Cirio Deimonte Kenya Ltd, Bestfoods, Kenya Orchards Ltd, Excel Chemicals, East African Breweries Ltd, Kuguru Food Complex, Unilever, Nestle Kenya Ltd. More competition was posed by importers such as Heinz Ltd, Ceres Ltd, Robertson etc. Numerous Jua Kali sector [MSE's] players were also involved in this business.

The proposed new entity would lead to an increase in employment. At the time the takeover application was considered. Premier employed 223 people (90 casual and 133 permanent), -Trufoods had 192 (113 casual/contract, 36 permanent), Kabazi 159 with 69 being permanent. The services of the staff of the two target firms, it was agreed, would be transferred to Premier Foods Limited. The 3 firms had human resource development programmes which included

training on quality management, computers, ISO, HACCP, lean manufacturing, supervisory skills, waste management, First Aid and personal health care' and plant hygiene etc.

- (f) Premier Foods Ltd expected to increase the utilization of its plants to 90% after the take-over. Due to efficient purchase, manufacturing and distribution, the company expected to adopt competitive pricing mechanisms for its products which would eventually lead to increased exports.
- (g) The turnover levels for the three companies for 2001 were Kshs1S7,126,751 for Trufoods, Kshs 179,994,596 for Premier and Kshs 126,631,367 for Kabazi.

Analysis

The issue of inter-locking directorships and shareholdings showed that the two target firms were, for; all practical purposes, one and the same and they thus were subject to the same management control on a day-to-day basis. Since the shareholders were engaged in businesses which were dissimilar to that of the firms involved in this transaction, there was little possibility that there could ensue unwarranted concentration of economic power.

Since the three firms manufactured and sold products to the wider EAC and CCMESA markets, there was a real chance that with the takeovers and the possibility of a consequent improvement in efficiency, they would enhance their exports to these areas and this would go a long way into bringing more foreign exchange to the country and also spawn competitive prices for the Kenyan consumers as a result of lower production and overhead costs.

Over 30 companies were operating in this sub-sector and none had any appreciable control of the market in any particular product. For instance, while Trufoods and Kabazi had a significant market share in the jam and tomato sauces segment, they only had a minimal market share in all the other products; Excel Limited had a bigger market share in squashes while Highlands Mineral water had more presence in mineral water and cordials. Milly fruit was a major player in the canned juices as compared to the other firms. In overall terms, there was no particular firm that could be said to be having any -material dominance in the market that could lead to anti-competitive practices. Therefore, the takeover was unlikely to lead to any dominance by Premier Foods Limited. Premier's estimated market share of about 10% did not pose any competition concerns.

The survey also revealed, that the market had a fair presence of the informal industries commonly known as the "Jua Kali Sector" who were now competing with the established formal industry. This enhanced competition in this market.

The two target firms were experiencing- difficult times due to their ancient technology which was on the verge of becoming irrelevant and this meant that they faced the danger of closing down. The takeover looked likely to salvage this situation and thus ensure that those persons already in employment would retain their jobs. Further; the expected expansion would in the medium to long-term create more employment opportunities in this sector for Kenyans.

Employment

Premier Food Industries Limited was only purchasing the assets of the two target companies. This being the case, it was not legally assuming any liabilities or any contractual-cum-legal responsibilities of the target companies. Such responsibilities subsumed employees. Although the proposed takeovers did not spawn any palpable competition concerns, the Monopolies and Prices Commission was cognizant of the government's commitment to creation of employment and the sustenance of existing employment.* The Commission therefore obtained confirmation from Industrial Promotion Services (Kenya) Limited that it would, post-acquisition, ensure that the current employment levels would be maintained. Mr. Lutf Kassam, the Managing Director, of Industrial Promotion Services was sanguine that the employment numbers would rise from the current 148 to about 500 in a short while as the new owners would take advantage of the EAC and COMESA integration initiatives. The Commission also obtained confirmation that all these existing employees of Trufoods and Kabazi who would wish to join Premier Food Industries would be given first priority before recruitment of any other employees by the acquiring enterprise. This would not include 3 senior managers and 4 directors.

Recommendation

In view of what is stated above, it was unlikely that the coming together of the assets of the three firms would pose a threat to competition. In any case, Trufoocs and Kabazi were owned by one group and had the same management with the result that their coming together did not change the market situation. There was also a great possibility that after being acquired by Premier, the almost obsolete technology of the two firms would be updated

ana this could only lead to greater and efficient production and more employment.

It should also be noted that with the emergence of the East African Community (EAC) ana COMESA markets, there was need for Kenyan companies to compete in this arena effectively. The takeover would likely create a bigger, stronger and more efficient firm which was capable of penetrating and competing in the two markets and the wider global arena. This would spawn greater economic prosperity.

It was, therefore, recommended in terms of Section 29 of the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 504) that the takeover be approved on the following conditions:

1. Trufoos Limited and Kabazi Canners Limited would pay all their pre-takeover employees their full employment benefits in accordance with the contractual arrangements governing their employment.
2. Premier Food Industries Limited would enter into new employment contracts with those of the said employees who would wish to become its employees.
3. Employment levels, post-acquisition, would remain at least at the same level as that subsisting at the time of the application for the intended takeover.

SOURCE: MONOPOLIES AND PRICES COMMISSION

2.4.10.2 CASE TWO: PREVENTION OF FUTURE POSSIBLE ABUSE OF DOMINANCE

The following case seeks to demonstrate that where a Competition Authority exists, its opinions are taken seriously by governments. In this case the recommendation that the National Social Security Fund should not be allowed to sell its shares in East African Portland-Cement Company Limited to Bamburi Cement Company Limited was accepted by the government. The proposed sale evinced competition concerns.

The following narrative is the background and the opinion the Monopolies and Prices Commission gave to the government of Kenya. It is reproduced in its original form.

PROPOSED SALE OF 9,300,000 NSSF SHARES IN EAST AFRICAN PORTLAND CEMENT LTD AND 870,000 NSSF SHARES IN ATHI RIVER MINING LTD 3Y BLDE CIRCLE INDUSTRIES [BCI] OF UNITED KINGDOM

Introduction

By his letter dated June, 2000 the Managing Trustee of NSSF wrote to the Permanent Secretary, Treasury seeking approval to carry out the above-named proposal. In this transaction the NSSF seeks to sell 9,300,000 shares which are part of its shareholding in EAPC Ltd and 870,000 shares, which is its total shareholding in ARML to Chanui Holdings Company.

The participating parties are NSSF and Chanui Holding Company. NSSF is a pension fund created by the Government of Kenya, while Chanui Holding Company is a local investment company, wholly owned by Associated International Cement (AIC). AIC is an international holding company owned by Blue Circle Industries (BCI) of United Kingdom.

This paper attempts to evaluate this proposal in accordance with the provisions of Cap. 504 of the Laws of Kenya. The paper is divided into the following three parts:

- i) Background of Cement Industry in Kenya.
- ii) Application of competition policy and law to this proposals
- iii) The way forward

cement manufacturing and marketing in Kenya

There are three factories, which produce cement in this country namely:-

- i) Bamburi Cement Limited (BCL)
- ii) East African Portland Cement Limited (EAPCL).
- iii) Athi River Mining Limited (ARML).

The three factories have annual capacity of production of 2.1 million tones while domestic consumption is 1.2 million tones. In terms of export, it is only Bamburi which does exportation.

BAM3URI CEMENT LIMITED (BCL)

BCL is located in Mombasa and started its operation in 1954. It is a limited local public company quoted in the stock market. It is one of the largest factories in the country with annual capacity of 1.2 million tones but sells approximately 600,000 tones annually. Currently it is commanding a market share of 54%.

The company has 13 directors as follows:

NAME	STATUS	NATIONALITY
Didier Tresarrieu	Managing Director	French
Alan Y. Lemeur (alt. Max Vogeei)	Director	French/Swiss
David Masika	Director	Kenyan
James M. Shiganga	Director	Kenyan
Geoffrey c.D. Groom	Director	Kenyan
Jean C. Hillenmever	Director	Kenyan
Solomon Karanja	Director	Kenyan
Joshua C. Kulei (alt. William Sambu)	Director	Kenyan
Mbuvi Ngunze	Director	Kenyan
Raohael M. Thyaka	Director	Kenyan
Richard Kemoli	Director	Kenyan
Tonev Hadley	Director	British
Ronald Roy	Director	Canadian

In terms of shareholding Bamcem holding limited is leading with 73.3% of issued share capital. The shareholders are as follows:

No.	NAME OF SHAREHOLDER	No. OF SHARES	% SHARE ISSUED
1	Bamcem Holdings.Ltd.	265,907,594	73.3.
2.	National Social Security Fund	57,314,178	15.8
3.	Baloobhai Chotabhai Patel	8,249,741	2.3
4.	Barclay Trust Investment Patel	5,583,981	1.5
5.	Insurance 'Co. of East Africa	2,272,088	0.6
6.	Kenya Reinsurance Corporation	2,735,748	0.8
7.	Old Mutual Insurance Co.	2,347,740	0.6
8.	Others	18,537,255	5.10
9.	Total	362,942,725	100

Bamcem holding is an international company registered in jersey, Crannel Islands. Its shareholders are:

- i) Cementia 40%
- ii) Costal 20%
- iii) Association International Cement (AIC) 40%

Cementia is an international holding company 100% owned by LaFarge of France.

It should be noted that the leading world cement producer namely Blue Circle of United Kingdom and LaFarge of France have an indirect shareholding in BCL making 3CL more of a foreign company. It trades its products under a brand name Boabob Cement and its market: includes the Coast, Rift Valley, Western and Nvanza provinces. For its export market it relies on Uganda, Indian Ocean Islands of Mauritius, Comoros, and Madagascar. In order to capture the Nairobi Market, BCL has set up a grinding plant at Athi River and this plant was commissioned in 1999. Recently, BCL has invested Kshs.189 million in ARML through a one year convertible bond. This will result in BCL having a shareholding of IS.4% in ARML. In order to supply the Ugandan

Market better, and also capture the Democratic Republic of Congo market, it has acquired Hima Cement Ltd in Uganda.

EAST AFRICAN PORTLAND CEMENT LTD. (EAPC)

This is the second largest factory in the country with, a production capacity of 800,000 million tonnes annually contributing approximately 500,000 million tonnes to the domestic consumption. It is a limited local public company quoted in the Nairobi Stock Exchange. Its factory is located in Athi River and was commissioned in 1953.

EAPC is a Kenyan Company as the citizens have a combined shareholding of about 53%. Its shareholders are as follows:

No	NAME OF SHAREHOLDERS	NO. OF SHARES	% OF ISSUED SHARE CAPITAL
1.	NSSF Board of Trustees	24/300,000	27
2.	?/S to the Treasury	22,799,505	25.33
3.	Cementia Holding AG	13,180,442	14.64
4.	Associated International Cement Ltd	13,144,442	14.60
3.	Bamburi Cement Ltd. (Nairobi Norminees Ltd)	10,016.068	11.13
6.	Public Thro' N.S.E.	6,559,543	07.29
	Total	90,000,000	100.00

In terms of directorship EAPC has eight directors. A part from one, all the others are Kenyans. Their names as follows:

No.	NAME OF DIRECTOR	STATUS	NATIONALITY
1.	A.M. Lulu	Chairman	Kenyan
2.	T.K. Barmazai	Managing Director	Kenyan

3.	T.K. Ibui	Director	Kenyan
4.	M. Chemengich	Director	Kenyan
5.	T. Hadley	Director	Kenyan
6.	M.L. Oduer-Otieno (Ait. G.M. Mitine)	Director	Kenyan
7.	G.C. Groom	Director	Kenyan
k	D.W. Masika	•Director	Kenyan

In 1986, the management of EAPC realized that there is need to **redlance** its plant, as it was old (39 years). Plans were made to **rehabilitate** the plant and various " financing agents were approached. Among those approached include Blue Circle and Cementia ana they were not willing to fund the project.- In 1994 **the** government opted to seek a loan from Japan, under Overseas Economic Corporation Fund (OECF¹ worth K£2,254,435 (U.S. Dollars 65 Million). This loan is fully guaranteed by the Government for seven years. The new factory was completed on December, 26, 1997 **and** commissioned in early 1998.

In the same period the government decided to diversify from EAPC **and** started looking for a strategic partner. Two partners were approached namely, Commonwealth Development Corporation and Pretoria Portland Cement Co. of South Africa. However, this process stalled and the company is still being controlled by the Government. EAPC has a technical agreement with Blue Circle Industries where they provide advice on technical matters related to its cement and clinker manufacturing. However, under the current Government policy of divestiture, the EAPC, is targeted for privatization.

The traditional market, for EAPC is Nairobi and its surroundings. **However** this market has been threatened by entry of ARML and also BCL. The company is now trying to venture, in other areas **outside** Nairobi, and also exploring ways of entering the export **market**.

ATHI RIVER MIKING LTD. (ARML)

This is one of the smallest cement manufacturing plants in the country and started producing cement in 1985. However, the company started its operation in 1973 and it has been producing chemicals and minerals. It has two factories, one located in

Athi River in Macnakes District ana the other is based in Bencra, Kilifi District.

ARML is a limited local public company and is quoted in the stock market. Its estimated annual capacity is 100,000 tones and it commands a market share of 8%.

Its Directors ana Shareholders are as follows:

NAME OF DIRECTOR	NATIONALITY	STATUS	% SHAREHOLDING
Brian Rogers	Kenyan	Chairman	Nil
Harjivandas J. Paunrana	Kenyan	Vice-Chairman	28.256
Fraaeep H. Paunrana	Kenyan	Managing Director	25.519
Sudhir A. Tanna	British	Director	0.270
Wilfred Murungi	Kenyan	Director	1.112
Palle J. Rune	Kenyan	Director	0.453
The Acacia Fund Ltd.	Kenyan Corporate	Director	8.162
Total			63.872

The other shares are held by about 4,000 plus shareholders, who brought shares, when the company offered for sale 23 million new shares in the Nairobi Stock Exchange in 1997.

In April 2000 ARML proposed to issue 18 million new shares, via convertible bonds to Bamburi Cement Ltd. which will give them 19.35% of the total expanded capital of the company upon conversion after one year. This proposal has already been executed and is saving ARML three million shillings per month in terms of interest cost. As a result, Bamburi will be represented in the Board of ARML.

APPLICATION OF COMPETITION POLICY AND LAW

Under Section 23 of the Competition Law, the Ministry of Finance is expected to keep the structure of production and distribution of goods ana services in Kenya under review to determine where concentration of Economic power exists, whose detrimental impact on the Economy outweighs the efficiency advantages, if any, of

integration in production and distribution. In identifying the concentration of Economic power, the following factors are considered:

- i) A Person controls a chain of distributing units, the values of whose sales exceed' one-third of the relevant market of category of goods sold by the chain.
- ii) 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.
- iii) A person has beneficial interest, exceeding twenty per cent of outstanding shares, in manufacturing enterprises, and has a beneficial interest however small of outstanding shares in one or more wholesale or retail enterprises which distribute the products of the manufacturing enterprise.

In the same law, control is defined as power to make major decisions in respect of conduct of affairs of an enterprise, after no more than nominal consultations with other persons, whether directors or other officers of the enterprise.

An unwarranted concentration of Economic power is prejudicial to public interest if having regard to the existing economic conditions in the country and 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.
- b) To increase unreasonably the price at which goods are sold and profits derived from the production, supply or distribution of goods from the performance of any service.
- c) To reduce or limit competition in the relevant market.
- d) To result in the deterioration in quality of goods or in the performance of any service.

Looking at these provisions of the law, the main parameters to determine whether an enterprise has economic power are control and the market share. This proposal of the NSSE therefore would be evaluated under the two parameters, and the main focus will be Bamburi Cement Ltd which has a shareholding in the other two cement factories.

rraol

proposal of the NSSF to sell shares to Chanui Holding
 •• is executed. The shareholding of the two companies,
 change as" rollows:

UPC

10.	Same of ShareHolder.	Current % issued share Capital	% Shareholding after orcposal is executed
	N'isf Board of Trustees	27	16.67
	?/S to the Treasury	25.33	25.33
	: amentia Holding AG	14 . 64	14.64
	Associated" ..-.ternaionai Cement Ltd. (AIC)	14 . 6	24.93
	Nairobi Nominees Ltd. (Bamburi C. L.)	11.14	11.14
	Public thro' NSE	07.29	07.29
	Total "	100	100

is a local holding company owned wholly by Associated
 '- itional Cement Ltd. (AIC) . AIC is owned by Blue Circle of
 t is therefore assumed that the shares owned by Char.ui are
 tly owned by AIC. From the above BCI's ana Lafarge's
 - r3tip of EAPC," will increase from 40.38% to 50.701 while the
 olding, will decline form over 52.33% to around 42%.

-he two fcreian investors, Blue circle will increase its
 --•holding to 24-. 93% from 14.60% while LaFarge shareholding
 regain 14.64%.

=: CEMENT LTD.

tO.	Name of •-, -^Holder	Current % issued share Caoital	% Shareholding after proposal is executed
	ia.T.cera Holding	73.3	71.85



i Limited		
j National Social	15.8	17 .25
i <u>Security Fund</u>		
Baloobnai	2.3	2.3
Chotabhai Patel		
3arclay Trust	1.5	1.5
Investment		
Insurance Co. of	0.6	0.6
East Africa Ltd.		
Kenya Re-	0.3	0.8
! insurance		
j Corooration		
Old Mutual	0.6	0.6
Insurance Co.		
Others	5.10	5.10
Tot«	100	100

NSSF will buy 5,276,315 units of shares in 3CL which translates to 1.45% shareholding. After sale of these shares, the shareholding of Bamcem, will change to 71.8%. This means that the co-sharing of Bamcem in Bamburi Cement Ltd will change among the three holding firms as follows:

Nc.		Current % Shareholding	After Implementation of Proposal
	Cementia	29.32	29.32
2_	Associated International	29.32	27.87
j.	Coastal	14 .66	14 .66
	Total	73.3	71.85

In Bamburi Cement Ltd the leading shareholder will' be Cementia, which is a holding company owned by LaFarge.

In terms of shareholding, it can be concluded that the two leading cement manufacturing plants in the country will be owned by foreign investors who already control BCL, the leading cement manufacturer. Again, Blue Circle will be the leading shareholder in SAPC while LaFarge will be leaders in Bamburi.

It should be noted that there is a cross directorship (interlocking directorates) in the two companies whereby three directors of SAPC are also directors in BCL. If the proposal is executed, it will also increase this cross directorship. BCL will also be represented in the Board of ARML. This state of affairs is inimical to competition as none of the three cement manufacturing companies in Kenya can strategize on itself as the Board member/s representing the competitor/s will avail any important information to the competitor/s.

MARKET SHARE

Currently BCL is a market leader with an estimated average market share of 55%. However, this share has been reducing over the years as the following table indicates:

ESTIMATED MARKET SHARES

FACTORY	1994	1995	1996	1997	1998	1999
3AMBCJRI	63.8	74	74.3	57.3	55.6	58.5
EAPC	36.2	26	23.0	36.7	37.0	34.6
ARML	2.2	6	2.2	6.0	7.4	6.9

On the other hand EAPC has a market share of 35% currently and its share has been fluctuating between 23% and 37%.

Bamburi's traditional exports market has been the Indian Ocean Islands. Due to collapse of the Asian Economies, this market has become uncertain. The Asian countries have increased their exports to these islands. The next alternative was Tanzania but there is excess capacity in that country. The only solution for BCL is to consolidate its domestic market share and increase its exports to Uganda. In Uganda, this has been achieved by acquiring Kima Cement Ltd.

The table below shows annual disposal of Kenyan cement for the last six years in both domestic and export markets:

YEAR	1994	1995	1996	1997	1998	1999
Domestic Sales x 1000 tones	848	1,044	1,148	1,252	1,352	1,447
Export Sales x 1000 tones	616	514	447	683	748	703
Total	1,464	1,558	1,595	1,935	2,100	2,150

1000 tones		1	1	
------------	--	---	---	--

Bamburi is the only company which exports cement in the country. From the table, it is clear that from 1997, it has been increasing its export sales.

Looking at the two parameters, control and market share, it can be concluded that Bamburi Cement Limited has dominant economic power as it controls more than 50% of cement sales in the country and, therefore, may exercise control over the conduct of the other two factories in the area of pricing. If the NSSF proposal is carried out, it will increase further its control in EAFC and Athi River Mining Ltd.

How BCL will use its enhanced economic power may be presumed from its past activities, especially in terms of price and profit. BCL has been a price leader while the others were followers. It incurs lower cost of production than the other two factories. The cost of production in EAFC is 80% higher than that incurred by the BCL. The main contributors to this cost differential are:

Raw Materials	31%
Furnace Oil	33%
Labour	6%
Grinding and packing	5%
Factory overheads	5%
Total	80%

The cost differential between EAFC and Bamburi in 1998 was estimated at about Kshs. 2,500 per tonne. The implication of this is that the BCL products should be cheaper than EAFC. The obvious deduction is that BCL Cement is priced unreasonably high.

The profits for the two factories during the 1995 to 1999 period are shown here below:

1.0 Profit before tax for Kenya Cement Industries

YEAR END	1995	1996	1997	1998	1999
BAMBURI	1,325	1,453	1,477	563	890
EAFC	93	105	111	499	(1,294)
ARM	19	28	60	12	19

2.0 Profits in Kshs. x 1000

From the above table it can be concluded that BCL has been making substantial profits throughout the five years. The profits have also been increasing. The other two factories have been making minimal profits compared with Bamburi.

As mentioned earlier, Bamburi has bought convertible bonds in ARML. One of the conditions given to ARML was that they should buy clinker from Bamburi. This resulted in ARML closing down its clinker plant. This resulted in reduction of competition in the production of clinker as for now only EAPC and Bamburi are producing clinker. Clinker is an essential raw material in production of cement.

THE WAY FORWARD

Cement is a basic input in construction and building industry which plays an important role in economic development of the country. This product has no substitutes and due to its importance in national economic growth, it has been referred to as a "strategic material". There is need therefore to keep the structure of the cement market efficient and competitive.

EAPC is controlled and managed by Kenyans. The Government has been granting loans to the company although and currently EAPC has a government guaranteed loan from OECF. The Company is financing its obligation without any recourse to the Government. Despite the foreign exchange losses, the company has been paying dividends to the Treasury almost every financial year. It has a state of the art modern factory at Athi River:

In terms of marketing, the company has a strategic position compared to BCL. It is near Nairobi, the most lucrative market for cement. With improved financial and technical management, EAPC can check the monopoly position currently enjoyed by BCL.

Arising from this therefore, the NSSF proposal to sell shares to Chanui Holding Company should be shelved for the time being. Members of the public should be given the first opportunity to subscribe to these shares through IPO at the Nairobi Stock Exchange.

Therefore, NSSF should be advised to sell these shares in an open market through Nairobi Stock Exchange. This will achieve accountability and transparency in the disposal of these shares and create opportunities for Kenyans and other investors to buy them. It will also promote competition in the cement manufacturing industry.

February, 2001.

POSTSCRIPT

1. The Government accepted the advice of the Monopolies and Prices Commission and NSSF was denied authority to sell its shares in EAPC as per its original proposal.
2. Around July, 2001 LaFarge acquired Blue Circle worldwide to create the world's biggest cement group. The acquisition agreement had been reached during the first week of January, 2001^Automatically LaFarge took control of BCL. Through this acquisition LaFarge took charge of 41.7 per cent shareholding in EAPC, BCL's competitor. Through the same deal LaFarge acquired 19 per cent in the shareholding of BCL's third, albeit small, competitor. This had the effect of allowing representatives of LaFarge to sit in the Boards of all the three cement manufacturing companies in Kenya. Had the proposal to sell NSSF shares as originally planned been approved, the control of the cement industry by LaFarge would have been tighter.

SOURCE: MONOPOLIES AND PRICES COMMISSION

2.4.10.3 CASE THREE-COLLUSION/PRICE FIXING

The Commissioner of Monopolies and Prices and The Association of Kenya insurers

1. This case addresses the problem created by a powerful Cartel in the insurance Industry in Kenya.

2. The case also addresses the problem posed where there is a sector regulator in the particular industry being investigated by the Competition Authority.

The Association of Kenya Insurers is one of the strongest industry associations in Kenya in terms of financial clout and a hundred per cent membership of the actors in the Insurance Industry. Its rules required all members not to reveal the decisions and strategies of the association. Hefty fines were imposed on those members who failed to abide by the prices and practices decreed by AKI. The fixing of insurance premium prices had been taking place for quite some time. However, as happens with cartels, it was difficult to get hard evidence.

The repression of competition in the insurance industry in Kenya caused a uproar. Insurance brokers and players in the transport industry protested. At one time, all Matatus (minibuses used in Kenya) threatened to remove their vehicles from the Kenyan roads, the Association of Kenya Insurers called a truce and started negotiating with the Matatu Welfare Association quietly regarding reduction of the fixed prices. At this point, the Monopolies and Prices Commission made a breakthrough and obtained a copy of the UCI Motor Rating Schedule dated 4th June, 2002 which set rates, terms and benefits to apply to all motor policies issued after 1st July, 2002. The Commission also obtained a copy of AKI Resolution 07/2002 wherein it was resolved and agreed that other supplementary rates would apply with effect from 1st January, 2003.

See Financial Times, 9th January, 2001.

The Commission wrote the following letter to AKI:

7th February, 2003

Restrictive Trade Practices

In accordance with Section 15 of the Restrictive Trade Practices, Monopolies and Price control Act, Cap 504 of the Laws of Kenya, I wish to inform you that allegations have been made that you have been engaging yourselves in Restrictive Trade Practices and specific evidence has been presented to substantiate those allegations. The allegations are:

1. You have been making, directly or indirectly, recommendations to your members which relate to the prices charged or to be charged by your members.
2. You have been making, directly or indirectly, recommendations to your members which relate to the terms of sale of insurance services and those recommendations directly affect prices, profit margins included in the prices or the pricing formula used in the calculation of prices.

I, therefore, invite your association to comment on the above allegations and the evidence provided to us, and to indicate what remedies (if any) you propose in order to bring your trade practices into conformity with the Restrictive Trade Practices, Monopolies and Price Control Act. The evidence relates to the rates, terms and benefits contained in the AKI Motor Rating schedule effective from 1st July, 2002. By powers conferred upon me by Section 15 of the Restrictive Trade Practices, Monopolies and Price Control Act, I request you to furnish your response to me, latest, by 24th February, 2003.

COMMISSIONER

MONOPOLIES AND PRICES COMMISSION

AKI replied as follows:

19th February, 2003.

RESTRICTIVE TRADE PRACTICES

We refer to your letter dated 7th February, 2003 regarding allegations made against this body concerning alleged restrictive trade practices. We observe that your letter does not disclose

the identity of the complainant or the nature of the evidence presented to you, as required by law. In any event, we now wish to address you as follows:

1. The Association of Kenya Insurers

- 1.1 "The Association of Kenya Insurers ("AKI") is a Society registered under the Societies Rules (1368) and under Certificate of Exemption for Registration number 2156 of 5th January 1388. Its objects include:

"Protecting, promoting and advancing the common interests of members including the taking of such concerted measures as may be deemed expedient whenever the business of the members of the Association may be affected by the action or proposed action of any authority, organization, body or person; and to acting as a medium of consultation and communication with the Government."

2. The Insurance Act

- 2.1* The insurance industry is regulated by the Commissioner of Insurance appointed by the Minister of Finance in accordance with Section 3 of the Insurance Act. Section 5 of the insurance Act (the "Act") further provides that:

- (1) Subject to this Act, the duties of the Commissioner shall include:
- a) the formulation and enforcement of standards in the conduct of the business of insurance with which a member of the insurance industry must comply;
 - b) directing insurers and reinsurers on the standardization to contracts of compulsory insurance;
 - c) directing an insurer or reinsurer, where he is satisfied that the wording of a particular contract of insurance issued by the insurer or reinsurer is obscure or contains "ambiguous terms or terms and conditions which are unfair or oppressive to the policy-holders, to clarify, simplify, amend or delete the wording, terms or conditions, as the case may be, in respect of further contracts;

d) the approval of tariffs and rates of insurance in respect of any class or classes of insurance;

e) such other duties as the Minister may assign to him.

(1a) The Commissioner may, with the approval of the Minister make regulations for the purpose of giving effect to the provisions of this Part.

(2) The Commissioner shall, as soon as reasonably practicable after each year ending on 31st December, furnish to the Minister a report on the working of the Act during that year together with summaries of returns and documents deposited with him under Part VI during that year; and the minister shall lay the report before the National Assembly as soon as reasonably practicable thereafter."

It will be noted that Section 5(1) (d) imposes a duty on the Commissioner of Insurance to approve tariffs and rates of insurance in respect of any class or classes of insurance and Section 5 (1A) permits the Commissioner to make regulations for the purpose of giving effect to the provisions of that Part.

Each insurer in Kenya is required to present its proposed rates to the Commissioner of Insurance for approval. In actual fact it is the Commissioner who specifies the range within which such rates may be levied (see Section 5 (1) (d) set out a paragraph 2.1 above) and no insurer is permitted to charge rates outside those parameters. It is therefore mandatory for insurers to charge premia within those specified parameters under the Act.

Section 75 of the Act requires an insurer carrying on general insurance business to file with the Commissioner a schedule or manual of rates of premia, proposed to be used by each insurer for each class of business. The Commissioner is entitled under Section 75 (5) to require an insurer to modify or revise the schedule or manual of rates filed with the Commissioner for his approval. As part of its self-regulation procedures AKI requires each of its members (which are all insurers licensed and registered to

conduct insurance business in Kenya) to comply with the rates and terms set out therein.

2.4 The Insurance Advisory Board created by Section 157 of the Act has, as amongst its functions set out in Section 163 of the Act;

1a) to advise the Minister with regard to any matter regarding the insurance industry, including rates, terms and conditions of policies, operation of the act whether arising from the Commissioner, the industry or other source, or as may be referred to the Board by the Minister;

(b) assist the Commissioner in matters relating to the insurance industry including formulation of standards in conduct of business; and

(c) deliberate and advise the Minister on disputes between the Commissioner and the insurance industry."

The Commissioner of Insurance carries out his duties under Section 75 of the act in accordance with the advice given to him by the Insurance Advisory Board under this Section 163.

3. The Restrictive Trade practices, Monopolies and Price Control Act

3.1 The Restrictive Trade Practices, Monopolies and Price Control Act states that:

"(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 skill, 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

(b) in respect of other persons able and willing to pay 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 Section 6 to 12 are declared to be restrictive trade practices for the purposes of this Act."

It is doubtful that the provision of insurance business as defined in

Section 2 of the Insurance Act, falls within the ambit of Section 4 Of the Restrictive Trade Practices, Monopolies and Price Control Act.

In any event, Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act exempts from the provisions of the Act;

"(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."

Insurers in Kenya clearly fail within both limbs of Section 5 (i.e. sub-section (a) and sub-section (b)) and can only be licensed to practice if they comply with the requirements of agencies of the Government, which, in this context are the Minister of Finance and the Commissioner of Insurance who are so authorized to act by the Insurance Act. When acting in compliance with the rates specified by the Commissioner of Insurance for particular classes of insurance,

Insurers would be exempt from the Restrictive Trade practices, Monopolies and price Control Act.

3.4. The specification of the applicable rates for any class of insurance is to provide protection for the consumer of those services and not the provider (insurance companies) and to guarantee sustainable solvency of insurance companies (which ultimately enhances the protection of the policyholder, as a consumer). It is therefore our submission that the protection offered by the Restrictive Trade Practices, Monopolies and Price Control Act was not intended by Parliament to be applicable to the insurance industry. This submission acquires overwhelming support from the fact that both Acts (i.e. the Restrictive Trade Practices, Monopolies and Price Control act and the Insurance Act) and both Commissioners (the Commissioner of Insurance and Commissioner of Monopolies and Prices) fall under the authority of the minister of Finance and it could not have been intended that the two Acts would contradict each other. Parliament could not have intended the Minister of Finance to compel the performance of a particular act under one Statute, whilst at the same time making the same Minister responsible for enforcing the prohibition of the same act under a second statute.

3.5'. Insurance claims emanating from motor vehicle business are a sensitive and emotive subject in the context of the Kenyan economy and it is for the protection of these injured by motor vehicles and in particular commercial motor vehicles that the Commissioner of Insurance requires rates to be approved by his office.

4. Conclusion

We hope that the above is a sufficiently adequate response to your invitation to us to comment on whatever allegations have been made. If you wish us to make a more comprehensive verbal presentation, we would be happy to do so.

Yours sincerely,

WILFRED R. NJERU
G. EXECUTIVE DIRECTOR

Copy to:

Commissioner of Insurance
Ministry of Finance

AKI also provided a letter in which the Commissioner of Insurance requested AKI to come up with premium guidelines. AKI took advantage of the innocent requests to justify and to practice price fixing.

The said letter is reproduced below:

20th August, 2001

PREMIUMS PATES

Please refer to my address to the Chief Executive Officers of Insurance Companies of 8th August, 2001.

It is appreciated by all that one of the biggest problems facing the Industry today is that of premium rate undercutting.

" I did in my referred address require that AKI comes up with rating guidelines on all classes of General Insurance Business for the market.

Underwriters will thereafter be required to file with this office rates to be charged by them w.e.f. 1.1.2000 in accordance with Section 75 of the Insurance Act.

This is therefore to request you to expeditiously draw up the guide stated above.

SAMMY M. MAKOVE
COMMISSIONER OF INSURANCE

The Commission's position was that it did not agree with AKI and replied as follows:

5th March, 2003

RESTRICTIVE TRADE PRACTICES

I "acknowledge receipt of your letter dated 19th February, 2003.

Please note that our letter of 7th February, 2003 made reference to two specific allegations made against you which principally related to the AKI Motor Rating Schedule effective from 1st July, 2002. The said schedule is in your possession as you authored it, vide your letter AKI CIRCULAR NC. 86/2002/MNW of 4th June, 2002. Among the complainants are the Kenya Transport Association and the Federation of Kenya Employers.

We do not agree that the Restrictive Trade Practices, Monopolies and Price Control Act and the Insurance Act contradict each other. We also do not agree that when fixing prices or when recommending prices, your Association is exempt from the application of the Restrictive Trade Practices, Monopolies and Price Control Act. We also note that you do not deny the allegations made against you..

In accordance with Section 15(3) of Cap 504, I deem your Association's response as contained in your letter of 19th February, 2003 not sufficient to remove the grounds for the allegations made against you as contained in our letter of 7th February, 2003. Consequently, I invite your Association, through its legally mandated officers, to negotiate with the Commissioner, who is the undersigned, a Consent Agreement satisfactory to the Commissioner. The said Consent Agreement will be negotiated within the law as laid down by section 15 of Cap. 504. The negotiation for the Consent Agreement to which you are being invited will take place on Tuesday, 25th March, 2003 at 11.00 a.m.

COMMISSIONER
MONOPOLIES AND PRICES COMMISSION

On 23rd April, 2003, the Commissioner of Monopolies and Prices and the Association of Kenya Insurers signed a Consent Agreement in the following terms:

"THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT, CAP. 504, LAWS OF KENYA)

In accordance with Section 15(3) of the Restrictive Trade Practices, Monopolies and Price Control Act, the Monopolies and

Prices'Commissioner and the Association of Kenya Insurers have this 23rd day of April, 2003 negotiated a Consent Agreement stipulating as follows:-

1. That the Association of Kenya Insurers undertakes to withdraw, with immediate effect, all its present and past Decisions on Premium Rates which purport to recommend prices chargeable for insurance services by its members. The Association of Kenya Insurers also undertakes to desist from making such decisions and from issuing such Premium Rates recommendations in future.
2. That the Association of Kenya Insurers undertakes to observe, with effect from the date of this Consent Agreement, all the Provisions of the Restrictive Trade Practices, Monopolies and Price Control Act.
3. That the Association of Kenya Insurers will diligently and strictly observe the terms of this Consent Agreement in order to compensate for the past effects of- the said past Decisions."

SCURCE: MONOPOLIES AND PRICES COMMISSION

The writer notes that since abolition of this insurance cartel there has been peace amongst the players in this industry, i.e. the Insurance Companies, the Insurance Brokers, the transport industry (the matatu sector especially) and the public. The dismantling of this hardcore cartel must have spawned immense benefits for the Kenyan economy as eventually it is the consumers (the public) who eventually suffer the consequences of repressed and/or distorted competition.

2.4.11 Extra-Territorial Relations

Kenya is a member of the World Trade Organization [WTO] which succeeded the General Agreement on Tariffs and Trade¹⁰⁵ arrangement in 1995. It is therefore bound by

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3. That the Association of Kenya Insurers will diligently and strictly observe the terms of this Consent Agreement in order to compensate for the past effects of the said past Decisions."

SOURCE: MONOPOLIES AND PRICES COMMISSION

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Kenya is a member of the World Trade Organization [WTO] which succeeded the General Agreement on Tariffs and Trade¹⁰⁵ arrangement in 1995. It is therefore bound by

(the Most Favoured Nation (MFN) concept vis-a-vis other WTO members. it is therefore obligated in relation to all other contracting parties to extend all concessions or favours made by each in the past or which might be made in the future to any other state in such a way that their mutual trade will never be on a less favourable basis than is enjoyed by that state whose commercial relations with each is on the most favourable basis. All then existing GATT members acceded to the World Trade Organization in January 1995¹⁰⁶. Kenya was one of the over 100 countries which signed the Uruguay Round's Final Act in Marrakesh, Morocco, in April 1994¹⁰⁷. The Uruguay Round led to the most comprehensive international trade treaty ever concluded¹⁰⁸. Kenya's relationship with WTO constitutes its most important international economic pact in world trade and competition matters.

Kenya also has had external relations with the European Union which have impacted upon its trading and competition situation. This has been effected through membership of such mixed agreements as in the form of Yaounde I (1964), Yaounde II (1969), Lome I (1975), Lome II (1979), Lome III (1984) and Lome IV (1989)¹⁰⁹. The agreements have provided for assistance to agreement

members who are developing countries and preferential access in certain areas to the European Union Markets-.

In the East African scene, Kenya is a member of the East African Community. It is envisaged that the existing arrangement will eventually spawn an Economic-cum-Political Community¹¹⁰. Article 78 of the draft Treaty of the East African Community which deals with competition provides that¹¹¹:

1. The partner states agree that any practice that adversely affects the objectives of free and liberalised trade shall be prohibited. To this end the partner states agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the community.

2. The council may declare the provision of paragraph 1 of this Article inapplicable in the case of:
 - a) Any agreement or category thereof between undertakings,
 - b) Any decisions by Association of undertakings, or

- c) Any concerted practice or category
- thereof; which improves production or distribution of goods or promotes technical or economic progress and which has the effect of enabling consumers to have a fair share of the benefits : Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of objectives of this Treaty or has the effect of eliminating competition.

, I

- 3) The Council may make regulations to ensure the application of the provisions of paragraph I of this Article.

Article 79 of the draft Treaty which obliges the three proposed member states of the Community, Kenya, Uganda, and Tanzania, to offer each other the Most Favoured Nation Treatment is superfluous as all the three countries are members of the World Trade Organization and therefore bound by the Most Favoured Nation Concept which is, in any case, a GATT creation.

Eventually, the area of competition was subsumed by Article 75 of the East African Community Treaty which makes competition one of the elements of the proposed EAC Customs Union. The Protocol establishing the Customs

Union was signed by the three East African Heads of State in March, 2003.

To further buttress its commitment to local and international competition, the Kenya government has stated that facilitation of both local and international trade will be two of its most important development and industrialization strategies. In a forward to Sessional Paper No.2 of 1996 on Industrial Transformation To The Year 2020, the then Minister for Commerce and Industry, Hon. Joshua Angatia, said with regard to international trade: "...As a country, we must look outward at our neighbours and the world both to seek opportunities for our enterprises and to invite others to participate in building our economy. We cannot create a future if we can turn our backs on the challenges of international trade and commerce."¹¹² The Sessional Paper further reiterated the need to assure promotion of competition among local traders "through strict enforcement of anti-monopoly and anti-trust laws"¹¹³. The Sessional Paper also definitively stated:

The "multilateral trade negotiations of the Uruguay Round culminated in the establishment of the World Trade

Organization (WTO) . It set out an ambitious agenda which included reducing trade barriers further. Kenya is a signatory to this agreement and must work within its trade regulations and recognise that international trade will become more competitive. However, new trade opportunities will emerge as a result of the new multilateral" arrangements that will encourage international trade provided Kenya can establish export oriented industries"⁴.

2.5 CHAPTER SUMMARY

This chapter has examined in detail the antitrust positions of the USA, EU and Kenya. By and large, it has been seen that the USA and the EU antitrust regimes have similar jurisprudential foundations towards restrictive trade practices, monopolization, mergers and takeovers. The USA and the EU systems are however more sophisticated than the Kenyan system, no doubt, due to their long existence. In the next Chapter ,The USA and EU laws will be juxtaposed with a view to determining their respective efficacies. The contribution of the courts towards antitrust enforcement in the USA and the EU will also be examined.

CHAPTER 3

A JUXTAPOSITION OF KENYA'S ANTITRUST POSITION WITH AMERICAN AND EUROPEAN POSITIONS

3.1 INTRODUCTION

In Chapter 1, the need for antitrust measures was examined. The historical foundation of antitrust was also examined. GATT (now WTO) and other international competition perspectives were also addressed. These perspectives are important because of the Theory of Comparative Trade. In any case, ignoring them can lead to deleterious effects in national economies and internationally as happened during the great depression. These perspectives are important because of the theory of comparative advantage.

As noted in Chapter 1, there is need for principles of antitrust economics to be well understood because as Alan Swan and John Murphy opined, "One cannot make much sense of the antitrust Laws without a firm grasp of these principles, and without them, the discussion of antitrust enforcement becomes almost incomprehensible*."

Chapter 1, therefore, prepared us to examine the substantive antitrust Laws of the USA, the EU and Kenya. The antitrust Laws of the three states represent the legal

embodiment- of the respective antitrust policies. In other words the antitrust policies are contained in the Laws which we examined in chapter 2.

Each of the three antitrust regimes was examined separately. The USA regime was found to be the oldest and in fact had sired, at different times, the other two regimes. Even though the EU regime had been activated by the Treaty of Rome only in 1957, therefore suggesting that it is still a young regime, the effects it had produced over the years were phenomenal. In 1957 when the system was sired, it encompassed only 6 countries, namely, Luxembourg, the Netherlands, Italy, France, Belgium and Germany. By January 1995, the regime had straddled 15 countries, namely, Luxembourg, the Netherlands, Italy France, Belgium, Germany, Spain, Britain, Greece, Ireland, Portugal, Denmark, Austria, Finland and Sweden.

Inexorably, the EU regime had, by the time the Uruguay Round's Final Act was signed in Marrakesh, Morocco in April 1994, attained an international position which just like the USA one is virtually unassailable. Voting wise, in the World Trade Organization, the EU regime which is represented by the European Commission, has got more clout in that it is buttressed by the votes of the 15 contracting states.

In the United Nations, two of the EU Contracting States, namely, Britain and France are permanent members of the

Security Council. The Treaty of European Union binds these members who are in the Security Council to take account of the UN positions in matters deliberated upon therein². There is no gainsaying the importance that security matters play in national and international trade. For example, it is the security council which is mandated to impose, sanctions, economic or otherwise on pariah states in the World¹. As for the USA, it is the only superpower that remains in the existing Unipolar economic and security situation.

As already seen, the Kenyan regime was only sired in 1989. It is the rookie among the denizens. Due to its relative youth, it has not developed in terms of volume of application and incisiveness of effects that come with long existence. It can however gain from the benefits that can accrue from the experience of the USA and the EU tested regimes. It does not have to grope in the dark. It can embrace the beneficial experience of the two older regimes and eschew their bad experience.

We shall now juxtapose the Kenyan antitrust position with the USA and EU position separately.

3.2 A JUXTAPOSITION OF THE KENYAN POSITION WITH THE USA POSITION

We shall look at how both regimes treat the following:-

- (a) Monopolization/abuse of dominant positions,
- (b) Restrictive Practices germane to collusion,
- (c) Restrictive Practices germane to price discrimination/collusion, and
- (d) Mergers / Takeovers

[a] Monopolization / Abuse of dominant Positions

To monopolize is to acquire a monopoly, which is defined by the firm's market share, with attention also to entry barriers. The USA treatment of monopolization primarily constitutes the instigation of the Sherman Act, section 2 case, alleging monopolization and seeking a remedy. Its two main parts are proofs that;

- monopoly exists and that
- the firm sought monopoly deliberately. Experts in American antitrust law have come to accept that the Section 2 route is long, uncertain, and partly neglected and that it is much less strict than the treatment of mergers and price fixing'.

The Relevant Market

Definition of the relevant market -is crucial to the decisions arrived at by antitrust authorities especially in cases involving mergers, takeovers and abuse of dominance. To

cetera in the market share, it is necessary that, the relevant market be defined. For example in Kenya, beer, soda, tea and coffee are part of the refreshments market. If we take it that the whole of the refreshments market is made up of four segments, (i.e. beer, soda, tea and coffee), then the beer segment may be represented by Kenya Breweries (say 10%), Castle (say 5%), soda by Coca Cola (say 15%) and- Pepsi (say 10%), and then tea 40%⁵. The percentages of each of the segments are as shown in Table 3.1.

Table 3.1

Refreshment Market Percentage/per Segment

Per cent

1.	Tea	40
2.	Coca Cola	15
3.	Kenya Breweries	10
4.	Pepsi	10
5.	Passion [unbottled]	20
6.	Castle beer	5
	Total	100

Source : Example by the **Writer**[Figures are hypothetical].

If we however minimised the relevant market to be that of bottled refreshments, then the situation would be different as shown herebelow:

Kenya Breweries	-25%
Castle	-12.5%
Cccacola	-37.5%
Pepsi	-25%%

We find that Coca Cola which hitherto held position number 4 with 15% of the market now holds number 1 with 37¹/₂ of the market. Kenya Breweries which held position number 4 with 10% of the market now holds position number 2 with 25% of the market. Pepsi and Castle have 25% and 12¹/₂% of the market respectively.

It can be seen that the market structure in percentage terms has changed due to the minimization of the relevant market. It should be noted that with minimization, all the percentages in the various segments have increased showing that the market share has increased. If we assume that a monopoly exists when a firm has a market share of fifty percent, we find that even though the percentages have increased, none of the four firms qualifies to be a monopoly.

If the relevant market is minimized further to be that of beer then we have the following results:

Kenya Breweries	-	66.7%
Castle	-	33.3%
Total	-	<u>100%</u>

With the threshold of monopolization being fixed at 50%, Kenya Breweries which commands two thirds of the market is an egregious monopoly.

A market is a grouping of buyers and sellers, communicating quickly and exchanging goods which are substitutable. In chapter 1 we saw that perfect markets have perfect substitution and instant adjustment within the market, but zero substitutability across the markets edges. In defining the relevant market, substitutability is the primary criterion. Geography also can enter into it, if there are local sub-markets within regional and national industries. To define a market, one needs to know:-

- [a] the nature of the product and its alternatives,
- [b] the consumer's subjective images of the product,
and
- [c] the geographic limits on interchanging 'the products.

The hypothetical Kenyan example shows the following:

- a! The leading firm will try to define the market broadly. In our example, Kenya Breweries commands only 10% of the market at the beginning when the market has the broadest definition. Upon minimization of the market it commands an unassailable 66%.
- b! The competitors of the leading firm will want to narrow the market as much as possible so that the leading firm reaches the monopoly firm threshold. In our case, Castle

will have a case' against Kenya Breweries when it has a market share of two thirds.

Let us now consider how the USA Courts have defined the relevant market in a few leading cases.

In US v Aluminium Co. - Of America (Alcoa) the firm wanted the definition of market share to include aluminium scrap? and to exclude the aluminium that the firm consumed itself. The aluminium scrap formed a significant part of the total aluminium in dispute. The court accepted the view of the USA Justice Division excluding aluminium scrap and including not only the ingots that the firm sold to others, but also the ingots it consumed itself. On this basis Alcoa's share of the market was found to be 90%. Although aluminium scrap competes with ingots it was excluded on the ground that it had been derived from products made from ingots that Alcoa had once produced, though Alcoa did not directly control the scrap supply. Had scrap been included in measuring the market, Alcoa's share would have stood at 60-64%. And if Alcoa's consumption of its own ingots had been excluded, its share of the open market would have stood at 33 percent. By adopting the first of these definitions of the market, the Court was enabled to make a finding of monopoly. Justice Hand stated that 90% clearly was monopoly; 60% might be; while 33% clearly was 'not. This obiter dictum has become the rule of thumb for all section 2 (monopolization) cases.

The Times - Picayune Publishing Co. V OS' treated the matter of defining the market differently. In this case the Times-Picayune Competitors wanted the market being defined to be that one of the morning papers. Times - Picayune as the leading firm wanted the market to be that one of morning and evening newspapers so that all the three daily newspapers could be included. The court defined the market the Times - Picayune way and thus reached the conclusion that the Times-Picayune had no monopoly.

It is clear that USA antitrust cases can be won either on a narrow definition of the market-or on-a broad definition of the market. The following case will illustrate the position further.

In Brown Shoe Co. V CJS³, the Supreme Court recognized three markets: those for men's, women's and children's shoes. The defence sought recognition for infant's and babies shoes, misses and children's shoes, ana youths' and boys' shoes and, within the sex and age groups, for medium priced and low-priced shoes. The court refused.

Determination of the Geographical market was considered in OS v Bethlehem Steel Corp⁹. Judge Weinfeld stated that in defining mark-its they should be listed as follows:-

- (a)the USA as a whole,
- (b)the northeast quadrant of the USA
- (c)Michigan, Ohio, Pennsylvania and New York,
- (d)Michigan and Ohio,
- (e)Michigan, and
- (f)Ohio.

The projected merger would have lessened competition in Michigan and along the border of Ohio and Pennsylvania, where Bethlehem and Youngstown (the competitor) had both made Sales. On this basis, the merger was properly held to be in violation of the law. The geographic market determination also featured in the US v Philadelphia National Bank¹⁰. In this case; the defendant (Philadelphia National Bank) wanted the market to be defined to include New York City (which had many banks) in addition to the four-county area of metropolitan Philadelphia. The Court refused the bank's definition and instead put local banking markets foremost, after all.

The above cases illustrate that the definition of the relevant market, either broadly or narrowly is crucial to the final determination of the market share. Of course, market share determines whether there is a monopoly/dominant position or not.

The Market Share

As has been seen in the Alcoa case (supra), there is no clear economic threshold. The courts have been willing at times to convict "abusive" combinations with as little as 20%, and yet to absolve "good" monopolists with as much as 90%. The established consensus is that an established market share below 60% is safe in court, -and even -70% to 75% may escape. This reflects Judge Hands dictum in the Alcoa case that 90% is monopoly, 60% may be and 33% is not.

The above notwithstanding, it is unquestionable that the key indicator of market power is the share of the market held by the alleged monopolizer. As explained in chapter 2, the most commonly used indicators of market power are concentration ratios and the Herfindahl Index. The OS Justice Department relies on the Herfindahl Index because it provides a measure of the concentration of the entire industry.

It should be stressed that the cases dealing with the definition of the relevant market are always apposite to this area. This is because the narrow or broad definition of the market invariably impacts upon the level of the market share and hence the point at which the monopoly threshold is reached.

More or less, what we are saying is that: once you define the market, all that remains is the measurement of the market share relative to the defined market.

The Kenyan Position

In Kenya, antitrust law relating to monopolies and concentrations is contained in part III of the Restrictive Trade Practices, Monopolies and Price Control Act. Section 23 of the Act mandates the Minister to 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 economy outweighs the efficiency advantages, if any, of integration in production and distribution. The Minister causes the Monopolies and Prices Commissioner to investigate any economic sector he has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power. The Commissioner is allowed by law to obtain information necessary to his investigation. Unlike the case of the USA where antitrust agencies can ex proprio motu instigate investigations, in the case of Kenya, the Commissioner only moves at the behest of the Minister.

In the identification of unwarranted concentrations of power, the Kenya antitrust law does not emphasize the definition of the relevant market so that the market share

car. be determined the way the CSA regime does. Instead, section 23 gives the minister the factors which he is required to pay attention to. These are¹¹:

- (a) In the case of a chain of distribution units, a person controls them if he exceeds one third of the sales for the relevant market be it a national, regional or an urban claim. Although the definition of the requisite market share seems to have been made superfluous by the threshold of "exceeding one third of the market sales," the issue of substitutability of the units in question may be raised in which case-the definition of the market would be relevant.

- (Co) A person, who supplies more than one third of the value of two or more physically distinct units manufactured by two or more manufacturing factories he has control over, has an unwarranted concentration. In finding an unwarranted concentration, the goods exported from Kenya are ignored.

- (c) A person who has 20% shares in a horizontal organization manufacturing goods and has a beneficial interest in any vertical organization which distributes the goods manufactured by the horizontal organization has unwarranted concentration.

(d) Similarly a person who has 20% shares in a horizontal organization which is a wholesale distributing enterprise and simultaneously has a beneficial interest in a vertical (retail) enterprise distributing goods supplied by the horizontal organization has an unwarranted concentration.

Factors (c) and (d) are straight-forward and will not raise serious issues regarding market shares. Factor (b) may however bring in the question of definition of the relevant market because the person may argue that the similar products produced by the two or more physically distinct units have a substitutability level with other items, which does not allow the person in question to reach the "more than one third of the value" threshold.

To the extent that indices such the concentration ratio and the Herfindahl index are not to be used in Kenya, it can be said that the determination of market share in Kenya is simplified. In the American scenario, as seen in the Alcoa Case (supra), the agencies and the courts, depending on the circumstances of the particular case, determine the percentage at which the monopolization threshold is reached. Hence there is room for uncertainty as shown by the view of Justice Hand in the Alcoa case that 90% clearly was monopoly, 60% might, while 33% was not. As seen earlier on, this obiter dictum has guided monopolization cases in the USA.

The Kenya antitrust regime, unlike the American one, which allows individuals to prosecute antitrust cases and even encourages individuals through the award of treble damages, does not allow individuals, unless they were part of the proceedings from the beginning, to initiate antitrust litigation in the Tribunal or in the High Court.

[b] Restrictive Practices Germane to Collusion

Restrictive trade practices can be divided into two main classes: a) two or more "competitors" cooperate to raise their combined market power and profits, such as by price fixing; or (b) one firm excludes others from a fair chance to compete, such as by predatory pricing. Generally, cooperation raises the level of prices, while exclusionary acts tend to change the structure of prices. ••

For collusion to thrive there must be conducive conditions. These conditions include:-

- (a) High concentrations,
- (b) uniform costs among the firms,
- (c) an entry barrier,
- (d) no powerful buyers able, to exert monopsony (a market with only one buyer and many sellers) power and

(e) similar attitudes among-the oligopolists.

now look at these conditions :

When concentration is high, the few leading sellers can coordinate more easily. The balance of their interests shifts' from competition toward cooperation. The fact that the number of market players is very small brings about simplicity of control, and it also means that price cutting can be found and penalized quickly. There is no exact standard for "high-" concentration, though a four-firm concentration ration of 50 percent of the market is a common rule of thumb. Collusion can crystallize at 40 or 60 percent, or break down at 80 percent, depending on the whole situation.

When costs are similar, agreement on the collusive price is easier. Cost differences undermine collusion. A firm with low costs will naturally prefer a lower price than will its high-cost rivals. In turn, costs can differ because of the sizes of the firms, the ages of the plants, special locations or inputs, or inefficiency.

A barrier to entry will raise the price at which collusion can be effective. New firms cannot

easily enter and thrive. The added security also gives the cartel members a stronger net incentive to stay up at the cartel price level.

4. Buyers can neutralize collusion. Powerful buyers can isolate and pressure the sellers into offering special deals. This directly breaks up the cartel's pricing unity. Indirectly, it reduces the mutual trust among the sellers, and so the collusion is less stable even when it does occur. A structure of discriminatory prices is likely to evolve, rather than a single collusive price. Even lacking monopsony (a market with only one buyer and many sellers) power, an alert buyer can sue or seek action under the antitrust laws. When buyers passively accept collusion there is usually some abnormal reason.

Similar attitudes can cause the firms' interests and expectations to converge. The managers may be from the same background and be long familiar with each other. With practice, they can fine-tune their signals and responses about pricing. The shared expectations can then become self-fulfilling. Such easy co-existence can be upset if one oligopolist changes its attitudes or goals. A new manager, or a take-over by an "outside" group,

often injects such shifts. Even just one maverick can be enough to destroy the cooperation.

For lasting success, collusion needs to cover all of the industry. Collusion may be tight and explicit or loose and fluid. A formal cartel will bind its members by various tangible controls. These can include pricing formulas, output quotas, a set of penalties for specific violations, a staff for detecting and punishing the violators, and in the very tightest of cartels—a direct pooling of profits.

We shall now look at how collusion has been treated in the U.S.A by examining collusion policy toward:-

- (i) price fixing,
- (ii) Tacit collusion and,
- (iii) connections among firms.

Price fixing

In their application of antitrust law U.S. courts have held the position that price fixing is illegal per se. The prohibition also applies to price controls on output, to market sharing agreements, and to co-operative exclusion of competitors by boycotts or other coercive practices. All that an antitrust attorney or private plaintiff needs to show at a trial is that competitors actually tried to fix prices or rig the market in some other way. Any evidence of a conspiracy—a

scribbled memorandum, an annotated price list, a tape recording of the discussions et cetera-is usually enough to convict and invoke penalties. No evidence that prices actually rose or rose to some "Unreasonable level is essential" though that sort of evidence will usually result in stiffer penalties and larger awards for damages".

Three mainstream cases were among the earliest cases in this area. These cases involving restrictive agreements among competitors were those of Trans-Missoure Freight Association¹³, the Joint Traffic Association lr. 1333, and the Addyston Pipe and Steel company¹⁴ in 1399". In Trans-Missoure and Joint Traffic, groups of railroads had fixed and enforced freight rates. In Addyston¹⁵, six producers of cast iron pipes had assigned certain markets to each of their number and determined the allocation of contracts elsewhere by operating a bidding ring. In all three cases the defendants argued that their restrictions were required to prevent ruinous competition and the resulting rates and prices were reasonable. In each case the court rejected this defence, holding the arrangements to be illegal themselves. This position was reaffirmed in the Socony Vacuum¹⁶ case. This case involved an agreement, under which the major oil companies in ten midwestern states raised and maintained the price of gasoline by purchasing marginal supplies from independent refineries. The court rejected the defence that the price established was no more than fair. Justice Douglas held that

any combination which tampers with price structures is an unlawful activity. He held that this remained the case even though the members of the policy fixing group were in no position to control the market, to the extent that they raised, lowered or established prices they would be directly interfering with the free play of market forces.

A classic large case is the Folding-Carton" case which involved 23 major makers of paperboard boxes, who had fixed-prices. The boxes were used for foods, drugs, household supplies and textiles. The firms held 70% of their market, and some 50 of their officials were caught. The firms included nearly all the significant sellers, such as Container Corp., Federal Paper Board Co., American Can Corp., International Paper Co., and Weyerhaeuser Co. The criminal trial resulted in nolo contendere pleas by nearly all of the firms and officers. A trial resulted in convictions of the rest. The volume of business was very large, over one billion dollars a year, and the Justice Division described the price fixing as being "as egregious as any in the history of the Sherman Act."

The offending practices were:

- price information was shared, and
- winning bids were rotated, while
- the rest put in deliberately high bids.

Also the firms agreed to make uniform price increases to customers they shared. The Division used the case to announce new tough guidelines for price-fixing penalties; an average 13 months jail term and an average fifty thousand dollars fine, plus fines on the company equaling 10% of sales in the product. Adjustments up or down would depend on the individual circumstances'-⁸. But the judge refused, setting only high jail sentences on 15 of the 43 managers averaging only 10 days, with fines averaging five thousand dollars.

In the USA, there has been concerted growing pressure against rules preventing competition in certain professions - lawyers, doctors, stock-brokers, accountants, druggists, architects, engineers, and others - which had long been informally accepted. In these "learned professions" one did not even announce ones prices or skills, much less engage in competitive bidding to get contracts. For example, in the case of the legal profession, the American Bar Association banned advertising by lawyers in 1908.

The Antitrust Division and the Federal Trade Commission have raised cases against fees schedules of physicians, radiologists, anaesthesiologists, and ophthalmologists¹³. For the American Bar Association, it met its **Waterloo** in 1976 in the form of two young lawyers who had opened a new legal clinic in the name of Bates and O'Steen in Phoenix, Arizona²⁰.

The two faced suspension or censure for placing a small factual advertisement of fees for routine services in the Arizona Republic. Eventually on appeal the Supreme Court, in June 1977, struck down the Arizona prohibitions on advertising. Under Antitrust Division pressure, the American Bar association moved in 1977 to permit certain factual advertising.

Tacit Collusion

Tacit collusion consists of what the Treaty of Rome calls concerted practices. It is - a very subtle form of collusion. Nevertheless when tacit collusion is discovered antitrust laws are applied to it. Two cases will illustrate the treatment of tacit collusion. In the Interstate Circuit²¹, case the operator of a chain of movie houses in Texas had entered into several contracts with eight distributors of films agreeing to show their pictures for an admission charge of 40 cents, on condition they not be rented later to be shown for less than 25 cents. There was no evidence that the distributors had consulted one another or agreed among themselves. But such evidence, said the court, "was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited the distributors gave their adherence to the scheme and participated in it.... Acceptance by competitors, without previous agreement, is sufficient to establish an unlawful

conspiracy under the Sherman Act'." A similar position was taken in the Masonite Case²². Here a manufacturer of hardboard had signed an agency agreement with each of his competitors, authorizing them to distribute his product and fixing the prices at which they could sell. And here again, there was no evidence of agreement among the other companies. But the court found the plan to be illegal, holding that each of them must have been "aware of the fact that its contract was not an isolated transaction but a part of a larger arrangement." However, even in a case "where there was not a whit of evidence that a common plan had even been contemplated or proposed," the court relied on admittedly wholly circumstantial evidence to convict American Tobacco".

Connections Among Firms

The application of US antitrust law has been extended to connections among firms. There are four main types ;

- (i) interest groupings and interlocks
- (ii) joint ventures
- (iii) patent pooling and trade associations

The Clayton Act, Section 8, made interlocking directorates illegal in 1914. This means that where one person sits on the boards of two competing firms, such action is illegal and antitrust measures will be taken. A

joint-venture is created by two or more firms. When setup by competing firms, they obviously make for common interests and may reduce competition in all the firm's activities. In the US economic criteria are examined and if found antitrust, action is taken. Horizontal joint-ventures have been found illegal whenever there is cartel behaviour or boycotts and exclusion of competitors. -If the result is price fixing either inherent in the joint venture, or ancillary to it - the joint venture is illegal. Remedy then depends on the market share of the parents of the joint-venture. If the shares are large, the joint venture will be dissolved²⁴. If the shares are small, the joint venture can continue, if it stops the price fixing".

Patent pooling may encourage competition, if it is open and free, but if it restricts access it may increase monopoly and invite antitrust action. The Standard Sanitary Mfg. Co. V US⁶ is the classic case in the patent pooling area. Various patents covering the production of enameled iron bathtubs and other sanitary wares had been pooled with a trade association. Included in licences issued to firms producing 85% of the output of such wares were provisions restricting output, fixing prices and discounts, and controlling channels of trade. These restrictions were held to violate the Sherman Act.

It is agreed that trade associations may be beneficial to business firms. Trade associations dealing with areas such as industrial research, collective bargaining, market surveys etc. are more likely than not to be innocuous. Where the trade associations impede competition and thereby take the form of restrictive trade practices, requisite antitrust measures are employed. The case of Container Corp- is illustrative. In this case cardboard box sellers in one region had a system allowing each seller to call up any other seller and demand the price of that seller's most recent sale. This system was struck down:-

- (a) because' it would "chili" competition by exposing price cutting more quickly, and
- (b) because buyers did not have equal access to the prices.

[C] Restrictive Practices Germane to Price Discrimination and Exclusion

In addition to reducing competition through collusion, a firm can also prevent, restrict or distort competition by way of imposing discriminatory prices and vertical limits. We shall first deal with price discrimination.

Several categories of discrimination will usually reduce competition:

- (a) true "predatory" pricing;
- (b) systematic discrimination by dominant firms;
- (c) tie-ins by dominant firms.

US policies have been roughly efficient towards categories (a) and (c)

The basic laws are the Sherman Act, -section 2 against "monopolization" actions, and the Robinson-Patman Act of 1936 which replaced Clayton section 2. Under the first, price discrimination may show a firm's intent to monopolize or stand as an abuse of monopoly power. True "predatory" pricing may be sufficient by itself to convict the firm for monopolizing. The Robinson-Patman Act places various limits on price discrimination, in order to protect small firms. That Act shifts concern from primary to secondary line effects, in order to protect small retailers against chain stores which could get supplies at lower prices.

A firm accused of price discrimination can first try to show that costs also differed in proportion, or that goods differed in their grade and quality. Hence price differences were not true price discrimination. Beyond that, there are three main economic defences against a charge of discrimination: that the prices;-

- (a) only met competitor's prices in good faith, or
- (b) were justified by costs, or
- (c) did not substantially lessen competition.

The Act can be blamed for preventing effective competition by limiting price cutting.

The Standard Oil Co. (Indiana) v. JS¹⁸ is the leading case in predatory pricing. Standard Oil Co. had used predation in at least two ways. One was selective price cutting to force small competitors into more favourable merger terms. The other was standard's coercion, to force railroads to give special freight rates, including a rebate to standard for each barrel of oil shipped for its competitors. The pricing was important to the creation of standard's monopoly, and it was clearly abusive.

Price discrimination is not always predatory. Sometimes it manifests itself in the form of systematic, continuing discrimination. One of the leading cases is United Shoe Machinery Corp. v. US²⁹. Just like other leading cases, the United Shoe Machinery Corp.(USM) case involved a dominant firm. Its systematic price discrimination took the form of leasing rather than selling its machines and making long term contracts on exclusive terms. The USM's extensive price discrimination also included the bundling of repairs into the machinery prices. This discrimination may not have been

precatory, but it reduced competition and reflected USM's intent to do just that. Although the Justice Division had asked the court to separate USM into three competing firms, the court refused and ordered the company instead to sell as well as lease its machines, shorten its leases, modify their terms, and grant licences under its patents to its competitors.

Tie-ins also constitute a substantial threat to competition. A tie-in requires you to buy good B which you do not want, in order to get good A, which you do want. The tying product (good A) is often patented or a popular branded item. The tied item is often a new product, or an inferior one, or simply a complement. The firm holds more market power for good A than for good B. The effects of tying are that :-

- (a) it can extend market power from the tying product into the tied product and
- (b) as a form of price discrimination it can serve to extend more profit.

Tie-ins -an violate Sherman 1 (an unreasonable restraint) or Sherman 2 (attempt to monopolize) , but it is Clayton 3 which specifically prohibits tie-ins if they "substantially lessen competition."

A classic case in tie-ins is the International Business Machines Corp. v. OS³⁰. In this case International Business Machines (IBM) made its customers use only IBM cards. IBM had an overwhelming market dominance of 50% of both the machines and cards market. IBM's defence was that other cards would jam the IBM machines or cause errors. The tie-in was held antitrust. It is similar to the on-going case involving Microsoft which was in court in December, 1997^J-. The US Justice Department in an antitrust suit, sought to compel Microsoft to desist from requiring that computer manufacturers install its Internet Explorer browser along with the company's dominant Windows 95 operating system. The Justice Department charged that the tactic was aimed at enabling Microsoft "to use its dominance in the operating systems market to stake out a monopoly in the separate browser sector. The Company riposted that the browser and the operating system cannot be separated without harming the operation of Windows 95. The case was settled by consent on 12th November, 2002.

[dj] Vertical Restrictions on Competition

There are two main types of vertical restraints. First are limits on what and where the dealers may sell. Second are restrictions on what dealers may buy.

Two cases will illustrate the USA antitrust treatment of geographical limits on sales. In US v Bausch and Lomb Optical Co.³², the Supreme Court held that a vertical territorial restriction which was part of an agreement to fix prices was illegal. In US v Arnold, Schwinn & Co.³³, the Supreme Court took a tougher line, nearer to a per se basis. In the 1950s, Schwinn had kept its wholesalers from selling to dealers outside their fixed territories or to non-franchised dealers, on threat of termination. The court held that such restrictions on re-selling the bicycles were illegal, even though Schwinn's market share had by 1950 fallen to 12%.

Restrictions on purchases have been caught and condemned. In the Carter Carburetor³⁴ case, the principal manufacturer of carburetors gave discounts to dealers who bought exclusively from it and denied them to those who bought from its competitors. This restrictive practice was condemned.

The Kenyan Position

All restrictive practices, be they with regard to collusion, price discrimination, exclusion and all others are grouped together by the Kenya antitrust law. The USA and EU antitrust regimes generally, through practice, have commercial undertakings as their subject. The Kenya antitrust regime right from the word go recognizes individuals, natural

or legal, as subjects of antitrust law. A restrictive trade practice is defined widely as an act performed by one or more persons engaged in production or distribution of goods or services which³⁵:-

- (a) in respect of other persons offering 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 to participate; or
- (b) in respect of other persons able and willing to pay 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.

For purposes of the above definition, of "restrictive trade practice," there is a novel way of measuring reduction or elimination of opportunities. In all cases it is to be measured with reference to the situation that would pertain in the absence of the practices in question. Although not introducing the per se rule as has been done in the OSA for price fixing infractions, the objective test applied by the law here is able to capture even the most incipient and insidious restrictive trade practices. In addition to the definition given in section 4(1), section 4(3) declares all

the practices enumerated in sections 6 to 12 to be restrictive trade practices. This is no doubt an ingenious way of doing things. Sections 6 to 12 have all the provisions relating to restrictive trade practices.

Section 5 gives exemptions with regard to trade practices directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred in any person by an Act of parliament or by any agency of the Government acting in accordance with authority conferred on it by an Act of parliament. It also exempts from the application of the Kenyan antitrust law, trade practices which are directly and necessarily associated with the licensing of participants in certain trade and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of parliament. Under this exemption will fall professionals such as Advocates, doctors engineers, Certified Public Secretaries, accountants and architects.

Categories of trade agreements declared to be restrictive trade practices are enumerated in Section 6. Section 7 subjects trade associations to antitrust law. An important case was handled by the Monopolies and Prices Commission in 2001, when the Monopolies and Prices Commission prohibited TESPOK, the Association of Internet

Service Providers from colluding to fix prices for internet browsing from Ksh.1 to Kshs. 3.

Although the treatment of trade associations by the Kenyan law is similar to the American situation, there is a difference in that some trade associations such as the Law Society of Kenya are exempted from application of competition law. Of course, some may want to call them professional associations with the hope that a difference is developed but it is all philology as the position remains the same. Hence it may be difficult for a lawyer to challenge the prohibition of advertising by the Law Society of Kenya, as was done successfully by two young lawyers against the American Bar Association in the Bates & O'steer.³⁶ Case. An adventurous lawyer may want to argue that Parliament in Kenya has not outlawed advertising but rather it has been done through promulgation of regulations and rules subordinate to an Act of parliament. Unfortunately in Kenya, individuals, legal or natural cannot prosecute antitrust cases.

Section 8 deals with refusal or discrimination in supply as restrictive trade practices. Section 9 addresses specific instances of refusal or discrimination in supply as restrictive trade practices. Section 10 prohibits predatory trade practices intended to repress competition. It is the only section that requires intention in the area of prohibited restrictive practices. Section II makes collusive

tendering a criminal offence. Hence, just like the position subsisting in the OSA, individuals in Kenya can be fined or imprisoned for antitrust infractions. Section 12 declares collusive bidding at an auction an offence.

[d] Mergers/Takeovers

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American Position

Mergers involve the joining of two or more firms to form a single bigger entity. Takeovers involve the acquiring of management control, through the acquisition of more than fifty per cent of shareholding, of one enterprise by another.

Antitrust law in the USA is concerned mostly with Horizontal and vertical mergers and not conglomerate mergers.

Horizontal mergers obviously reduce competition. Part of the market process is enclosed under direct internal control. The power to raise prices is increased. The larger the increase in combined share, the bigger will be the loss of competition.

Two cases will illustrate the treatment of horizontal mergers by the US antitrust law. In the Bethlehem Youngstown³⁷ case, the Department of Justice instituted a case against a proposed merger between Bethlehem Steel and Youngstown Sheet and Tube. Bethlehem, the nation's second

largest steel producer, had planned to acquire Youngstown, the sixth largest, thus raising its own share of the nation's output from 15 percent to 20 percent, and the share of US Steel and Bethlehem together from 45 percent to 50 percent. The Department sued to enjoin the merger, and the case went to trial under Judge Edward Weinfeld in a Federal district court.

The defence argued that the merger would make the industry more competitive, since it would enable Bethlehem to compete more effectively with US Steel. It cited, in particular the market near Chicago. Here, Bethlehem had no plant and shipped in less than 1 percent of its output. By acquiring and expanding Youngstown's Chicago facilities, it would provide more vigorous competition for US Steel in this area. It declared that it would not otherwise enter the market.

These points were rejected by Judge Weinfeld, who was not persuaded that the merger afforded the only means by which the supply of steel in the Chicago area could be increased. In any case, he said, the argument was irrelevant, since congress "made no distinction between good mergers and bad mergers. It condemned all which came within reach of a prohibition of Section 7³⁸." The Merger was enjoined.

The other case is Von's Grocery³⁹. It involved the merger of two retail food chains in Los Angeles. Von's Grocery, the third largest food chain in the area, had acquired Shopping Bag, the sixth largest, thereby moving into second place. But Von's share of the market, after the merger was only 7.5 percent. The share of all the market leaders was declining, and there was no barrier to the entry of new concerns. But the court noted that the number of stores operated by individual owners had fallen. And it found the merger to be unlawful on the ground that it was the purpose of the law "to prevent concentration in the American economy by keeping a large number of small competitors in business." This case arguably set the seal on horizontal limits.

Vertical mergers need not alter competition at either level if market conditions are perfect. Yet they will reduce competition if;-

- (a) the merger raises entry barriers (by making new entrants join both levels at once, thereby raising the level of capital that must be raised on imperfect capital markets), and
- (b) the merger triggers a wave of parallel mergers, which sharply reduce the scope of open market sales. And if the possibility of price squeezes is increased, the mere threat of this may induce independent firms to behave

sore passively. How much competition is reduced depends on these conditions.

Although no general rule against vertical integration per se has been applied in antitrust cases, it is accepted that a large rise in vertical integration is per se likely to have the effect of foreclosing competition and raising entry barriers in the market. A case in point is the Du Pont-General Motors⁴⁰. Here, the Anti-trust Division alleged that du pont's holding of General Motors stock gave it preference in the market for automobile fabrics and finishes. The supreme court enjoined the merger and the shares were divested.

Another example is Inco-ESB. In 1974 the International Nickel Co. of Canada acquired ES3, Inc. (the former Electric Storage Battery Company) for US \$ 234 million after a bidding war with the United Technologies Corp. ESB was the leading u.S battery maker, with 18 percent of the market. Inco was the dominant supplier of nickel to the battery industry. The Antitrust Division sued in 1976, arguing that their vertical joinder reduced the competition between the two firms in developing and producing batteries for forklift and mine locomotives. A consent decree in 1977 was designed to prevent the exclusive effects of the vertical merger. Inco promised to give free access to 201 patents on metallic foil batteries and to avoid any merger with other battery makers for ten years.

The Kenyan Position

As we have already seen USA antitrust law is principally concerned with horizontal and vertical mergers. The law relating to the control of mergers and takeovers in Kenya is enshrined in Section 27 of the Restrictive Trade Practices Act. The Kenya law is simple and clear. All relevant mergers and takeovers cannot be successfully consummated without an order from the minister authorizing them. The law says that a person who tries to consummate a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar services or tries to consummate 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. Such a person 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.

Any relevant merger carried out in the absence of an authorizing order by the Minister shall have no legal effect. All obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall not be enforceable in legal proceedings. Hence, unlike in the USA, where objective criteria such as the merger being intended to make the industry more competitive, unauthorized relevant

mergers in Kenya are by law per se prohibited. In juxtaposition with the American position this state of affairs simplifies merger law in Kenya.

3.3 A JUXTAPOSITION OF THE KENYAN POSITION WITH THE EUROPEAN UNION (EC) POSITION

As seen in Chapter two the EU position is encapsulated in Articles 81 and 82 (formerly 85 and 86) of the Treaty of Rome. Article 81 prohibits agreements and concerted practices among private commercial bodies if they affect trade between member states and distort, prevent or restrict competition. Article 82 prohibits commercial practices by one or more enterprises where such practices amount to an abuse of a dominant position within the community.

[a] Monopolization/dominant positions

The Eu Position

In the European Union (EU) antitrust law, just as is the case in the USA, the existence of a monopoly, that is the holding of a dominant position, is not prohibited under Article 82 per se. What is prohibited is abuse of a dominant position. The Article is not intended, as was shown in Chapter 2, to penalize or punish efficient forms of economic behaviour. However, the acquisition or maintenance of a monopoly through restrictive practices which create artificial competitive conditions is what the EU antitrust law in this area seeks to uproot.

The existence of a dominant position or monopoly is determined through concepts similar to those that are applied in the USA. As seen in Chapter 1 the ED antitrust position was inspired by the American position which was activated by the Sherman Act 1890. The concepts applied to establish a dominant position are:-

- (i) The definition of the market, and
- (ii) "the calculation of the market share.

(i) Definition of the market

The relevant market is "defined by reference to both the relevant product market and the geographical market. The product in Question is isolated from similar products in the market. In doing so the Commission identifies one relevant product together with all other products which may be perfectly substituted for the production under investigation. In accordance with the ruling of the European Court of Justice (ECJ) in AZKO Chemie V. EC Commission", jointly these products constitute the relevant market. United Brands V EC Commission^{*2} defined the geographical market as the area "where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be evaluated."

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(ii) Calculation of market share

Similar to the situation obtaining in the USA, no particular share of a market is required to determine the existence of a dominant position. In the United Brands case (supra), the ECJ stated that its 40 percent share was not in value sufficient to establish market dominance. Instead, other factors including the company's control of a shipping fleet, the perennial nature of banana's and its subjection of competitors to competition regardless of weather conditions contributed to the determination of a monopoly (dominant) position. In the Continental Can Case⁴³, a share of 50 percent of the relevant market made the firm occupy a dominant position.'

As already pointed out, the EU antitrust law addresses abuse of a monopoly position not monopoly per se and this concept is handled in an objective manner. Article 82 enumerates a non-exhaustive list of examples which may constitute abuse of a monopoly position.

The Kenyan Position

As was seen when the American position was juxtaposed with the Kenyan position, Section 23 of the Restrictive Trade Practices, monopolies' and Price Control Act has simplified the area of market share by providing specific criteria for its determination. The EU position allows both the Commission

and Individuals to enforce infractions of antitrust law. The commission has Quasi judicial powers as well. Individuals will enforce antitrust law in national courts whereas the commission will do so in the ECJ.

Although the Kenyan antitrust law gives specific factors which the Minister is required to pay attention to in keeping the structure of production and distribution of goods and services under review, it can be argued that since the Kenya law is aimed at checking concentrations of economic power, it may be unfair to natural and historical monopolies. This is because although efficiency advantages are considered in the Minister's review, natural and historical- monopolies generally have a huge capitalisation. Kenya as a developing country generally lacks alternative capital to take over such monopolies. Care should be taken, also, lest the calculation of efficiency advantages be made in a subjective manner as the law does not give any guidance whatsoever.

[b] Restrictive practices Germane to Collusion and

ic] Restrictive Practices Germane to Price Discrimination and Exclusion

Restrictive practices relating to collusion, price discrimination and exclusion strangle both Articles 31 and 82 of the Treaty, of Rome. Article 81 prohibits agreements and concerted practices among private commercial bodies if they

affect trade between member states. This is collusion among private commercial bodies. Article 82 prohibits commercial practices by one or more enterprises where such practices amount to an abuse of a dominant position. The enumeration of the examples which amount to prohibited practices cuts across collusive practices, price discrimination and exclusion.

Under Article 81 agreements (collusion) that' are mentioned affect price fixing;, controlling of production, markets, technical development or investment; sharing of markets or sources of supply (exclusion); applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage (exclusion) and subjecting conclusion of contracts to supplementary obligations unconnected with contracts (tying). Article 82 which addresses the area of abuse of monopoly (dominant position) enumerates examples which again straddle the area of collusion, price fixing and exclusion. The examples are:-

- (i) directly or indirectly imposing unfair purchase or selling prices (price fixing) or other unfair trading prices
- (ii) limiting production, markets or technical development to the prejudice of consumers

- (iii) applying . dissimilar conditions to equivalent transactions with other trading parties (collusion and exclusion) ana
- (iv) making the negotiation of contracts subject to acceptance by the other parties of supplementary obligations- which, ' tiy their nature or according to commercial usage have no connection with the subject of such contracts.

Article 81 addresses agreements and concerted practices and Article 82 addresses abuse of dominant position. The agreements / concerted practices and the abuse of dominant position can touch all the three areas of collusion, price discrimination and exclusion. The examples of prohibited practices enumerated by both Article 81 and 82 are particular examples which are not exhaustive. Article 81 in enumerating them uses the words "and in particular those which:" and Article 32 uses the words, "in particular, consist in:".

The Kenyan Position

As seen when comparing the American law with the Kenyan law all restrictive practices are bundled together in the Kenyan law be they collusion, • price 'discrimination or exclusion. The law 'defines a restrictive trade practice widely⁴⁴. The law then declares all the practices enumerated

in sections 6 to 12 to be restrictive trade practices". The aim is to allow section 4 to embrace all restrictive practices in addition to all the enumerated practices. Although the wording is different from the wording in the EU law, the effect is the same: 30th. laws are capable of embracing all restrictive trade practices except the exempted ones.

[d] Mergers ana takeovers

'Articles 81 and 82 of the Treaty of Rome which constitute the basic antitrust law of the EU do not make express provisions with reference to the issue of mergers ana takeovers. This glaring omission notwithstanding, the European Commission and the European Court of Justice (ECJ) have been prepared, through indubitable commitment to competition on the part of the commission and Judicial activism on the part of the ECJ, to extend EU antitrust law to the area of mergers and takeovers. Hence in Tetra Pak Rausir.g SA V. EC⁴⁶ a merger in the form of one producer or supplier being able to absorb competitors by way of an acquisition was found to be foul of EU antitrust law. In British American Tobacco & RJ Reynolds Industries V. EC Commission⁴⁷, Article 81(1) [old 85] (any ether trading conditions) was applied to acquisitions of shareholdings where a company acquires a minority stake in a competitor as a leverage for . the coordination of marketing strategy between the two undertakings.

Although the EU Commission and the ECJ were willing to extend EU antitrust law to merger control, specific mandate was only granted to the European commission in 1990 through the Merger Control Regulation 1990. This law allows the commission to investigate takeovers and mergers above a certain threshold.

In the regulation the term "concentration" is employed to refer to mergers and takeovers. A concentration arises where either:-

- (a) two or more previously independent undertakings merge into one, or
- (b) one or more persons already controlling at least one undertaking acquire, whether by purchase of securities or assets, direct or indirect control of the whole or part of one or more other undertakings.

Article 1 of the regulation confers regulatory jurisdiction upon the commission over all mergers involving a "Community dimension". A concentration has a "Community dimension" where:-

the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million⁴;

and

- (ii) the aggregate community-wide turnover of each of the undertakings concerned is more than ECU 250 million¹¹.

Concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of a public bid, or the acquisition of the necessary controlling interest. If a merger is by consent, the notification must be made jointly by all parties involved. In all other cases, including contested acquisitions, the notification to the commission must be made by the acquiring undertaking.

The Kenyan Position

As seen earlier on, when we compared the American law on mergers/turnovers with the Kenyan law, all relevant mergers which are not authorized by the Minister are illegal in Kenya. In all cases an application must be made to the Minister, through the Commissioner, before the consummation of a relevant- merger or takeover. Hence in Kenya all unauthorized relevant mergers are illegal per se whether they are dominant or not.

In the EU the concern of the law is not the authorization of mergers per se. The law is intended to investigate takeovers and mergers above a certain threshold. Those which do not reach the threshold are ignored by the EU law. The threshold is a combined turnover worked out by the European Commission from time to time. Mergers/takeovers which have reached the threshold are required to notify the commission.

3.4 CHAPTER SUMMARY


This Chapter has comprised a juxtaposition of the American and EU antitrust laws with the Kenyan law. In the area of monopolization it has been seen that the USA and the EC regimes make extensive use of the market share which is arrived at after the definition of the relevant market. In USA and the EU this area has been riddled with controversy and a lot of litigation has taken place. In the case of Kenya, the law seeks to give exhaustive indicators and to this extent the Kenyan Law has been simplified.

With regard to mergers and takeovers the American and the EU systems are concerned with the market share with a view to arriving at a threshold beyond which antitrust measures are taken. The Kenyan system, however, outlaws all

relevant mergers which are consummated without an order by the Minister authorizing them.

In the area of restrictive trade practices, all the three juxtaposed regimes aim at regulating competition and controlling restrictive business practices. Although in the other two regimes individuals (legal or natural), may gain direct access to remedies through the courts, in Kenya parties are required to seek remedies through the antitrust agency. This means that after submitting their complaints, aggrieved parties leave the rest to the Commissioner and the Minister. Eventually, all restrictive business practices are regulated through ministerial orders.

In the case of control of unwarranted concentrations of economic power, action is instigated by the Minister who directs the Commissioner to investigate. Aggrieved individuals do not have a role. In the case of mergers and takeovers those intending to consummate proposed mergers make applications to the Minister. Aggrieved individuals can just watch. In all the three cases, access to the Restrictive Trade Practices Tribunal is by the parties who are aggrieved by the orders made by the Minister. Other interested parties do not have access to the Tribunal. A priori, interested parties also do not have access to the High Court, which is the final arbiter in antitrust matters.



CHAPTER 4

SUMMARY, OBSERVATIONS AND RECOMMENDATIONS

4.1 SUMMARY

In chapter 1 we discussed the need for antitrust measures. The historical foundation of antitrust was addressed. It was seen that the common law system, upon which the Kenyan system is predicated and also upon which the American system is substructured, had as long ago as 1603 struck down a monopoly". Also in England, grants of monopoly by the Crown were held illegal in common law by the courts and were eventually voided by parliament in 1623. Monopolies conferred by parliament and through individual effort were however found in order. Basically, this is the position that obtains upto the present system, only that those monopolies obtained through individual effort (efficiency advantages) have to be regulated lest they be abused to the detriment of competition. As Adam Smith said, it is in the nature of human beings that they give paramcunty to self interest. He said, "It is not from the benevolence of the butcher, the brewer, or baker, that we can expect our dinner but from their regard to their own interest²". Hence the need to regulate monopolies in order to assure competition.

ic was seen that antitrust in its present, form was introduced in the USA by the Sherman Act, 1890. The Sherman Act experiment was seminal in the area of antitrust and interesting hybrids have since sprouted around the world. In all cases, the aim is clear in concept: to bring about the optimal degree of competition in the world. The American system is the substructure upon which the European and Kenyan antitrust positions are superstructured.

We looked at the economics behind the need for competition in fair detail. The need to have a fair knowledge of this area was buttressed by the definitive statement of Alan Swan and Murphy that: "One cannot make much sense of the antitrust laws without a firm grasp of these principles and, without them, the discussion of antitrust enforcement ... becomes almost incomprehensible."

The theory of comparative trade was examined and it was shown that competition at the international level is important to world trade and can impact on national trade. It was shown that what matters is comparative advantage and not absolute advantage. Any attempt to suppress trade which is predicated upon the theory of comparative advantage inexorably leads to pernicious results. The example of the Great Depression was given to illustrate this point.

It was shown that the Great Depression was precipitated by the intransigence of the American Congress and President Hoover who sought to overprotect American manufacturers farmers and other businessmen from foreign competition. The rest of the world retaliated and as a result the world trade fell and the deleterious effects of this fall led to the Great Depression.

It was shown that there were feelings, postulated mostly by American leaders, that the cause of the second world war may have been partly fuelled by the failure of the international trading system³. This realization, coupled with the experience that the USA had undergone during the Great Depression, spurred the USA to spearhead the establishment of an* international organization to promote competition in international trade. Although the proposed International Trade Organization was not given ratification by the USA senate, which action led to its demise, 23 states, America included, acceded to the General Agreement on Tariffs and Trade (GATT) in 1947. The GATT established international machinery to promote competition. The USA, the European Union and Kenya are all participants in GATT rounds and fully participated in the most recent Uruguay Round whose Final Act was signed in Marrakesh, Morocco, in April, 1994. All existing GATT members including the USA, the European Union and Kenya, acceded to the World Trade Organization (WTO) which succeeded GATT in January, 1995.

Chapter 1 also examined international perspectives that impact upon international trade. These include diverse laws regulating competitive behaviour, product liability laws, bankruptcy laws, international court judgments and global trends in politics affecting trade. To the extent that these perspectives can affect international trade, they are important both to international and national competition. This is borne out by the effect of the Great Depression to international trade and national economies.

Chapter 2 examined in detail the antitrust positions of the USA, EU and Kenya. By and large, it was seen that the USA and the EU antitrust regimes have similar jurisprudential foundations towards restrictive trade practices, monopolization and mergers and takeovers. The USA and the EU systems are however more sophisticated than the Kenyan system, no doubt, due to their long existence.

Chapter 3 comprised a juxtaposition of the American and EU antitrust laws with the Kenyan laws. In the area of monopolization it was seen that the USA and the EU regimes make extensive use of the market share which is arrived at after the definition of the relevant market. In the USA and the EU this area has been riddled with controversy and a lot of litigation has taken place. In the case of Kenya, the law seeks to give exhaustive definitions and to this extent the Kenyan Law has been simplified.

With regard to mergers/takeovers the American and the EU systems are concerned with the market share with a view to arriving at a threshold beyond which antitrust measures are taken. The Kenyan system, however, outlaws all mergers which are consummated without an order by the Minister authorizing them.

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In the area of restrictive trade practices, in all the three regimes it is aimed at arresting antitrust infractions. In the USA and the EU systems the antitrust measures are through practice primarily aimed at undertakings. The Kenya law from the word go is aimed at individuals and undertakings. What will happen after long practical experience can only be a matter of conjecture.

When juxtaposed with the other two antitrust regimes the Kenyan regime has one glaring deficiency : individuals (whether legal or natural) are not given direct access to remedies. This means that private parties do not take direct charge of proceedings. In all cases the antitrust agency assumes the role of *Parens Patriae*. In the case of restrictive trade practices aggrieved persons submit a complaint to the Minister, through the Commissioner. From that point the complainant is in the hands of the Commissioner and the Minister. In the case of control of unwarranted concentrations of economic power, action is instigated by the Minister who directs the Commissioner to investigate. Aggrieved individuals do not have a role. In the

case of mergers and takeovers those intending to consummate proposed mergers make applications to the minister. Aggrieved individuals can just watch. In all the three cases, access to the Restrictive Trade Practices Tribunal is by the parties who are aggrieved by the orders made by the Minister. Other interested parties do not have access to the Tribunal. A priori, interested parties also do not have access to the High Court, which is the final arbiter in antitrust matters.

4.2 OBSERVATIONS

It is quite clear that all the three regimes which have been examined profess the need to promote competition both in their localities' and internationally. In their localities each of the examined regimes have promulgated antitrust laws. The eldest antitrust measures were enacted by the USA and the original measures are now one hundred years old. The American momentum has not, despite the long period of existence, abated its momentum. Amendments to the various antitrust laws have been made whenever the need arose. The American Courts have also evinced a palpable degree of judicial activism over the years. That has augured well for the development of adequate measures to check antitrust infractions.

The EU antitrust system was sired by the Treaty of Rome in 1957. Originally it encompassed only six countries. Now it embraces fifteen countries. Although the basic antitrust

Articles, which are Articles 81 and 82 of the Treaty of Rome, have not been amended over the years, the EU system has employed judicial activism to spread to all the required areas. The Commission, through authority delegated by the Council of Ministers, has had quasi-judicial powers including the power to fine undertakings breaching EU antitrust law. It also has powers to order divestitures. With the help of the Council of Ministers a Regulation has been made to control the area of mergers since 1950. Even before the Regulation had been made the Commission, with the support of the ECJ, had subjected offending mergers/takeovers to antitrust measures as seen in the cases of Tetra Pak Rausing SA v EC Commission* and British American Tobacco & R.J. Reynolds Industries Inc. v EC Commission⁵.

The same cannot be said with respect to the Kenyan situation. Right from the word go, the Kenyan antitrust agency is divested of autonomy. In the area of restrictive practices the complainant writes to the Minister : albeit through the Commissioner. They do not write to the Monopolies and Prices Commissioner, who paradoxically is **responsible** for the control and management of the Monopolies and Prices Department of the Treasury⁵. The responsibility given with the right hand is taken away with the left hand. The law, however, expressly grants the Commissioner ex proprio motu powers to initiate investigations .

In the case of control of **unwarranted** concentrations of economic power, it is the Minister who is, in an imperative

manner, mandated to keep a check on unwarranted concentrations of economic power⁹. The Commissioner only investigates an economic sector, only after receiving direction from the Minister. He is again deprived of ex proprio motu powers. Also the responsibility given to the commissioner for the control and the management of the Monopolies and the Prices Department is subject to the 'general control of the Minister'⁹. In the case of mergers and takeovers, applications are made to the minister, again albeit through the Commissioner.

It would seem that in comparison with the USA and the EU positions, ; the Kenyan antitrust agency has only been granted half-hearted powers. In the USA and the EU, antitrust agencies have powers to require divestiture. In the case of Kenya almost all the powers to remedy infractions are bestowed upon the Minister. Under section 15, the commissioner merely requests compliance with recommendations. The independence of the agency is not guaranteed. This places the antitrust agency in a situation amenable to political and other manipulations.

In the USA two organs can initiate antitrust actions. These are the Justice Department and the Federal Trade Commission. Private parties are also allowed to initiate treble damages actions. In the European Union antitrust action can come from several directions. The European Commission can take action, national antitrust departments can take action and the individuals affected {natural or legal persons) can initiate

action. The multiplicity of avenues for vindication of antitrust, infractions provides a better environment for promotion of competition.

Unlike the case in the USA and the EU there is a patent conflict of loyalties in the appointment, of the Restrictive Trade Practices Tribunal. In Kenya members of the Tribunal are appointed by the Minister. And yet aggrieved persons appeal against the Minister's orders to the Tribunal. This is against natural justice. The rules of the Tribunal are also made by the Minister. It is like the judge (minister) appointing a prosecutor (the Commissioner) who prosecutes the case before the judge (the minister) and then the judge(the minister) having the appeal from his case heard by an appellate judge (the Tribunal) appointed by the judge (minister) himself. This, to the studious bystander, is a preposterous situation. The basic checks and balances"are lacking.

The situation is worsened by the fact that the Tribunal members are subject to intimidatory possibilities. They are paid on an ad hocacy basis. The remuneration is in the form of subsistence and travelling allowances determined by the Minister himself. This drives a./ay any veneer of independence that the Tribunal members may want to- claim. Incidentally, except for the subsistence and travelling allowances, Tribunal, members are not expressly entitled to be paid for their work.

The area of antitrust is a complex one requiring an indubitable mastery of antitrust economics and antitrust law. Although the chairman is required to be a lawyer, at least one other member should be a competition lawyer, an international economic lawyer or an antitrust economist. Similarly, the Commissioner should be either an antitrust economist or an antitrust lawyer. Otherwise as opined by Alar. Swan and John Murphy, without a knowledge of the concepts involved, "the discussion of antitrust enforcement against . . . becomes almost incomprehensible¹⁰." Information obtained from the staff of the Monopolies and Prices Commission has confirmed that the Chairman of the tribunal is a lawyer qualified in accordance with the statutory requirements. The appointment of the other four members also accords with the law.

The enforcement of antitrust law inexorably requires the antitrust staff to interact with businessmen who are being investigated. Businessmen who attract the attention of the antitrust department are almost invariably the successful ones. The government of Kenya has accepted that the civil service is inefficient and unfriendly to the business community". It has also stated that there is need to reduce corruption¹². The inefficiency and the unfriendly attitude of the civil service to the business community may be predicated upon the idea that businessmen who are harassed by inefficiency and the pugnacious attitude of civil servants will be bamboozled into a state of

apparent helplessness and be proselytized into bribery tendencies.

Inefficiency and corruption will not promote competition. To obviate these possibilities the department should be manned by a professional cadre of staff who should be well remunerated. The Tribunal should also be manned by professional staff. The antitrust department and the Tribunal should be accorded independence from the civil service.

The Kenyan system prohibits unauthorized Mergers per se. This is a system that may be abused by egregious subjection of businessmen to negative bureaucracy. In our admittedly corrupt environment it accords unscrupulous civil servants a rich hunting ground for corrupt deals. A minimum aggregate market share should be determined. All mergers and takeovers which do not meet the aggregate market share threshold -should be exempted from the blanket authorization order requirement. Alternatively the threshold should be determined by way of defined aggregate totals of sales or profits in Kenya shillings.

In some areas the Kenya antitrust law promotes whimsical tendencies. For example in all areas where orders are made, that is' sections 19, 24 and 31 of the Restrictive Trade Practices, Monopolies and Price Control Act, the law says that the Minister may make the orders. When we are dealing with an area as important as antitrust which is one of the pillars of a healthy

economy, this is an undesirable situation. In all appropriate cases the Minister should make requisite orders. It is through the same spirit of promoting whimsical subjectivity that section 15 of the Act allows the Commissioner to authorize any person in writing to conduct all or any portion of any hearing on his behalf. The person in question does not have to be an Officer of the Monopolies and Prices Department. He can even be an uneducated successful businessman. He or she can be the Commissioner's wife or husband or child. The person can be an unemployed graduate or even a messenger. This is a higgledy-piggledy way of ordering things. It is eminently preposterous!

In matters of economics and business, time is of the essence. When dealing with restrictive trade practices complaints, concentrations of economic power and mergers/takeovers, the time within which investigations should be completed should be given. This is even more important when it is considered that the matter may be taken to the tribunal and eventually to the High Court.

The Kenyan position is peculiar when compared with the other two regimes it has been juxtaposed with. It is the only regime that in a casual manner willy-nilly denies its citizens, unless they are the parties being investigated or directly affected by the Minister's order, recourse to the antitrust agency, to the tribunal and to the High Court. This position does not allow for the untrammelled development of competition

jurisprudence. The Kenyan system also does not allow the highest Court in the land, to participate in the development of antitrust law. This is an undesirable position especially when it is contrasted with the U.S.A and EU systems where the Supreme Court and the European Court of Justice have made great contributions to the antitrust laws of their jurisdictions, sometimes through sheer judicial activism.

Sessional Paper number 1 of 1986, committed the government of Kenya to the promotion of competition internally³. Sessional Paper No 2 of 1996 committed the government to promotion of competition through the path of comparative advantage¹⁴. The paper also committed Kenya to the World Trade Organization (WTO) agreement which arose from the Uruguay Round and stressed that Kenya would work through the WTO trade agreements which promote international trade¹⁵. Kenya law should reflect these commitments and include laws which embrace international competition as judgments in American¹⁶ and European Union¹⁷ courts have done. This has got an added urgency in that the three East African Governments on 30th November, 1999 formed an East African Community. The East African Community treaty has embraced some level of free competition¹³.

Finally in Session Paper No 2 of 1996 the government of Kenya has recognized some important factors that impede the growth of the economy. These factors which relate to Commercial and Juridical systems are: 1. That the legal environment within

Which business operate in Kenya is not sufficiently efficient. This is attributed to the underdeveloped legal information culture and in particular the incomplete collection and publication of legal materials, the inadequate and slow dissemination of laws when passed and the continuing existence of irrelevant, outmoded and anti-market laws and regulations on the statute books even where current practices have sharply departed from the spirit of those rules; 2. That there is evidence of unpredictable and wide discretionary powers of administrators of laws and regulations, which deters private sector operations and; 3. That the slow and cumbersome adjudication process of Kenyan Courts and the absence of adequate specialized commercial courts to adjudicate speedily business disputes also add to the difficulties of the private sector. It can not be put any better.

These problems should be addressed if competition is to be maximized. Specialized tribunals such as the Restrictive Trade Practices Tribunal should be strengthened. Law reports should be published in time to strengthen the culture of observance of law. Just like in the European Union, a Parliamentary Ombudsman should be established to enforce observance Of laws promulgated by parliament. The anti-market laws and regulations mentioned by the sessional paper should be tackled.

4.3 RECOMMENDATIONS

Arising out of this study, the following, recommendations are made: -

- 1.- It has been seen that the Kenyan antitrust system has a lot to learn from the well established USA and EU systems. The DSA and EU systems have accorded their antitrust agencies independence and autonomy to conduct their antitrust missions unfettered. The Kenya Monopolies and Prices Commission should be freed from ministerial shackles. The Chief Executive of the Commission should be accorded security of tenure and should be remunerated handsomely. This is because an antitrust agency deals mostly with the society's rich individuals (natural or legal) and temptations can develop. Other employees of the Commission should be remunerated well.
2. The Restrictive Trade Practices Tribunal should operate independently from the Ministry of Finance. The Chairman, who should be a competition lawyer or an international economic lawyer should be appointed by an independent body such as the Judicial Service Commission. During the tenure of his contract, he should be removed only on grounds authenticated by an impartial tribunal. Such a tribunal could be appointed by the Chief Justice.
3. We have seen that members of the Restrictive Trade Practices Tribunal perform their duties on an ad hoc basis.

The tribunal should be made -permanent by law. The remuneration of the chairman and the members should be adequate. The notion that they should receive only travelling and subsistence allowances should be discarded forthwith. As presently provided by section 64 of the Restrictive Trade Practices, Monopolies and Price Control Act, it is not expressly clear that the Tribunal members are entitled to any other remuneration except subsistence and travelling allowances.

4. The Restrictive Trade Practices Tribunal should promulgate rules to prescribe its procedure. It is not fair that the Minister, whose orders are appealed in the Tribunal, should make rules on how appeals against his orders will be determined. Matters relating to fees payable in respect of appeals should also be regulated by the Tribunal.

5. We have seen that antitrust cases reach the highest court in the USA, that is, the Supreme Court. In the EU, the ECJ is the highest court with respect to the European Union matters. These two courts handle antitrust matters and have contributed tremendously to the development of the antitrust law of the two systems. Lack of legal measures allowing Kenya's antitrust appeals to reach the Court of Appeal in Kenya is inimical to the development of antitrust jurisprudence in Kenya. It is no solace that no appeal from the Restrictive Trade Practices Tribunal has gone to the

High Court since the Tribunal was established. This may happen in future. It is necessary that we make provisions for antitrust appeals to be heard by the highest court, that is, the Court of Appeal.

6. In the appointment of the other members of the Commission, a part from the Chairman, it is necessary that those appointed are well versed in antitrust law and antitrust economics. The Tribunal deals with a specialist subject and it does not help at all when members are appointed on political or other irrelevant basis.
7. It was seen in chapter 2 that the Monopolies and Prices Commission's Report of 1995 had carried a case in which the Minister for Finance had approved a merger between Transnational Bank Limited and Transnational Finance Limited, through the provisions of the Banking Act rather than the Restrictive Trade Practices, Monopolies and Price Control Act. This was an unorthodox way of effecting the merger and the action breached the antitrust provisions. There are other laws such as the Trade Licensing Act which may engender considerations which breach antitrust law. All such laws should be harmonized with the antitrust law in order to give better efficiency.
8. The Kenyan system prohibits unauthorized horizontal mergers per se. This is a situation that subjects businessmen to

unnecessary bureaucracy especially when the intended mergers and takeovers are de minimis. A minimum aggregate market share should be determined. All mergers and takeovers which do not reach the aggregate market share threshold should be exempted from the blanket authorization order requirement.

9. The Kenyan government has committed itself to competition locally and internationally in Sessional Papers No.1 of 1986 (supra) and No.2 of 1996 (supra). The country has also committed itself to competition measures to be enacted under the proposed East African Community arrangement (supra). The 1996 Report of the Monopolies and Prices Commission carried a report of a merger of Tetra Pak and Alfa Laval which the Commission had detected through the daily newspapers. Tetra Pak revealed that the merger had been consummated outside the country.

We have seen that the USA and EU antitrust law embrace international practices which may impact upon competition. With the advent of the East African Community and the fact that antitrust practices taking place outside Kenya may have an effect in Kenya, the law should be adjusted to take account of this reality.

10. Provisions which promote whimsical tendencies e.g. sections 18, 24 and 31 of the Restrictive Trade Practices,

Monopolies and Price Control Act should be amended so that they require the taking of appropriate action by the Minister. The word "may" should be changed to "shall." Section 16 of the Act which allows the Commissioner to authorize "any person" to conduct a hearing should be amended to usher in objectivity in antitrust law.

11. The time frame within which restrictive trade practices complaints are investigated should be given. The same should be done for investigation of mergers or takeovers and concentrations of economic power.
12. The appeals procedure through the Restrictive Trade Practices Tribunal should be activated. It is the writer's view that the negotiation procedure, where a consent agreement is reached under section 15(3), could be contributing to this state of affairs. Also individuals who complain under section 13 should be given locus standi to appeal to the Tribunal alongside the privileged persons enumerated by section 66. Similarly, individuals who are aggrieved by concentrations of economic power and mergers/takeovers in some substantial way should also be accorded locus standi.
13. In its annual Reports the Monopolies and Prices Department Calls itself the Monopolies and Prices Commission. This is merely tendentious, perhaps with the hope that with the

continuous use of the word Commission, the powers that be will be persuaded to transform the department into a Commission. Where there are antitrust Commissions they comprise a group of people. The Federal Trade Commission of the USA has five Commissioners. The European Union Commission has twenty Commissioners appointed by the fifteen states- A Commission connotes autonomy and all the positive attributes that go with it. Whereas we can have a Commissioner of Police, a Commissioner of Cooperatives ad infinitum, this does not transform the institutions concerned into Commissions. The Department should desist from deceptively describing itself as a Commission until it is transformed into one. The Oxford Advanced Learners Dictionary says a Commission is, "a group of people authorized to carry out a task." The Teachers Service Commission, the Public Service Commission and the Judicial Service Commission are Commissions in vacuo. It is recommended that in line with the practice in the other two antitrust regimes we have studied, the Monopolies and Prices Department of the Treasury should be transformed into a fully-fledged Commission with quasi-judicial powers and free of ministerial (government) control.

14. The atavistic retention of Part IV of the Restrictive Trade Practices, Monopolies and Price Control Act which relates to the control and display of prices should be done away with. Through legal Notice No.382 dated 29th October, 1994,

the government removed petroleum products as the last item from the price control regime. This action theoretically liberalized the economy totally, presupposing that determination of prices would be left to the market forces of supply and demand. The continued retention of the prices control part of the antitrust law is therefore an undesired anachronism. It is recommended that this part be formally and definitively repealed.

We saw in chapter 2 that private party suits have proliferated in the USA and over the years their number has overtaken that of agency instigated suits. This adventurous spirit by private parties in the USA has been attributed to the prospect of the parties obtaining treble damages as provided for in the Clayton Act. As there is an analogous provision under section 21 of the Kenya antitrust law, which provides for the award of double damages, this remedy should be activated to act as a deterrence against future and incipient practices. The law should be amended to allow private parties to take charge of antitrust suits in appropriate situations.

A review of undertakings exempted under section 5 of Kenya's antitrust law should be undertaken with a view to determining the desirability of the exemptions in the particular cases. Unless, perhaps in cases where such exemptions involve the security of the state, the

exemptions "should not be maintained as they fly in the face of liberalization and the determination of market trends by the forces of supply and demand. In view of this recommendation, the Coffee Act, the Agriculture Act, the Electric Power Act, the Kenya Posts and Telecommunications Act and other similar laws should be amended as appropriate. The antitrust agency in Kenya should be allowed to have regulatory authority over areas exempted through such laws.

Even though competition should be allowed to rule supreme in an unframed manner, unfair competition is one of the areas that should be overseen by an antitrust authority. Kenya is a member of the World Trade Organization (WTO) and is bound by the organization's antidumping provisions. As the antidumping international perspective is a possibility in the area of international trade, an antidumping legislative regime should be promulgated for the Kenyan antitrust agency.

From the reports of the Monopolies and Prices Department of the Treasury, there is no record of the activation of the provisions dealing with the control of unwarranted concentrations of economic power by 2000. This does not mean that investigations have not been carried out. They may as well have been carried out but the law says that the Minister 'may' make the requisite order after the

investigations. He has the discretion to make orders or not to make them. Where such concentrations have been discovered the Minister should in an imperative manner be required to make such orders. As this is a very important area, it is recommended that an annual statement regarding the structure and distribution of goods and services in Kenya be made, whether there are unwarranted concentrations or not. All investigations undertaken by the antitrust agency in this area should be mentioned in the annual report. In the same vein, all restrictive practices which attract the attention of the agency should be mentioned in the annual report. This will constitute good references for future antitrust work. This will also constitute important public records. As we have already seen, the government has in Sessional Paper Number 2 of 1996 on Industrial Transformation to the year 2020 decried lack of appropriate legal and other such records. The present record showing that the antitrust agency has been handling an annual average of slightly less than 24 cases may not be a true reflection of its operations, especially when it has in its reports complained of a shortage of members of staff. It is apparent that many activities of the agency are not made public.

4.4 CHAPTER SUMMARY AND SUGGESTIONS FOR FURTHER STUDY

This Chapter has contained a summary, observations and recommendations. One of the recommendations made is that the Monopolies and Prices Department of the Treasury in Kenya should be transformed into a fully-fledged autonomous antitrust agency. Even though the agency will ideally have a Chief Executive, who could be called a Director General or Secretary, important decisions should be made by the proposed Commission comprising of at least three Commissioners (better still, five). The Commissioners to be appointed should be well versed in antitrust law and antitrust economics and should have full autonomy and security of tenure. This is important because, the antitrust agency, invariably deals with the rich and the mighty of the land. The suspension of the Director of Kenya's Anti-Corruption Authority, Mr. John Harun Mwa, on twenty-ninth July, Nineteen Ninety Eight after he attempted to have senior Treasury officials arraigned in court for having flouted the law is an apposite example that buttresses the need for the antitrust agency to have full autonomy and security of tenure¹⁹. It demonstrates the ever present danger of the rich and the mighty riding rough-shod over regulatory and investigative agencies which are not accorded full statutory (and preferably constitutional) protection. In short, the proposed antitrust agency should have powers similar to those enjoyed by the Federal Trade Commission and the European Commission.

A priori, the Restrictive Trade Practices Tribunal should be transformed into a fully fledged quasi-judicial authority.

Appointment procedures should be streamlined to reflect safeguards to the required independence. All the members should be well versed in antitrust law and antitrust economics. During their term of office, the members should enjoy security of tenure and safeguards similar to those that are put in place when a High Court judge is being removed from office should be promulgated.

It has been seen that several important functions of Kenya's antitrust agency have not been activated or if activated have not been reported upon. It is recommended that a future study be undertaken regarding the area of the control of unwarranted concentrations of economic power to identify the apparent failure of the Minister to keep the structure of production and distribution of goods and services in Kenya under review as mandatorily required by the law. An imperative annual reporting mechanism should be provided for, to ensure that the statutory duty imposed upon the Minister is undertaken. Another area that warrants further study is the area of the Restrictive Trade Practices Tribunal. A study should be undertaken to see whether the negotiation procedure which requires the Commissioner to mandatorily invite persons responsible for alleged infractions to seek a consent agreement has contributed to the fact that the Tribunal had by the end of year two thousand handled only one appeal despite its twelve years of existence.

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