

**TOPIC:** Regulation of restrictive trade practices, mergers and concentration of economic power; a comparative study of competition law in Kenya, United States of America and European Union.

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## **ABSTRACT OF THESIS**

This study looks at how the Kenyan law as evinced by the Restrictive Trade Practices, Monopolies and Prices Control Act, regulates restrictive trade practices, mergers and concentration of economic power in comparison to the law in the United States of America and European Union. It also analyzes how effective the Kenyan law is in regulation of the above restrictive trade practices.

In chapter one, the study deals with the scope of the study. The concept of competition as well as the various theories of competition are discussed in fair detail.

Chapter two is concerned with concentration of economic power. This chapter looks at the relevant provisions under the R.T.P.A and the procedure for inquiry into concentration of economic power. The provisions of the R.T.P.A are also evaluated with a view to identifying the weaknesses of the Kenyan law.

Chapter three discusses mergers and takeovers. The different types of mergers as well as the relevant cases are extensively discussed. The U.S.A and E.U experience is very important as the law is much more developed in Comparison to the Kenyan Law and that is why the cases that have been discussed are mainly from the two jurisdictions. This Chapter also analyzes how the R.T.P Act controls mergers and takeovers and the procedure for investigation into the same. Relevant provisions are evaluated with a view to identifying the weaknesses of the Kenyan law.

Chapter four dwells on the regulation and control of restrictive trade practices under the Kenyan, U.S.A and E.U law. In this chapter Horizontal and vertical agreements have been discussed in detail as well as the procedure for inquiry into these trade practices. The provisions are also evaluated and analyzed with a view to identifying the weaknesses of the Kenyan law.

In chapter five of the dissertation the institutions created to deal with restrictive trade practices, mergers and concentration of economic power in the three jurisdictions are discussed. The study also discusses the weaknesses of the Kenyan law in regard to the institutions created under the RTPA.

Chapter six closes the debate with a few concluding remarks and recommendations.

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## 1.0 CHAPTER ONE: INTRODUCTION

### 1.1. Background to the Problem

The Kenyan Government at independence identified three main hindrances to development as poverty, ignorance and disease. The government made the eradication of poverty, ignorance and disease its primary responsibility and consequently it had a major task of setting the country on firm and sound economic footing. It made a commitment to achieve a high degree of industrialization and therefore became more actively involved in the economic affairs of the country. In order to hasten the industrialization process the government sought the co-operation of the private sector and therefore a pattern of mixed economy was adopted whereby the private and public sector existed side by side.

However, with globalization and liberalization of the world economy in the late 1980's, the Kenyan Government shifted from governmental intervention and direct control to market-oriented strategy. It was felt that in most situations free market economies, left to their own devices, would produce results more beneficial than could be realized by intervention in markets.<sup>1</sup> At this time, the markets in Kenya were still very small and only a few manufacturers were able to produce at reasonable cost. The markets were thus distorted by concentration of economic power and restrictive trade practices and the government felt that there was need for an anti-monopoly law as successful control of these practices would enable emphasis to be shifted from most direct control towards greater dependence on market forces.

It was however recognized that the benefits of the market-oriented reforms were likely to be fully realized only if enterprises acted under the spur of competition<sup>2</sup>.

The Government's resolve to enact an anti-monopoly legislation is clearly reflected in the following passage;

“At present Kenya has no comprehensive legislation making restrictive trade practices illegal and no administrative and legal legislation to prevent them. The working party on government expenditure recommended the establishment of the prices and monopolies commission to

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<sup>1</sup> Yash Vyas, “Competition Law of Kenya: Imperfections and weaknesses” (2000) vol 13 (1&2) Lesotho L.J., pg 177

<sup>2</sup> Ibid

promote competitive markets and prevent practices in restraint of trade. Government will propose legislation prohibiting restrictive trade practices and establishing an administrative mechanism to enforce it”<sup>3</sup>

It was in response to this commitment that the Restrictive Trade Practices, Monopolies and price Control Act, Cap 504, Laws of Kenya (hereinafter referred to as RTPA) was enacted. This legislation aims, as stated in its preamble, “to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices”<sup>4</sup>.

The statute is supposed to enforce competition policy in Kenya. This is a policy aimed at preserving and promoting competition by enforcing competition law against restrictive business practices by firms and by influencing of other governmental policies or measures affecting competition.

The RTPA does not define monopolies nor what constitutes a concentration of economic power. There are also no decided cases in this respect by the Kenyan courts and thus resort will be had as to the interpretation as to what constitutes a monopoly to the United States Of America (U.S.A) law and the European Union (E.U) law as there has been a lot of litigation as well as references under the two jurisdictions.

In the U.S.A dissatisfaction with the common law’s protection and more importantly, rising concern over abusive practices by corporate giants in the second half of the 19<sup>th</sup> Century led to legislation restricting the power of the railroads and “trusts”. Congress’ initial response, the passage of the Interstate Commerce Act of 1887 and the Sherman Antitrust of 1890, did not, however, satisfy public concern. Continuing abuses and undulating business cycles as well as disappointing judicial interpretations of the new antitrust act created further pressures, until the antitrust issue dominated the presidential election of 1912 and led to the adoption, in 1914, of the Clayton and Federal Trade Commission Acts<sup>5</sup>. In discussing Regulation of restrictive trade practices, mergers and concentration of economic power, the study will look at the relevant provisions of the Sherman Act and the Clayton Act.

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<sup>3</sup> Yash Vyas, “ Anti-monopoly policy and the structure-conduct-performance paradigm: The Kenyan approach” (1994) Vol 10(1) Eastern Africa Economic Review., pg 12

<sup>4</sup> Ibid

<sup>5</sup> E. Gellhorn, Antitrust Law and Economics. (Minnesota, West Publishing Co. 3<sup>rd</sup> ed., 1990) pg 15

The Rome Treaty of 1957 established what is known as the European Community. The treaty, as renumbered by the Amsterdam Treaty, consists of 314 Articles and it is a complex document which has generated a considerable body of jurisprudence<sup>6</sup>. Much of the EC law is concerned with the elimination of obstacles to the free movement of goods, services, persons and capital; the removal of these obstacles in itself promotes competition within the community. However quite apart from this effect of the treaty on competition, it also contains specific competition rules that apply to undertakings and to Member states themselves<sup>7</sup>. EC competition law is contained in Chapter 1 of Part 111 of the EC Treaty, which consists of Articles 81 to 89<sup>8</sup>. Within this part of the Treaty, Article 81(1) prohibits agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition, although this prohibition may be declared inapplicable in the case of agreements which satisfy the conditions in Article 81(3) Article 82 prohibits the abuse by an undertaking or undertakings of a dominant position. These are the Articles this study will concentrate on.

## **1.2. Statement of the Problem**

How does the Kenyan law as evinced by the restrictive Trade Practices, Monopolies and Prices Control Act, regulate restrictive trade practices, mergers and concentration of economic power as compared to the US and EU law, and how effective is it?

The research problem in this thesis has two dimensions. First is how the Kenyan law regulates restrictive trade practices, mergers and concentration of economic power in comparison to the law in the United States of America (US) and European Union (EU). The second is to analyze how effective is the Kenyan law in regulation of restrictive trade practices, mergers and concentration of economic power. The US and the EU jurisdictions have been picked to be compared to the Kenyan Law because the Law is more developed and thus a lot can be learned from the two jurisdictions.

This will entail an in-depth discussion of the weaknesses of the Kenyan law in regard to regulation of the above as well as analyzing the functions and weaknesses of the enforcement institutions.

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<sup>6</sup> R Whish, Competition Law. (London, Sweet & Maxwell, 5<sup>th</sup> ed., 2003) pg 49

<sup>7</sup> *Ibid.*, at pg 50

<sup>8</sup> *Ibid*

### **1.3. Justification for the Study**

This study is necessary for various reasons;

- a) There is no general work in this topic and also the articles available don't have an in depth analysis of local cases thus the study will be a contribution to knowledge in this area of competition law as it will discuss the local cases in detail.
- b) The study seeks to analyze the law regulating Restrictive trade practices, mergers and concentration of economic power in Kenya in comparison to the Law in the U.S.A and E.U. This will offer an insight into the workings and failure of the R.T.P.A in this regard.
- c) Since the law and policy of competition was introduced in Kenya to encourage competition in the economy by prohibiting Restrictive trade practices, controlling monopolies, concentration of economic power inter alias, there is need to analyze and evaluate how effective it has been in regulating the above practices. This will in turn offer an insight as to whether it has been able to achieve the aims it was intended to.

### **1.4. Objectives of the Study**

The objectives of the study can be summarized as herein under;

- a) To compare the Kenyan, U.S.A., E.U law in regard to regulation of restrictive trade practices, mergers and concentration of economic power.
- b) To discuss the functions and weaknesses of the institutions created under the RTPA to deal with restrictive trade practices, mergers and concentration of economic power and compare them to the ones under the EU and U.S.A law.
- c) To show that the Kenyan law has a lot of deficiencies and is not properly enforced and consequently has not been effective in controlling Regulation of Restrictive trade practices, mergers and concentration of economic power.
- d) To show that the Kenyan law is a good example of bad drafting and that due to the imperfections, amendments to the existing law are not likely to help since most of the existing

provisions need to be redrafted<sup>9</sup>; consequently the existing law need to be replaced by a new legislation.

- e) To discuss cases that have been decided by the Monopolies Commissioner with a view to analyzing decisions made and whether the approach that is used is correct.
- f) Based on the weaknesses identified in the current law Regulating Restrictive trade practices, mergers and concentration of economic power, this dissertation will then recommend measures that will address those weaknesses and improve the capacity of the Kenyan to regulate the above practices.

### 1.5. Hypothesis

- a) The R.T.P. Act has not been effective in regulation of restrictive trade practices, mergers and concentration of economic power and it should be replaced by a new legislation.
- b) In regard to the provisions relating to restrictive trade practices, mergers and concentration of economic power, the RTPA has numerous weaknesses which make its enforcement difficult and time consuming.
- c) The enforcement institutions established under the RTPA have several weaknesses and they need to be reorganized.

### 1.6. Theoretical Framework

In the 20<sup>th</sup> Century the ideological struggle between capitalism and communism was a common feature.<sup>10</sup> Many countries were suspicious of competitive markets and instead preferred state planning and management of the economy. However, there have been great changes in economic behaviour in the world which have seen widespread demonopolisation, liberalization and privatization of economies. These changes together with rapid growth in technology and the opening up of International trade have resulted to powerful economic forces. Societies and individuals have reacted differently to these changes. However there is a growing consensus that, on the whole,

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<sup>9</sup> Vyas, *supra* note 1, at pg 19

<sup>10</sup> *Ibid.*, at pg 2

markets deliver better outcomes than state planning; and central to the idea of a market is the process of competition.<sup>11</sup>

The antitrust laws are designed to control the exercise of private economic power by preventing monopoly, controlling cartels, and otherwise protecting competition<sup>12</sup>. Generally antitrust laws aim at increasing consumer welfare by ensuring that markets remain open to entry and that output can expand. This in turn ensures maximization of national wealth. Whether antitrust also serves to promote equality of business opportunity, the just distribution of goods or other social or political goals is a matter of intense debate<sup>13</sup>.

Competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place: in the United Kingdom, the Competition Commission has described competition as 'a process of rivalry between firms...seeking to win customers' business over time'.<sup>14</sup> Competition is analogous to a competitive market. The United Kingdom Government stated that:

"Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organization of production".<sup>15</sup>

### 1.6.1. Functions of Competition Law

Competition has been found desirable in the market place and competition law has been designed to;

- To protect the consumer by safeguarding individuals against the power of monopolists or the anti-competitive agreements made by independent firms.
- The dispersal of power and the redistribution of wealth: the promotion of economic equity rather than economic efficiency

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<sup>11</sup> Ibid

<sup>12</sup> See Standard Oil Co. V FTC, 340 U.S. 231, 249 (1951)

<sup>13</sup> Whish, supra note 6, at pg 1

<sup>14</sup> Ibid., at pg 2

<sup>15</sup> Ibid., at pg 16

- Protecting competitors: competition law should be applied in such a way as to protect small firms against more powerful rivals and thus competition law should be concerned with competitors as well as the process of competition.
- Single market integration: Competition law can be moulded in a way so as to encourage trade between states partly by facilitating cross-border transactions and integration<sup>16</sup> e.g. the goal of EC law is to create a single market integration thus they are dismantling all barriers. When we move closer home one of the objectives of the East African Community is to create a single market within the member states.
- Ensure that workable competition is maintained in oligopolistic industries.
- Monitor mergers between independent firms whose effect is to concentrate the market and diminish competitive pressures within it.

### **1.6.2. Theoretical Competition Models**

There are various theories of competition which include:

#### **1.6.2.1. Perfect Competition Theory**

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

Perfect competition exists where there are a large number of undertakings in the market. If there are a large number of undertakings prices will be low and consumers will benefit. In such a situation producers respond to consumer tastes by producing what buyers want and, in competition with each other, at the lowest price. In a perfectly competitive market the individual firm is merely a quantity adjuster. All firms sell at marginal costs and earn only a normal return on investment. Each firm takes price as set by the market and no firm can affect the price by adjusting its output. Firms in a competitive market respond to rather than dictate changes in market place.

The following conditions which suggest the existence of perfect competition are also useful in predicting whether competition behaviour is likely in a market:-

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<sup>16</sup> Ibid., at pg 21

- a) Equality of bargaining power
- b) Homogenous products
- c) Free entry and exit from the market
- d) A large number of buyers and sellers
- e) Independence of decisions among firms and
- f) Perfect knowledge<sup>17</sup>

Restrictive trade practices, concentration of economic power and mergers (if not controlled) deprive society the benefits of perfect competition which have been said to include inter alia;

### **Allocative efficiency**

Here allocation of goods and services depends on the price that the consumers are willing to pay. Prices never rise above the marginal cost<sup>18</sup> and the benefits to a consumer while purchasing a product are maximized. This is because total output will be determined by what consumers will pay at that price.

### **Productive efficiency**

Economists consider that under perfect competition goods and services will be produced at the lowest cost possible, which means that as little of society's wealth is expended in the production process as necessary.<sup>19</sup> There is thus efficiency in the production process as the producer is not able to sell above cost as if he attempts to do so his customers will move to his competitors; he is also not able to sell below cost as doing so he would not be profitable.

### **Dynamic efficiency.**

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<sup>17</sup> Gellhorn, *supra* note 5, at pg 56

<sup>18</sup> Whish, *supra* note 6, at pg 3

<sup>19</sup> *Ibid*

It has been argued that producers will constantly innovate and develop new products in order to have an edge over their competitors. Competition has therefore been said to have the desirable dynamic effect of stimulating important technological research and development.<sup>20</sup>

The results of perfect competition are favorable to consumers because resources are used and distributed efficiently.

### 1.6.2.2. Monopolistic Competition Theory

This theory was first propounded by E.H.Chamberline and it may be defined as “an industry characterized by a large number of firms of different sizes producing heterogeneous that is similar but not identical products with relatively easy entry into the industry”<sup>21</sup> Sellers in monopolistic competition are able to price their products above competitive levels because brand differentiation gives them a degree of monopoly power yet they are not in the same position as monopolists because close substitutes for their products exist.<sup>22</sup> Under this theory, there are many sellers but each seller’s product is distinct and distinguishable by brand or other means of identification from those sold by others in the industry.<sup>23</sup>

The only difference between monopolistic competition and perfect competition is that the former recognizes that each producer sells differentiated products while the latter recognizes that each producer sells homogeneous products.

### 1.6.2.3. Oligopoly Theory

This is defined as a market in which there are a few firms each of which recognizes that its actions have a significant impact on the price and supply of a commodity.<sup>24</sup> In an oligopolistic market there are a few sellers in the market and none of them is dominant. Due to this the sellers realize that their actions affect each other and the other seller is likely to react in a certain way to its activities; the sellers are thus interdependent. Consequently oligopolists generally will not compete with one another in terms of price and have little incentive to compete in other ways. Oligopolists are

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<sup>20</sup> Ibid., at pg 4

<sup>21</sup> Vyas, supra note 3, at pg 17

<sup>22</sup> Ibid

<sup>23</sup> Gellhorn, supra note 5, at pg 75

<sup>24</sup> Vyas, supra note 3, at pg 17

therefore able to earn supra-competitive profits without entering into the type of collusive agreement or concerted practice generally proscribed by competition law.

Generally, oligopolies have express or tacit agreements on pricing policies and such agreements tend to make the prices of goods identical and the price differential of differentiated goods uniform.<sup>25</sup>

#### 1.6.2.4. Structure-Conduct-Performance Paradigm

The SCP approach was first formalized by Mason in 1939.<sup>26</sup> His detailed case study approach was modified by Bain in 1951 who sought to draw more generalized conclusions from large sample, cross-section studies<sup>27</sup>.

In this context structure refers to the importance and characteristics of individual markets within an economy. It describes the environment within which firms in a particular market operate.<sup>28</sup>

Conduct refers to the behaviour of the firms in a market; to the decisions these firms make and also to the way in which these decisions are taken.<sup>29</sup> Performance refers to the appraisal of how far the economic results of an industry's behaviour fall short of the best possible contribution it could make to achieving these goals.<sup>30</sup>

The Structure-Conduct- Performance (SCP) postulates causal relationships between the structure of a market, the conduct of firms in that market and their economic performance<sup>31</sup>. The SCP approach argues that performance is determined by the conduct of firms, which consequently determine the structural characteristics of the market. The SCP approach involves the logical application of neoclassical models to draw deductions about the performance of markets.<sup>32</sup> This approach has been criticized for various reasons by economists: - Some argue that the relationships between structure, conduct and performance are more complex than originally envisaged. Another argument is that the

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<sup>25</sup> Ibid., at pg 18

<sup>26</sup> P R.Ferguson, Industrial Economics: Issues and Perspectives, (London McMillan Education Ltd., 1988) pg 9

<sup>27</sup> Ibid

<sup>28</sup> Ibid at pg 8

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ibid., at pg 7

<sup>32</sup> Ibid., at pg 22

technique is too loosely derived from its theoretical underpinnings, and this has led to various developments including attempts to link SCP more vigorously back to neoclassical theory. Other economists have argued that the SCP approach gives too limited a perspective on the operations of markets, and that it provides a poor basis for policy formulation.<sup>33</sup>

However, this does not mean that the SCP approach has no value since some markets will be sufficiently stable for the approach to generate useful results.

#### 1.6.2.5. Chicago School Theory

According to this school the main purpose of anti-trust law is to protect the welfare of the consumer. Under this school there is a belief that there is a direct relationship between bigness and power. The idea that big enterprises are powerful has led naturally, if not inevitably, to the belief that either their power should be limited or else its exercise should be controlled.<sup>34</sup> In this school concern about the power of large enterprises has been expressed on three different levels which are:-

- a) It is asserted that power may result in abuses of power, such as changing extortionate prices or unfairly bludgeoning competitors.
- b) It is asserted that the power of large enterprises brings about an unfortunate distortion in the performance of the economic system because it leads to such characteristics as rigidity of prices and relaxation of drives toward maximum efficiency.
- c) It is asserted that an economic system in which power has been unduly concentrated suffers from an impairment of some of its important institutions such as the opportunity for new comers to undertake new ventures.

According to Demsetz of the Chicago School, since in any market, the firm with the lowest costs will tend to increase in size and market share over time, there will be pressure on all firms to be efficient and a tendency for market concentration to increase.<sup>35</sup> Consequently he argues that market structure will develop into that which enables production and distribution to be done at the lowest cost.

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<sup>33</sup> Ibid., at pg 7

<sup>34</sup> R.D. Irwin, Industrial Organization and Public Policy, (Illinois, Richard D. Irwin Inc., 1958) pg 337

<sup>35</sup> Ferguson, supra note 26, at pg 12

### 1.6.2.6. Harvard School Theory

This School looks at the theories of effective competition. According to this school, if the factories or industries are concentrated it affects their conduct as well as their performance. This was developed by Mason and Bain into the structure-conduct-performance (SCP) paradigm which is based on the neoclassical theory of the firm.<sup>36</sup> According to the School there have always been atleast two ways of looking at competition and of judging the effectiveness of competition in a particular market.<sup>37</sup>

First competition is thought of as a type of market organization setting severe limits to the power or control exercised by the individual firm.

The other way is in terms of the performance of firms in a market. From the point of view of economic policy, competition is supposedly desirable, not as an end in itself but for the results that are expected to follow from it.<sup>38</sup>

### 1.6.2.7. Contestable Markets Theory

The theory of contestable markets was developed by Baumol<sup>39</sup> and has developed in a manner that relies formally on the standard distinction between incumbents and outsiders.<sup>40</sup> Contestability theory stresses the conditions that would make outsiders play as important a role in price determination as played by insiders. Markets are 'contestable' where the costs facing new entrants are similar to those of firms already in the market and when a firm leaving the market is able to do so without incurring any loss. The threat of entry forces existing firms to minimize their production and distribution costs, and therefore influences the structure of the market. Regardless of the structure that emerges, contestability automatically ensures that good performance will result.<sup>41</sup> A perfectly contestable market doesn't need to be perfectly competitive since an industry which is monopolistic or

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<sup>36</sup> Ibid., at pg 2

<sup>37</sup> Irwin, *supra* note 34, at pg 377

<sup>38</sup> Ibid

<sup>39</sup> Ferguson, *supra* note 26, at pg 11

<sup>40</sup> H. Demsetz, *Efficiency, Competition and Policy* (New York, 1989) pg 88

<sup>41</sup> Ferguson, *supra* note 26, at pg 12

oligopolistic may be perfectly contestable where there are no impediments to entry or exit, so that intervention by the competition authorities is unnecessary<sup>42</sup>

It is worth noting that in the real world of business, perfect competition or absolute monopoly are rare conditions. Economists recognizing the shortcomings of the theory of perfect competition have endeavoured to define a more realistic standard of economic performance which is workable competition.

#### 1.6.2.8. Workable Competition Theory

There have been serious attempts to define the term but in no case has the author set forth conditions so completely devoid of value judgements or so all-embracing that he feels free to acclaim the universal applicability of his definition.<sup>43</sup> The term was first used by Professor J.M. Clark who placed much emphasis on rivalry among selling units and the free option of the buyer to buy from a rival seller or sellers of what we think of as the 'same' product.<sup>44</sup> He defines workable competition to mean a

“rivalry in selling goods in which each selling unit normally seeks maximum net revenue, under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as ‘the same’ product, necessitating an effort by each seller to equal or exceed the attractiveness of the others; offerings to a sufficient number of buyers to accomplish the end in view”<sup>45</sup>

According to Professor Stigler, an industry is workably competitive if the following conditions exist;

- a) There are a considerable number of firms selling closely related products in each important market area
- b) The firms are not in collusion

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<sup>42</sup> Whish, *supra* note 6., at pg 15

<sup>43</sup> Irwin, *supra* note 34 at pg 88

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid.*, at pg 378

- c) The long- run average cost curve for a new firm is not materially higher than that for an established firm.<sup>46</sup>

Clair Wilcox defines workable competition as “the availability to buyers of genuine alternatives in policy among their sources of supply”<sup>47</sup>

These writers clearly think of workable competition in terms market conditions imposing a set of limitations on the scope of action of the individual buyer or seller. These limitations prevent the exploitation of buyers by sellers when few in number or in collusion with each other and prevent the exploitation of sellers by buyers. There are an adequate number of alternatives to choose from.

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

Competition law is important as free markets left on their own may, at times, be distorted by concentration of economic power in the hands of a few undertakings, mergers between independent firms whose effect is to concentrate the market or by restrictive trade practices.

Every large firm having economic power has the ability to adopt restrictive trade practices to control other firms or to oust them. On the other hand firms without economic power may sometimes strive to achieve it by means of collusion or agreement among themselves to adopt trade practices which may restrain competition.

Under the Kenyan law control and regulation of such practices are contained in part II of the RTPA. Restrictive trade practices are defined in Section 4(1) while section 6 (1) outlines the categories of trade agreements declared to be restrictive trade practices. We shall be able to see that the Act covers all types of trade practices namely horizontal, vertical and unilateral agreements. It defines a restrictive trade practice as an act performed by one or more persons engaged in production or distribution of goods or services which:

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<sup>46</sup> Ibid

<sup>47</sup> Ibid

- a) In respect of other persons offering the skills, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate; or
- 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<sup>48</sup>. 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<sup>49</sup>.

Concentration of economic power is the extent to which economic activity is controlled by large firms. A firm may be large in absolute terms that is, in relation to the whole economy as well as large in relation to other firms in the same industry. Concentration of economic power is of two types

- a) Product or industrial wise concentration.
- b) Aggregate or country wise concentration.

If there is only one firm supplying the full market demand, that firm is called a monopolist. Such a firm will recognize that it can alter market price by altering its own output<sup>50</sup>. In order to maximize profits such a firm can manipulate output which will consequently affect price, an option not open to the firm which faces a competition structure. In consequence, an industry dominated by a monopolist will tend to produce less, charge a higher price, and earn a large aggregate profit than would that industry with a competitive structure<sup>51</sup>.

Monopoly structure affects conduct of the market and this leads to socially poor performance. Monopoly power has been defined as power to control or to exclude competition.<sup>52</sup>

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<sup>48</sup> Restrictive Trade Practices Monopolies and Price Control Act Cap 504 s4 (1) a, b (2)

<sup>49</sup> Ibid., s(2)

<sup>50</sup> L.A. Sullivan, Handbook of the Law of Antitrust, (Minnesota, West Publishing Co., 1977) pg 25

<sup>51</sup> Ibid., at pg 26

<sup>52</sup> Ibid., at pg 33

Provisions relating to concentration of economic power are covered under part III sections 23-26 of the RTPA. This part seeks to create an environment within which market forces can best function in Kenya.

This study will look at concentration in detail as well as discuss concentration as a monopoly problem. It will also discuss the procedure to be followed before a firm can be said to be adopting unwarranted concentration of economic power detrimental to the economy.

In Kenya the external growth of firms by way of mergers is controlled under the provisions of the RTPA. Under the Act mergers and takeovers are defined in Section 22(1). Under Section 27 of the Act, approval of the Minister of finance is required for mergers and takeovers.

A merger refers to the combination of two or more firms to form a single firm in order to facilitate growth and increase the value of the combined enterprise. If company A and B merge to form company C and if C's value exceed that of A and B taken separately then synergy is said to exist and such a merger is held to be beneficial to both A's and B's stockholders. Synergistic effects can arise from four sources;

- Operating economics
- Financial economics,
- Differential management efficiency
- Increased market power.

A merger could be an uncontested union between two or more firms or a hostile takeover where one firm successfully gains control of another<sup>53</sup> by either outright purchase of assets of the target company or by purchase of its stock. Mergers are generally classified into three broad categories: horizontal, vertical and conglomerate<sup>54</sup>. Horizontal mergers are those that take place between competitors in the same product market and at the same level. Vertical mergers are those where a company takes over a current or potential supplier or customer while conglomerate mergers involve the union of two companies that produce or supply unrelated goods or services.<sup>55</sup>

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<sup>53</sup> Whish, *supra* note 6, at pg 664

<sup>54</sup> Vyas, *supra* note 3, at pg 26

<sup>55</sup> *Ibid*

The primary focus of the law is whether the new “partnership” will eliminate actual or potential competition among the “ventures” thereby substantially reducing competition.

Agreements between independent companies, especially direct competitors, have been viewed as dangerous to competition, since their likely impact is the restriction of output and consequently increased prices. Hence, the primary question has become one of whether these arrangements are so inimical to competition that they should be banned outright (through application of a per se rule) or whether justifications for these arrangements should be heard (under a rule of reason) before deciding whether the antitrust laws have been violated.<sup>56</sup> Under the Kenyan law only horizontal mergers and takeovers are controlled under the Act.

Many of the legal guidelines in competition law are primarily aimed at preserving and promoting structures conducive to competition.

This dissertation will look at the Restrictive trade practices in detail and compare the Kenyan, U.S.A and E.U experiences. It will also look at case law from the three jurisdictions.

### 1.7. Literature Review

Most of the text books that have been found relevant to this study emanate from the developed countries and explores the U.S.A and E.U experience in the Regulation of Restrictive trade practices, mergers and concentration of economic power and generally competition law.

The study will refer to the third and Fifth editions of “Competition Law” by Richard Whish. The books are relevant to the study as they discuss in detail the Regulation of restrictive trade practices, mergers and concentration of economic power in the United Kingdom (UK) and the E.U (However study will only focus on the E.U experience). The author discusses various decided cases under this jurisdiction. He also offers a glimpse into the U.S.A. experience and compares it to the European models. However this book does not discuss the experience in Kenya.

Richard Posner’s “Antitrust law and Economics Perspective” puts forth the proposition that the only aim of competition law should be to promote competition as the term is understood in economics. This theme is developed in chapter two of the book. In Chapter three and four the author unravels

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<sup>56</sup> Gellhorn, *supra* note 5, at pg 334

the convoluted doctrine of antitrust in the U.S.A judicial system and states. In reading this book one cannot help but draw comparisons between the numerous legal provisions found in Kenya and the judicial experience in the U.S.A. There lies a problem locally, the Kenyan law is prolix in its substantive provisions, which do prove to be a problem in enforcement and thus are anti competitive.

“Law and Economic policy in America. The Evolution of the Sherman Act” by Letwin W is a book that traces the history of the Sherman Act, which was the first law to touch on economic policy and which is the law that Regulates Restrictive trade practices, mergers and concentration of economic power in the U.S.A. The Act was a political response to predations of conspiratorial trusts in the U.S.A. during the last decade of the 19<sup>th</sup> Century and it sought to regulate them.

“Competition Law and Policy cases and materials and commentaries” is a text incorporating all facets on competition from a comprehensive review of the economic rationale for competition to the substantive provisions of a competition law. It contains a fair amount of cases drawn from the EU, UK and the U.S.A which is a useful comparative to the study.

Ernest Gellhorn’s “Antitrust law and Economics in a nut shell” book will be referred to. The book deals extensively with the U.S.A experience in regard to antitrust laws. It is relevant to this study as in Chapter II it deals with antitrust statutes in the U.S.A and discusses various cases. Chapter IV deals with the monopoly problem and says that “-----monopoly power is feared both because of its consequences and its potential for abuse.<sup>57</sup> Chapter IX deals with mergers and discusses in detail the different types of mergers, the U.S.A experience and several decided cases. Restrictive trade practices which include vertical and horizontal restraints are discussed in Chapters V, VI and VIII. The only shortcoming of the book is that it only discusses the U.S.A experience.

Weinberg and Blank on “Takeovers and mergers” is relevant to this study as the book defines takeovers and mergers and discusses the various categories of takeovers and mergers. However the book discusses the two topics generally and does not give the U.S.A or E.U experience. It also doesn’t discuss monopolies, concentration of economic power nor cases and thus other texts will be referred to.

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<sup>57</sup> Ibid., at Pg 91

E. Sullivan and Herbert Hovenkamp "Antitrust law, policy and procedure" is relevant to this study as Section II of Chapter one gives a glimpse of the origin of the Sherman Act which is one of the legislation that will be discussed while looking at the U.S.A experience in regard to restrictive trade practices, mergers and concentration of economic power. The book also discusses various U.S.A cases which are relevant to this study.

"Handbook of the Law of Antitrust by Lawrence A. Sullivan is also a text which is relevant as it discusses in detail the U.S.A experience in regard to regulation of restrictive trade practices, mergers and concentration of economic power. The book also discusses various relevant cases and will be useful in this study.

"Industrial Economics: Issues and Perspectives by Paul R. Ferguson is a text that discusses the theory of competition. In chapter two it discusses the structure-conduct-performance paradigm theory of economics. However it does not discuss monopolies, concentration of economic power and mergers.

"Readings in Industrial organization and public policy" by Richard D. Irwin deals with the theories of competition. These are discussed in Chapter V

Government policy papers have been analyzed to gauge government commitment to competition policy in economic management in the country. The most important one is sessional paper No.1 of 1986 titled economic management for Renewed Economic Growth this map out the introduction of competition policy in Kenya and expresses a change in the macroeconomic policies pursued by the government. Sessional paper No. 1 OF 1994 titled Recovery and sustainable Development to the year 2010 mentions the measures put in place by the introduction of a competitive policy.

There are various local articles that are relevant to this study. Most of them are written by Yash Vyas and include "Anti-Competitive Trade Practice and the Law Relating to Contracts in Restraint of Trade; The Kenya Perspective The article discusses restrictive trade practices and looks at the Kenyan, U.S.A and U.K experience. The article does not discuss monopolies and concentration of economic power.

Another article by Yash Vyas is " Anti-Monopoly Policy and the Structure- Conduct-Performance Paradigm: The Kenyan Approach The article deals with the Kenyan approach in regard to Provisions relating to concentration of economic power, mergers and takeovers as well as

Restrictive trade practices. The article does not discuss the U.S.A and EU perspective. It also does not discuss any cases and other texts will be referred to.

Yash Vyas has also written an Article on Imperfections and weaknesses of Competition Law in Kenya. The article discusses in detail the weaknesses of the Kenyan law. However it does not discuss what monopoly, concentration of economic power nor mergers is. The article does not also discuss the U.S.A and EU experience nor the cases.

The office of Monopolies Commissioner has a number of reports have been read. In the annual reports are summaries of the case laws which went before the commissioner for investigation.

Various Internet sites were also browsed with a view to accessing the latest cases in regard to the study under the U.S.A and E.U laws.

### **1.8. Research Methodology**

The methodology of evaluation research has been used. The study has relied on secondary material, library research and internet searches. The libraries to that were used are the Faculty of law Parklands Campus library and the University of Nairobi library. The office of Monopolies Commissioner was expected to yield cases on the practice of the law and policy of competition in the country.

### **1.9. Limitations of Study**

The Study will discuss the Kenyan law, the U.S.A law and the E.U law but the comparison will not be exhaustive in the sense that it will not be analyzing the U.S.A and E.U law comprehensively but compare the law in those countries with the Kenyan law only where there are weaknesses in the Kenyan law. Also it will not be possible to get cases decided under the U.S.A and E.U law after the year 2003. It was also not possible to study the files in regard to the cases that have gone before the Monopolies and Prices Commissioner in order to analyse them. The officers in the department cited the Government secrets Act.

## 2.0 CHAPTER TWO: CONCENTRATION OF ECONOMIC POWER

### 2.1. Introduction

Concentration of economic power is the extent to which economic activity is controlled by large firms. A firm may be large in absolute terms that is, in relation to the whole economy as well as large in relation to other firms in the same industry. If there is only one firm supplying the full market demand that firm is called a monopolist such a firm will recognize that it can alter market price by altering its own output.<sup>1</sup> Consequently, an industry that is dominated by a monopolist will tend to produce less, charge a higher profit, and in turn earn a large aggregate profit in comparison to an industry that has a competitive structure.<sup>2</sup>

Under the Kenyan law the Provisions relating to concentration of economic power are contained in sections 23-27 of the RTP Act. Section 23 requires the Minister of Finance to identify and keep under review the unwarranted concentration of economic power in Kenya. The minister is supposed to keep under review those concentrations of economic power whose detrimental impact on the economy outweighs their efficiency advantages. While identifying unwarranted concentrations of economic power some of the factors that the Minister should put into consideration include:

- a) Controls over chain of distribution units the value of whose sales exceeds one-third of the relevant market for the category of goods sold by the chain: or
- b) Control over two or more physically distinct units together supplying more than one third of the value, at ex-factory prices of a given commodity for the domestic market; or
- c) Shareholdings exceeding twenty per cent in a manufacturing unit and at the same time having a beneficial interest, however small, in a wholesale or retail enterprise; which distribute products of the manufacturing enterprise ; or

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<sup>1</sup> L. A Sullivan, Handbook of the Law of Antitrust, (Minnesota, West Publishing Co., 1977) pg 25

<sup>2</sup> *Ibid*, at pg 26

- d) Shareholdings exceeding twenty per cent in a wholesale enterprise and at the same time having a beneficial interest, however small, in a retail enterprise which distributes goods supplied by the wholesale enterprise.<sup>3</sup>

The Act however does not define what constitutes concentration of economic power and thus resort will be had to the U.S.A law and E.U law as to the interpretations. Under the U.S.A law concentration of economic power is covered under Section 2 of the Sherman Act. The section enumerates three distinct offences; it makes it a crime to “monopolize or attempt to monopolize or combine or conspire to monopolize” any part of interstate or foreign commerce.<sup>4</sup> A firm is said to have monopolized in Violation of S2 if it deliberately follows a course of market conduct through which it has obtained or maintained power to control price or exclude competition in some part of the trade or commerce covered by the act.<sup>5</sup>

Under the E.U law concentration of economic power is captured under Article 82. This Article is directed towards the unilateral conduct of dominant firms which act in an abusive manner.<sup>6</sup> The Article provides that:

“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:

- a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- b) Limiting production, markets or technical development to the prejudice of consumers;
- c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) 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.”<sup>7</sup>

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<sup>3</sup> Yash Vyas, “Anti-monopoly policy and the structure-conduct-performance paradigm: The Kenyan approach” (1994) Vol 10(1) Eastern Africa Economic Review., pg 24

<sup>4</sup> Sullivan, *supra* note 1, at pg 29

<sup>5</sup> *Ibid*

<sup>6</sup> R. Whish, Competition Law, (London, Sweet & Maxwell, 5<sup>th</sup> ed., 2003) pg 175

<sup>7</sup> *Ibid.*, at pg 176

In Kenya there are no cases that have been decided by the courts but there is one that was decided by the Commissioner of Monopolies, however there has been a lot of litigation under the U.S.A and E.U laws and thus cases from these two jurisdictions will be discussed.

## 2.2. Monopoly Power

Monopoly power has been defined by Sullivan as the power to control or to exclude competition.<sup>8</sup> However there is little reason to be concerned with the actions of a single firm, if there is no actual or probable market power. Under S2 of the Sherman Act, one of the two elements in the offence of monopolizing is “the possession of monopoly power in the relevant market.”<sup>9</sup> In the case of *United States V Grinnell Corp*<sup>10</sup>. A firm without power cannot impose its choices on the market either on its competitors or its customers; it has no ability to charge more than its competitors, and no reason to sell for less<sup>11</sup>. Departure from the perfectly competitive market almost always shows that some firms possess market power and thus the first issue for antitrust law in the monopoly context is to determine what degree of market power becomes so excessive or so significant that’s its exercise should be subjected to scrutiny and control<sup>12</sup>. S2 of the Sherman Act doesn’t mention market power and it doesn’t provide any guidance for determining either how market power is to be measured or what minimal aggregation constitutes market power within the meaning of the Act. Under the EU law Article 82 applies only where an undertaking has a ‘dominant position.’<sup>13</sup> The concept of a dominant position is not defined in the EU 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 in the case of *Continental Can v EC Commission*<sup>14</sup>:

“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”

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<sup>8</sup> Sullivan, *supra* note 1, at pg 33

<sup>9</sup> F. Gellhorn, *Antitrust Law and Economics* (Minnesota, West Publishing Co., 3<sup>rd</sup> ed., 1990) pg 93

<sup>10</sup> See *United States V Grinnell Corporation*, 384 U.S. 583, 570 (1966)

<sup>11</sup> Gellhorn, *supra* note 9, at pg 93

<sup>12</sup> *Ibid.*, at pg 94

<sup>13</sup> Whish, *supra* note 6, at pg 178

<sup>14</sup> *Continental Can v EC Commission* [1984] ECR 2999

Article 82 does not only apply to the activities of single firms. For example in *Re Italian Flat Glass suppliers*<sup>15</sup> 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 factor is the position of the firms in the relevant market and their behaviour.

The European Court of Justice (ECJ) in *United Brands v Commission*<sup>16</sup> laid down the following test:

“The dominant position referred to by Article 82 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”<sup>17</sup>

This definition contains two elements; that is the ability to prevent competition and the ability to behave independently without explaining how these two ideas relate to each other.<sup>18</sup> However it does not adequately reflect that Article 82 also applies to market power on the buying as well as the selling side of the market, since it was not in issue in *United Brands*; a powerful purchaser may also be able to behave independently of its sellers who are not exactly ‘customers’ in the normal sense of that word.

According to Gellhorn<sup>19</sup> three different approaches could be used to measure market power:

### 2.2.1. Performance

Measurement of a firm’s actual performance through examination of the degree to which it deviates from the competitive norm can probably be said to be the most accurate approach. This involves determining how much a firm’s prices are different from its marginal cost or the amount that a firm’s net profits exceed the industry average (if that average reflects similar risks in a competitive

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<sup>15</sup> *Re Flat Glass Suppliers* [1992] 5 CMLR 502

<sup>16</sup> *United Brands v Commission* case 27/76[1978] ECR 207

<sup>17</sup> Whish, *supra* note 6 at pg 179

<sup>18</sup> *Ibid*

<sup>19</sup> Gellhorn, *supra* note 9 at pg 95

industry)<sup>20</sup>. Performance tests are not necessarily satisfactory and such measures are rarely used in anti-trust cases for the following reasons;

- Marginal costs estimates are difficult to desire and economic profit figures may not reflect actual market power where a firm fails to maximize profits.
- Reliability of cost figures varies according to accounting conventions.
- Profit figures may also underestimate market power where the firm's costs are out of line<sup>21</sup>.

### 2.2.2. Rivalry

This test tends to focus on competitive behaviour and it studies the sensitivity of the firm's sales or output to changes in its rivals' sales and prices. While this standard is in fact used under the broad designation of cross-elasticity of demand to ascertain which products compete with each other, it suffers the drawback of severe difficulty in acquiring accurate data for use in specific cases and of the requirement that the comparable prices be competitive if the interchange is to demonstrate rivalry<sup>22</sup>.

### 2.2.3. Structural Approach

This is perhaps the most widely used method and it entails simply counting the number of firms in a market and comparing the volume of sales controlled by each firm. The market shares are then used as surrogates for market power and it is inferred that a firm with a major share of the market has monopoly power<sup>23</sup>. These tests also consider entry barriers and product differentiation among other things.

The measurement of market power is an inexact and often misunderstood process<sup>24</sup>. Usually in a monopoly case the product and geographic markets are first defined, then the sales of the defendant are compared with those of other sellers who compete with the defendant; Thereafter this market share is used as a rough index of the defendant's market power, along with ease and likelihood of entry, availability of second-hand goods or other acceptable (but non-equivalent) substitutes, and

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<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid, at pg 96

<sup>24</sup> Ibid

similar factors which indicate whether the defendant has the ability to raise prices and reduce output<sup>25</sup>.

In the U.S.A and E.U legal systems, a monopoly position and market power are not abstract concepts; they can only exist in relation to a market. The choice of the correct product and geographic market is therefore an essential step in identification of monopoly power. It is however important that this choice be correct and that the market chosen be the relevant market. In the case of *Berkey Photo v Eastman Kodak*<sup>26</sup>, the U.S Appeal court said that it was a “basic principle” in the law of monopolisation that the relevant or first step in a court’s analysis must be a definition of the relevant market.

### 2.3. Product Market

Defining the product market in which the seller operates is an effort to locate all substitutes available to the purchasers of the seller’s products, i.e. the defining process asks whether the seller’s product competes with other products, whether these products limit his ability to raise price, and whether they should be included in the product market<sup>27</sup>. Realistically, no single definition of a product market is likely to be decisive because all sellers within it directly limit the power of the seller whose power is the subject of inquiry and all sellers outside of it affect the subject seller so little that they can be ignored<sup>28</sup>. If the definition is too narrow and thus excluding substitutes the defendant’s ability to affect price and output will be overstated while if no substitutes are included, the defendant’s market share will be understated because some of the included products will have only an insignificant impact on his price-setting powers<sup>29</sup>. Whether various products are sufficiently close substitutes to be included within a market is a question which has proved surprisingly difficult e.g. is the sole manufacturer of cellophane in direct competition with producers of wax paper or aluminium foil, or does the cellophane firm have a monopoly of distinctive product?<sup>30</sup>

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<sup>25</sup> Ibid

<sup>26</sup> *Berkey photo Inc. v Eastman Kodak Co.*, 603 F 2d 263 (2<sup>nd</sup> Cir, 1979)

<sup>27</sup> Gellhorn, *supra* note 9, at pg 98

<sup>28</sup> Sullivan, *supra* note 1, at pg 41

<sup>29</sup> Gellhorn, *supra* note 9, at pg 98

<sup>30</sup> Ibid

The case of *United States vs. E.I Du Pont de Nemours & Co*<sup>31</sup>. is not only the leading case outlining the dimensions of product market analysis but it also illustrates how the judiciary developed criteria are applied and possibly sometimes misapplied.

While the ultimate issue was whether Du Pont had monopolized the cellophane market in violation of S2 of the Sherman Act, since no effect was made to show that du Pont had attempted to monopolize, the government had the burden of proving that du Pont possessed a high degree of market power. The government relied on the fact that DuPont produced almost 75% of the cellophane sold in the US as demonstrating, at least prima facie, DuPont's monopoly power. It also argued that either flexible wrapping material was not sufficiently competitive to limit du Pont's control of the cellophane market price. Du Pont countered that cellophane was not a distinct product since it competed directly and closely with other flexible packaging materials such as aluminium foil, wax paper, saven wrap etc. And with these goods included in the product market, du Pont's market share declined to less than 20%-well below the monopoly threshold. Its worth noting that du Pont did not deny that cellophane was a distinctive product, rather it contended that since cellophane was under severe competitive pressure from substitute flexible wrapping materials, it lacked the power to exclude competitors and its power over price was correspondingly limited. The government proposed that before other products could be included in the cellophane product market they must be substantially fungible and sell at close to the price of cellophane.

The Supreme Court rejected this narrow measure of physical and price identity instead it called for

“an appraisal of the cross-elasticity of demand in the trade” to determine whether the “commodities are reasonably interchangeable by consumers for the same purposes”.

Reasonable interchangeability, the Court said, has three components: price use and qualities considered. Applying the quality test i.e. determining whether the physical attributes of cellophane and other flexible wrappings were sufficiently similar the court was persuaded that cellophane generally possessed no qualities desired by consumers which were not possessed by a number of other products. Similarly the functional interchangeability test i.e. whether buyers were able to shift back and forth from cellophane to other flexible wrappings supported du Pont's contention that cellophane belonged in a broader product market. These two tests of reasonable interchangeability

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<sup>31</sup> United States v E.I Du Pont de Nemours /& Co., 351 U.S. 377 (1956) (Cellophane)

i.e. quality and end use are essentially subjective considerations, and the court's conclusions are not without support. Less persuasive, however, was the court's examination of price movement and responsiveness to indicate whether cellophane belonged in the larger flexible wrapping market.

In holding that other flexible wrappings competed with cellophane, the court relied on the finding that some price-sensitive buyers did shift their purchases in response to price changes insignificant portion of their product's price.

The Supreme Court's analysis of cellophane's price elasticity seems inadequate on several grounds.

- Buyer price responsiveness to changes in cellophane prices establishes that other flexible wrap products are close substitutes only if competitive prices were in fact being charged for cellophane. In that situation, du Pont's cellophane position is not that of a monopoly. However, if Du Pont were charging a monopoly price for cellophane, the high cross-elasticity for cellophane may have signified only that du Pont could not have raised its price still further without a substantial sales loss.
- The Court's reliance on evidence of high cross-elasticity of demand to determine the product market would have been correct if two cellophane products in a competitive market had sought to merge and the question was whether the merged cellophane company would now have monopoly power.
- The concept of cross-elasticity of demand is helpful in establishing whether two products are close substitutes only when both are sold at competitive prices.

In the case of *Hoffmann-La Roche v Commission*<sup>32</sup> the ECJ rejected the commission's argument that the fact that Roche produced a wider range of products than its rivals and that it was the largest producer of vitamins in the world were relevant for the purposes of establishing dominance<sup>33</sup>. The mere fact that a firm is large does not in itself mean that it is dominant in respect of any particular product market; however size and strength within a market will be relevant<sup>34</sup>.

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<sup>32</sup> *Hoffmann La Roche v Commission*, case 85/76 [1979] ECR 461, [1979]3 CMLR 211

<sup>33</sup> Whish, supra note 6, at pg 186

<sup>34</sup> *Ibid*

## 2.4. Geographic Market

In situations where products are sold nationwide and the cost of transportation is insignificant, courts frequently define the geographic market as the entire nation. Also if a manufacturer and his rivals sell their product only in a limited geographic area and their customers do not have an outside source of supply, the general rule has been to define the geographic market as that particular area and to include only the sales made within that market<sup>35</sup>. However If the seller's geographic market is less certain attention is paid to actual sales patterns as well as price relationships and movements in different areas. Where there is a close relation between prices and price movements, especially when supported by sales interchanges, there is a strong indication that a geographic market has been identified<sup>36</sup>.

On the other hand if there is significant price differences and unrelated price changes this may suggest that more than one geographic market exists, even where some sales interchanges occur.

Therefore the relevant geographic market in antitrust analysis is that "section of the country" where a firm can increase its price without attracting new sellers or without losing many customers to alternative suppliers outside that area<sup>37</sup>.

Geographic market definitions in monopoly cases tend to understate market shares where market price reaches monopoly levels while overstating a defendant's market power (shares) where it faces competitive rivals. Therefore, geographic market-drawing tests that rely on actual sales patterns may tend to give erroneous results. However, this difficulty is probably better resolved by the evaluation of market shares (i.e. the weight given or reliance placed on them) rather than in the determination of geographic market boundaries<sup>38</sup>.

Another problem in locating geographic markets is that markets can be identified from either the supply or demand viewpoint e.g. a typical purchase of a new car in Peoria, market shares for the car manufacturer may differ markedly from their national or international figures. The question to be asked is "Is the issue whether an auto marker has monopolized the new car market for buyers or for

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<sup>35</sup> Gellhorn, *supra* note 9, at pg 109

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

sellers?" In either case the question is where the locus of competition is. For buyers it may well be limited to Peoria; for sellers it is likely to be the entire nation since inter-firm rivalry is not confirmed to any geographic area<sup>39</sup>.

The Supreme Court was forced to consider these questions in *United States V Grinnell Corp*<sup>40</sup>. Where the district court had ruled that a national market existed in accredited central station protective services even though seller rivalry for sale of fire and burglar alarm systems was admittedly confirmed to individual metropolitan areas and customers in one city could not realistically transfer their patronage to seller located in other cities. Accepting this determination, the court relied on the defendant's national planning and price schedule, relations with other large businesses on a nationwide basis, and similar factors to find a national market. However, this conclusion cannot withstand close analysis because the recited facts neither define the locus of inter-firm rivalry<sup>41</sup>.

The available precedents do not provide a clear or coherent basis for drawing geographic markets. Despite the critical nature of market definition, monopoly case guidance is often of little value; yet courts frequently rely on similar rulings in merger decisions<sup>42</sup>.

The relevant geographic market has been defined by the European court in the case of *United Brands v EC Commission*<sup>43</sup> as the area:

"Where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be evaluated"

Generally, the relevant geographic 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 geographic market be reduced. Further as the single internal market program proceeds, it is likely that such artificial barriers will be permitted to reduce the geographical market from the whole territory of the community.

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<sup>39</sup> Ibid

<sup>40</sup> *United States v Grinnell Corp.*, 384 U.S. 563 (1966)

<sup>41</sup> Gellhorn, supra note 9, at pg 112

<sup>42</sup> Ibid

<sup>43</sup> *United Brands v EC Commission*, supra note 74

## 2.5. Market Share

In assessing market power, market shares are an important issue but other 'factors indicating dominance' must also be considered. However, they are not conclusive as mere numbers cannot in themselves determine whether an undertaking has power over the market<sup>44</sup>. The task of computing market shares is accomplished by setting the defendant's production or sales as the numerator and then dividing that by the larger denominator constituting total production or sales in the defined area<sup>45</sup>. However, as illustrated by Judge Learned hand's celebrated decisions in *United States V Aluminium Co. of America (ALCOA)*<sup>46</sup>, market share determination can prove difficult and controversial. In this case it was generally conceded by parties involved that ingot aluminium consumed in the United States was the appropriate market. Obviously this included all virgin ingot produced and sold on the open market. If this were all, ALCOA was conceded to be a monopolist, being the sole American producer. But what of secondary aluminium i.e. clippings, trimmings and second-hand ingot available from aluminium fabrications previously sold and processed as scrap? Or what of imported virgin, both fabricated and secondary? The extent to which this additional aluminium was included in the market could have dramatic effect on Alcoa's market share.

The first issue was whether to include in the market computation the ingot produced by Alcoa but not sold on the open market because it was consumed in Alcoa's own fabrication facilities. The trial court concluded that this captive production should not be included, because it was not available to buyers and hence, the court said, had no effect on price or output. Judge Hand rejected this premise because "all ingot with trifling exemptions is used to fabricate intermediate or end products and therefore all intermediate, or end products which 'Alcoa' fabricates and sells, protanto reduce the demand for ingot itself."

On the issue of secondary aluminium being included in the market, Judge Hand reversed the trial courts decision; because he believed it had erred in including secondary in the market. He reasoned that "Alcoa" always knew that the future supply of ingot would be made up in part of what it produced at that time..... He concluded that that consideration must have had its share in

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<sup>44</sup> Whish, *supra* note 6 at pg 180

<sup>45</sup> Gellhorn, *supra* note 9, at pg 115

<sup>46</sup> *United States v Aluminium Co. of America*, 148 F.2d 416 (2d Cir.1945)(Alcoa)

determining how much to produce. The difficulty with Hand's reasoning is that he totally excluded secondary from the market, rather than just discounting it. If secondary is included, Alcoa's market share declines from 90% to 64%. It was unclear then whether the better figure amounted to monopoly power. When so able a judge as Learned Hand makes several disputed calls in resolving the market share equation, one is alerted to the inherent limitations of any market share determination. Even the most carefully defined market as in Alcoa inevitably includes some firms or production whose impact on the defendant is insignificant while excluding others having greater market force. Market shares are, in other words, only an indication of market power, they should mark the beginning point for further careful analysis, not the end of it; they are not synonymous with market power. The courts have recognized this point at least implicitly e.g. Judge Hand noted that although foreign imports accounted for 10% of United States consumption, they were at most a ceiling on Alcoa's market power since tariffs and transportation costs borne only by foreign competitors allowed Alcoa a margin for manoeuvre in its pricing policy.

As far as Article 82 is concerned, it is obvious that the larger the market share the more likely the finding of dominance. In the case of *Hoffman-La Roche v Commission*<sup>47</sup> the ECJ said:

'...Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time... is by virtue of that share in a position of strength...'

In this case the court is of the view that large market shares may in themselves be evidence of a dominant position subject to the following two conditions;

- By recognising that in 'exceptional circumstances' large market shares may not mean that a firm is dominant.
- By referring to the notion that the market share must exist 'for some time'<sup>48</sup>.

In the case of *AKZO v Commission*<sup>49</sup> the ECJ referred to the above passage from *Hoffman-La Roche* and decided that a market share of 50% could be considered to be very large such that if there

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<sup>47</sup> *Hoffman-La Roche v Commission*, supra note 89

<sup>48</sup> *Whish*, supra note 6 at pg 181

<sup>49</sup> *AKZO V Commission Case C-62/86* [1991] ECR I-3359, [1993] 5 CMLR 215

are no exceptional circumstances showing otherwise, an undertaking with such a market share will be presumed dominant; the said undertaking has the burden of establishing that it is not dominant.<sup>50</sup> The percentage necessary to support a showing of monopoly power is affected by clarity of the market boundaries and the persistence (or growth) of the market share overtime. A similar “sliding scale” approach has been applied to determine how much abusive conduct is required to justify a finding of illegal monopolization<sup>51</sup>.

## 2.6. Entry Barriers

It is necessary to consider how easily other undertakings are able to enter the market and this involves considering the height of the barriers to entry as well as exit from the market.<sup>52</sup> Entry barriers and barriers to expansion are important as no structural analysis is complete without considering these factors which may affect the significance of determinations about the degree of concentration<sup>53</sup>. Entry barriers may result from ownership of scarce resources, from vertical integration from patent research and development policies and from the level and type of production expenditure, and from various resource acquisition and product marketing policies<sup>54</sup>. In the case of *United States V United Shoe Machinery Corp*<sup>55</sup>. The evidence showed a large market share but the court did not predicate a finding of power on this fact alone; it identified numerous barriers to entry, which conjunctively, indicated that United’s market share gave it massive power. The court concluded that these factors greatly reduced the opportunities for rivals to attract business from United.

## 2.7. Monopolisation

S2 of the Sherman Act does not on its face condemn the possession of monopoly power<sup>56</sup>. A party charging the offence of monopolization must prove both the existence of monopoly power and either that the power was acquired or has been used in ways which go beyond normal, honestly

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<sup>50</sup> Whish, *supra* note 6 at pg 181

<sup>51</sup> Gellhorn, *supra* note 9 at pg 121

<sup>52</sup> Whish, *supra* note 6 at pg 184

<sup>53</sup> Sullivan, *supra* note 1 at pg 77

<sup>54</sup> *Ibid.*, at pg 78

<sup>55</sup> *United States v United shoe Mach. Corp.*, 247 U.S. 32 (1918)

<sup>56</sup> Gellhorn, *supra* note 9 at pg 121

industrial business conduct. The conduct element in the offence of monopolization is difficult to pin down however the following tests discuss issues pertaining to conduct<sup>57</sup>.

### 2.7.1. Classic Test

The earliest monopoly cases condemned railroad mergers even though there was no proof that the resulting market power had been misused and in fact, may have resulted in a desirable economic purpose<sup>58</sup>. In the case of *Northern Securities Co. V United States*<sup>59</sup>, the court relied upon the elimination of competition between previously competitive railroads as evidencing an illegal purpose and intent. Subsequent railroad cases applied this rule so rigidly that even consolidations between lines which did not overlap but which used common terminal point were condemned without considering the effect of the merger on competition.

Other than the railroad merger cases, the early landmark cases were those attacking marauding practices of John D. Rockefeller's oil giant and of the tobacco trust.<sup>60</sup> In the cases of *Standard Oil Co. V United States*<sup>61</sup> and *United States V American Tobacco Co*<sup>62</sup>; there was no question that both defendants had monopoly power; Standard Oil controlled almost 90% of the nation's refining capacity and the tobacco trust controlled 95% of cigarette sales. Nor was there much doubt, according to the court, that each had engaged in patently unreasonable business practices which could not be justified as normal competitive activities. Standard Oil had coerced railroad into granting it preferential rates, had engaged in local price discrimination and business spying and had committed other unsavoury acts, all to force local competitors out of business. The tobacco trust's tactics, including its purchase of over 30 competing firms whose plants were immediately closed, were in the words of the court, "ruthlessly carried out," again, all in support of the trust's monopoly position. These cases, then presented the Supreme Court with classic examples of aggregate unsavoury business practices by monopolists.

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<sup>57</sup> Sullivan, *supra* note 1 at pg 94

<sup>58</sup> Gellhorn, *supra* note 9 at pg 123

<sup>59</sup> *Northern securities Co. v United states*, 193 U.S. 214 (1922)

<sup>60</sup> Gellhorn, *supra* note 5 at pg 124

<sup>61</sup> *Standard Oil Co. of N.J. v United States*, 221 U.S. 1 (1911)

<sup>62</sup> *United States v American Tobacco Co.*, 221 U.S. 106 (1911)

### 2.7.2. The Deliberateness Test

The tendency has been to deal with the conduct issue in monopolization cases through the use of suggestive phrases such as monopoly power “thrust upon” the defendant does not violate the act; monopoly power acquired through an “element of deliberateness” does violate it. Monopoly resulting solely from “superior skill, foresight and industry” does not; monopoly obtained through conduct “not honesty industrial” does; monopoly obtained through conduct “not honestly industrial” does.<sup>63</sup> However one is required to fully understand what the phrases do and do not imply.

The leading cases concerning the kinds of conduct which render the acquisition of monopoly power unlawful are *Alcoa*<sup>64</sup> and *United shoe Machinery*<sup>65</sup>.

In holding Alcoa in violation, the court did not rely directly upon the pre-1912 conduct. Rather the court said on the basis of its post-1912 conduct that Alcoa had monopolized because it had been something more than a “passive beneficiary” of monopoly power; it had “achieved monopoly, rather than having monopoly thrust upon it.” Though under no compulsion to do so, it kept doubling and redoubling its capacity before others could enter the field. It proceeded “progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization.” As the court saw it, “exclusion” is not limited to “manoeuvres not honestly industrial,” or “activated solely by a desire to prevent competition.” “Exclusion,” includes any cause of action which is deliberate in the sense that the firm has a choice whether or not to follow it, and which has the effect of excluding others.

The Supreme Court gave its own commitment the deliberateness test, or something very much like it in the case of *United states V Grinnell Corp*<sup>66</sup> the court defined the important elements of monopolization as:

- a) The possession of monopoly power in the relevant market
- b) The wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.<sup>67</sup>

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<sup>63</sup> Sullivan, *supra* note 1 at pg 95

<sup>64</sup> United States v Aluminium Co. of America, *supra* note 103

<sup>65</sup> United States v United Shoe Machinery Corp., *supra* note 112

<sup>66</sup> United States v Grinnell Corp., 384 U.S. 563 (1966)

The court said that monopoly power offends S2 only when there is shown a “wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The Alcoa test seems flawed in that it fails to deal realistically with the human element in the market situation. It does not provide the firm which wishes to obey the law with rational guides to conduct, nor does it leave open the opportunity for a market response which is both rationally self-regarding and lawful.

There are three types of conduct that have received the most attention in monopolization cases:-

### 2.7.2.1. Predatory Pricing

Predatory business conduct can be defined as conduct which has the purpose and effect of advancing the actor’s competitive position, not by improving the actor’s market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively<sup>68</sup>.

Generally, courts have held that proof of pricing below marginal or average variable costs is presumably predatory and thus the burden of proof is on the defendant to show that the price was promotional or that his costs were expected to fall<sup>69</sup>.

### 2.7.2.2. Product Innovation

In *Berkey Photo v Eastman Kodak Co*<sup>70</sup>. The court ruled that “any firm, even a monopolist, may generally bring its products to market whenever and however it chooses” even though it may thereby make it more difficult for smaller firms to compete or survive. We find that courts are normally not eager to inhibit conduct that is desirable or substitute their judgement for that of the individual business or market. Perhaps reflecting a corollary reluctance to allow monopoly firms too much market freedom, the cases have noted that coercion (including reliance on monopoly market

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<sup>67</sup> Gellhorn, *supra* note 9 at pg 143

<sup>68</sup> Sullivan, *supra* note 1 at pg 108

<sup>69</sup> Gellhorn, *supra* note 9 at pg 144

<sup>70</sup> *Berkey Photo v Eastman Kodak Co.*, *supra* note 83

power) to gain market acceptance of a new product is unlawful. It is however unclear what evidence will establish such coercion<sup>71</sup>.

### 2.7.2.3. Refusal to Deal

The term 'refusal to deal' normally refers to a situation in which a firm refuses to sell to certain customers. The practice itself is not illegal. However, when a refusal to deal accompanies some illegal practice or when the intent of the seller using it is to create monopoly power, it violates the provisions of section 1 and 2 of the Sherman Act<sup>72</sup>. *Eastman Kodak Co. v Southern Photo Materials Co*<sup>73</sup>; *Otter Tail Power Co. v United States*<sup>74</sup>. Generally, these cases have however been limited to situations where a firm had monopoly power at one level of a chain of distribution and refused to deal with firms at the next level in order to gain a monopoly position at both levels. It was thus a surprise when recently the Supreme Court held that a monopolist's unwillingness to participate in a joint marketing scheme with its only competitors could amount to monopolization.

### 2.8. Attempts to Monopolise

They are recognized as felonies under S2 of the Sherman Act. In *Swift & Co. V United States*<sup>75</sup>, Justice Holmes concluded that attempted monopolization consisted of conduct that closely approaches but does not quite attain completed monopolization, plus a wrongful intent to monopolize. Thus conduct amounts to an attempt to monopolize if it is demonstrated that there is a specific intent to monopolize and a dangerous probability that, if unchecked such conduct will ripen into monopolization.

Under the Kenyan law concentration of economic power is not condemned per se. Under S23 (4) the rule of reason criteria is provided. 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

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<sup>71</sup> Gellhorn, *supra* note 9 at pg 147

<sup>72</sup> *Ibid*

<sup>73</sup> *Eastman Kodak CO. V Southern Photo materials Co.*, 273 U.S. 359 (1927)

<sup>74</sup> *Otter Tail Power Co. v United States*, 410 U.S. 366 (1973)

<sup>75</sup> *Swift & Co. v United states*, 196 U.S 375 (1905)

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.

In the case of National Social Security Fund (NSSF) and Chanui Holding Company<sup>76</sup> the recommendation that the NSSF should not sell its shares in East African Portland Cement Limited (E.A.P.C.L) to Bamburi Cement Company Limited (herein after called Bamburi) was accepted due to competition concerns. By a letter dated June, 2000 the Managing Trustee of NSSF wrote to the Permanent secretary, Treasury seeking approval over proposed sale of 9,300,000 NSSF shares in E.A.P.C.L and 870,000 NSSF shares in Athi River mining Ltd (ARML) by Blue Circle Industries (BCI) of United Kingdom to Chanui Holdings company Ltd. There are three companies, which produce cement in this country namely: - Bamburi cement Ltd (BCL), EAPCL, and ARML. The three factories have an annual capacity of 2.1 million tonnes while domestic consumption is 1.2 million tonnes. It is only Bamburi that does exportation.

**BAMBURI 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 tonnes annually. Currently, it is commanding a market share of 54%.

The company has 13 directors as follows:

NAME	STATUS	NATIONALITY
Mitchell	Managing Director	French
Alan Y. Lemeur (alt. Max Vogeli)	Director	French/Swiss
David Masika	Director	Kenyan
James M. Shiganga	Director	Kenyan
Geoffrey C. D. Groom	Director	Kenyan

<sup>76</sup> Unreported, source: Department of Monopolies and Prices Commission

Jean C. Hillenmeyer	Director	Kenyan
Solomon Karanja	Director	Kenyan
Joshua C. Kulei (alt. William Sambu)	Director	Kenyan
Mbuvi Ngunze	Director	Kenyan
Raphael M. Thyaka	Director	Kenyan
Richard Kemoli	Director	Kenyan
Toney Hadley	Director	British
Ronald Roy	Director	Canadian

In terms of share holding, 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 ISSUES
1.	Bamcem Holdings Ltd	265,907,994	73.3
2.	National Social Security Fund	57,314,178	15.8
3.	Baloobhai Chotabhai Patel	8,249,741	2.3
4.	Barclays 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	18,537,740	5.10
9.	Total	362,942,725	100

Bamcem holding is an international company registered in Jersey Channel 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 BCL more of a foreign company. It trades its products under brand name Baobab cement and its market includes the Coast, Rift Valley, Western and Nyanza 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 19.4% 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 (EAPC)**

This is the second largest factory in the country with a production capacity of 800,000 million tones 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 1958.

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

<b>No.</b>	<b>NAME OF SHAREHOLDER</b>	<b>No. OF SHARES</b>	<b>% OF ISSUED SHARE CAPITAL</b>
1.	NSSF Board of Trustees	24,300,000	27
2.	P/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
5.	Bamburi Cement Ltd. (Nairobi Nominees Ltd)	10,016,068	11.13
6.	Public through N.S.E	6,559,543	7.29
	<b>Total</b>	<b>90,000,000</b>	<b>100.00</b>

In terms of directorship, EAPC has eight directors. Other than one, all the others are Kenyans. Their names are 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. Oduor-Otieno (Alt. G. M. Mitine)	Director	Kenyan
7.	G. C. Groom	Director	Kenyan
8.	D. W. Masika	Director	Kenyan

In 1986, the management of EAPC realized that there was a need to replace its plant, as it was old (38 years). Plans were made to rehabilitate the plant and various financing agents were approached. Among those approached included Blue Circle and Cementia and they were not willing to fund the project. In 1994, the government opted to seek a loan from Japan, under Overseas Economic Corporation Fund (OECF) 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 into other areas outside Nairobi, and also exploring ways of entering the export market.

#### **ATHI RIVER MINING LIMITED (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 Machakos District and the other is based in Bondora, Kilifi District.

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

Its Directors and Shareholders are as follows:

<b>NAME OF DIRECTOR</b>	<b>NATIONALITY</b>	<b>STATUS</b>	<b>% SHAREHOLDING</b>
Brian Rogers	Kenyan	Chairman	Nil
Harjivandas J. Paurana	Kenyan	Vice-Chairman	28.256
Pradeep H. Paurana	Kenyan	Managing Director	25.619
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 bought 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 and 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 percent 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 market share. This proposal of the NSSF 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.

## CONTROL

If the proposal of the NSSF to sell shares to Chanui Holding Company is executed. The shareholding of the two companies will change as follows:

### EAPC

No.	Name of Shareholder	Current % issued share Capital	% Shareholding after proposal is executed
1.	NSSF Board of Trustees	27.00	16.67
2.	P/S to the Treasury	25.33	25.33
3.	Cementia Holding AG	14.64	14.64
4.	Associated International Cement Ltd (AIC)	14.60	24.93
5.	Nairobi Nominees Ltd. (Bamburi C. L.)	11.14	11.14
6.	Public through NSE	7.29	7.29
	Total	100.00	100.00

Chanui is a local holding company owned wholly by Associated International Cement Ltd. (AIC). AIC is owned by Blue Circle of UK. It is therefore assumed that the shares owned by Chanui are directly owned by AIC. From the above BCL's and Lafarge's ownership of EAPC, will increase from 40.38% to 50.70% while the Local Holding, will decline from over 52.33% to around 42%.

For the two foreign investors, Blue Circle will increase its shareholding to 24.93% from 14.60% while LaFarge shareholding will remain 14.64%.

### BAMBURI CEMENT LTD

No.	Name of Shareholder	Current % issued share Capital	% Shareholding after proposal is executed
1.	Bamcem Holding Limited	73.30	71.89
2.	National Social Security Fund	15.80	17.25
3.	Baloobhai Chotabhai Patel	2.30	2.30
4.	Barclays Trust Investment	1.50	1.50
5.	Insurance Company of East Africa Ltd	0.60	0.60

6.	Kenya Re-insurance Corporation	0.80	0.80
7.	Old Mutual Co.	0.60	0.60
8.	Others	5.10	5.10
	Total	100.00	100.00

NSSF will buy 5,276,315 units of shares in BCL 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:

No.	Name	Current % Shareholding	After Implementation of Proposal
1.	Cementia	29.32	29.32
2.	Associated International	29.32	27.87
3.	Coastal	14.66	14.66
	Total	73.30	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 EAPC 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 EAPC 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 strategise on itself as the board member/s representing the competitor/s will avail any important information to 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
BAMBURI	63.8	74.0	74.3	57.3	55.6	58.5
EAPC	36.2	26.0	23.0	36.7	37.0	34.6
ARML	2.2	6.0	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 has been 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 Hima 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 1,000 tonnes	848	1,044	1,148	1,252	1,352	1,447
Export Sales x 1000 tonnes	616	514	447	683	748	703
Total x 1000 tonnes	1,464	1,558	1,595	1,935	2,100	2,150

Bamburi is the only company which exports cement in the country from the table, it is clear that from 1997, and 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 EAPC 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 EAPC is 80% higher than that incurred by 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 EAPC and Bamburi in 1999 was estimated at about Kshs. 2,500 per tonne. The implication of this is that the BCL products should be cheaper than EAPC. The obvious deduction is that BCL Cement is priced unreasonably high.

The profit for the two factories during the 1995 to 1999 period is shown here below:

Profit before tax for Kenya Cement

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

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 production of clinker as for now; only EAPC and Bamburi are producing clinker. Clinker is an essential raw material in the 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 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.

January, 2001.

## **TRANSCRIPT**

The Government accepted the advice of the Monopolies and ... Commission and NSSF was denied authority to sell its shares in EAPC as per its original proposal.

Around July, 2001, LaFarge acquired Blue Circle world wide to create the world's largest 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**

## **2.9. Weaknesses of the Kenyan Law**

By S23 (1) of the act, the minister is empowered to control unwarranted concentration of economic power. The provisions in sub-section 23(1) (a) are applicable only to a chain of distributing units. They do not apply to a distributing enterprise which is not part of a chain even though its sales exceed one-third of the relevant market. Similarly, a single one-plant manufacturing firm supplying more than one-third of the category of goods into the domestic market is not subject to anti-concentration provisions of the Act, whereas a two-plant manufacturing firm supplying more than one-third of the category of goods is subject to them.

One fails to understand the rationale behind excluding a single manufacturing and distributing unit having a market share of more than one-third of a particular product or good though they have a potential of having anti-competition effect. Also there appears to be no clear provision for the control of exclusive dealings and purchasing arrangements.

S23(b) states; a person, by virtue of controlling two or more physically distinct units which manufacture substantially similar products, supplies more than one-third of the value, at ex-factory prices, of the domestic market for the category of the goods into Kenya but excluding exports of the goods from Kenya. By virtue of controlling two or more physically distinct units which manufacture substantially similar products, it covers only those manufacturing units in two distinct plants. Therefore if a plant is manufacturing a third of the goods it does not fall under the Act. There is no rationale!

The Act applies to trivial matters. S23 (1) provides that the minister in identifying an unwarranted concentration of economic power, shall pay attention to the factors outlined in sub-section (c) and

(d). Application of the act to trivial matters is likely to swamp the enforcement agencies with too much trash and thereby prevent them from investigating more important things<sup>77</sup>.

The minister is given very wide powers under S24. On report from the commission, he may order a person to dispose of such portion of his interests in an undertaking as the minister thinks fit in order to remove the unwarranted concentration of economic power. This provision may discourage potential investors from investing in Kenya. The provisions in S24 also deserve criticism on the ground that they provide drastic powers to the minister only on the report of the commissioner, who happens to be his subordinate. The possibility of subjective decision by the minister or commissioner cannot be completely ruled out<sup>78</sup>.

Under the U.S law the remedies available are Division of the Undertakings, Dissolution, and Divestiture (3DS). The problem in Kenya is that the remedy of Divestiture is stringent and may affect the economy. It has not been applied so far.

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<sup>77</sup> Yash Vyas, "Competition Law of Kenya: Imperfections and Weaknesses" (2000) Vol 13 (1 & 2) Lesotho L.J., pg 191

<sup>78</sup> Vyas, supra note 3, at pg 26

### 3.0 CHAPTER THREE: MERGERS AND TAKEOVERS

#### 3.1. Introduction

A merger<sup>1</sup> is a marriage between two companies, usually of roughly equal size<sup>1</sup>. According to Whish, a true merger involves two separate undertakings merging entirely into a new entity<sup>2</sup>.

A takeover may be defined as a transaction or series of transactions whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company<sup>3</sup>. Where shares are closely held, a takeover will generally be affected by agreement with the holders of the majority of the share capital of the company being acquired.

A merger may have no impact on the markets in which the firms operate; the merging firms may be too small or entry into their markets may be easily accomplished<sup>4</sup>.

The purpose of antitrust merger law has been to get rid of mergers whose impact on competition would be so substantial such that the advantages derived from such mergers are outweighed by their adverse consequences.

In Kenya the external outgrowth of firms by way of mergers is controlled under the RTPA. Mergers and takeovers effected without an authorizing order from the minister of Finance are illegal ab initio and not justiceable. Section 27 of the Act provides: - Every Person who.... In the absence of an authorizing order by the minister, participates in consummating:

- a) A merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar services; or
- b) A takeover between two or more of such enterprises by another such enterprise; or by a person who controls another such enterprise shall be... guilty of an offence. Under sub-section 2 no

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<sup>1</sup> M.A. Weinberg & M.V. Blank, Takeovers and mergers (London, Basil Blackwell Ltd., 4<sup>th</sup> ed., 1979) pg 3

<sup>2</sup> R. Whish, Competition Law, (London, Sweet & Maxwell, 5<sup>th</sup> ed., 2003) pg 779

<sup>3</sup> Weinberg & Blank, supra note, 1 at pg 3

<sup>4</sup> E Gellhorn, Antitrust Law and Economics, (Minnesota, West Publishing Co., 3<sup>rd</sup> ed., 1990) pg 335

merger or takeover as described in sub-section 1 carried out in the absence of an authorizing order shall have any legal effect.

Any person intending to effect a merger or takeover 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 ameliorate action, including specific requirements be undertaken within a given time which must be longer than twenty eight days of the publication of the notice in the Gazette<sup>5</sup>

In the United States attempts to control mergers started with the Sherman Act of 1890, which sought to control mergers that might impair competition. Its rule of reason standard did not forbid mergers unless they were designed to create a monopoly and apparently succeeded in doing so<sup>6</sup>. As part of the legislative response to the “rule of reason” congress enacted the Clayton Act in 1914<sup>7</sup>. Section 7 of this Act sought to limit the acquisition of stock where such acquisition would substantially reduce competition or it would tend to create a monopoly.

Under the EU law Article 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 mergers and takeovers. Notwithstanding this glaring omission, The European Commission and the European Court of Justice (ECJ) have been committed to extend the EU antitrust law to the area of mergers and takeovers through judicial activism on the part of the ECJ and indubitable commitment to competition on the part of the Commission. Thus in *Tetra Pak Rausing SA v EC*<sup>8</sup> 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 Commission*<sup>9</sup>, Article 81(1) was 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.

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

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<sup>5</sup> Restrictive Trade Practices and Price Control Act Cap 504, Section 18

<sup>6</sup> Gellhorn, *supra* note 4, at pg 340

<sup>7</sup> *Ibid*

<sup>8</sup> *Tetra Pak Rausing SA v EC*[1991] 4 CMLR 334

<sup>9</sup> *British American Tobacco v EC Commission* [1986]ECR 1899,

control Regulation 1990. This law allows the commission to investigate takeovers and mergers above a certain threshold. Mergers are controlled in cases where there will be concentration that will be incompatible with the common market. When determining whether a concentration is compatible with the market, the commission will consider whether it would create or strengthen single firm dominance or whether it will result in collective dominance. 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 million<sup>10</sup> and
- The aggregate community-wide turnover of each of the undertakings concerned is more than ECU 250 million<sup>11</sup>.

Once the commission has jurisdiction in relation to a concentration, its task is to determine whether it is ‘compatible with the market’. The burden of proof is on the commission and it’s upon it to adduce evidence that a merger is incompatible with the common market<sup>12</sup>. Article 2(1) provides the criteria that the commission must take into account when making the appraisal. Article 2(2) provides that;

“A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market”<sup>13</sup>.

The adoption in the European community merger regulation of the expression ‘dominant position’ meant that the jurisprudence of the ECJ under Article 82 could be used by the commission in developing its decisional practice under the regulation<sup>14</sup>. Article 82 applies only to the abuse of pre-existing dominant position but the ECMR can be used to control the creation as well as the strengthening of a dominant position. ECMR has therefore the ability to prevent mergers that would

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<sup>10</sup> Council Regulation 4064/89 (1989)

<sup>11</sup> Approximately British Pounds 3371/2 million

<sup>12</sup> Whish, supra note 2, at pg 833

<sup>13</sup> Ibid

<sup>14</sup> Ibid

bring about an undesirable market structure. The judgment of ECJ in *France v commission*<sup>15</sup> established that there must be a causal link between the concentration and the deterioration of the competitive structure of the market for the ECMR to apply. In this case the ECJ was considering whether a 'failing firm' defence existed under the ECMR. It held that a concentration should not be blocked where the firm would have failed anyway and its market share would have accrued to the acquirer since the concentration did not cause the creation or strengthening of dominance. In *De Beers/LVMH*<sup>16</sup> the commission's clearance was specifically based on absence of any causal link between the creation of the joint venture and the strengthening of De Beer's dominant position in the market for rough diamonds.

### 3.2. Types of Mergers

Many of the legal guidelines in competition law are primarily aimed at preserving and promoting structures conducive to competition. Mergers are generally classified into three categories: horizontal, vertical and conglomerate.

Under the Kenyan law only horizontal mergers and takeovers are controlled under the Act. According to the Act any person seeking an order authorizing a merger or takeover may apply to the minister through the Commissioner.<sup>17</sup> The commissioner is obliged under 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 shall be regarded as advantageous to Kenya in the sense that it leads to a more efficient unit with lower production costs and greater marketing thrust, thus enabling it to compete more effectively with imports and expand exports.
- b) Whether a merger or takeover will be disadvantageous to the extent that it leads to a reduction in the level of competition in the domestic market.
- c) Whether a merger or takeover will be disadvantageous to the extent that it encourages capital-intensive production in lieu of labour-intensive technology.

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<sup>15</sup> *France v Commission* cases ECR 1-1375, [1998] 4 CMLR 829

<sup>16</sup> *De Beers/LVMH* Case No. Comp/M. 2333 PM 112-114

<sup>17</sup> R.T.P.A., *supra* note 5, at S28

After considering the recommendations of the commissioner, the minister may make an order approving or rejecting the application, or may approve the application on condition that certain steps may be taken to reduce the negative effects of the merger or takeover on competition. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High court.

The following case which involved takeovers of the assets of *Trufoods Ltd and Kabazi Cannery Ltd* by *Premier food Industries Ltd*<sup>18</sup> demonstrates 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.

Premier food industries Ltd, an operating company of Industrial promotion services (Kenya) Limited applied to the Monopolies and Prices Commission on the 21<sup>st</sup> November, 2002 seeking approval to takeover the assets of Trufoods Ltd and Kabazi cannery Ltd in accordance with section 28 of the Restrictive Trade Practices, Monopolies and price Control Act, cap 504.

Premier food Industries Ltd is a limited local private company established on 28<sup>th</sup> December 1987 and is located in Baba 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.

Trufoods 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

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<sup>18</sup> Unreported, source: Department of Monopolies and Prices Commission

situated along Jogoo road in Nairobi and sells its products in Kenya and the wider East African community market

Kabazi canners limited is also a limited local company and is also not quoted in the Stock exchange. 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:

- It is envisaged that the acquisitions will greatly benefit the Kenyan consumers and enhance export potential for processed foods for EAC and COMESA markets. The acquisitions will also, as a consequence, contribute to the growth of the agricultural sector.
- Trufoods 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.
- 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 subsector:-

- 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 Ltd a Swiss firm. Someg Investments Ltd 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 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.

- b) 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 and other vegetables.
- c) Premier sold its products both in the local market-4104 metric tones (Kshs 168 million) and export market-218 metric tones (Kshs 12 million) in Tanzania, Zanzibar, Somalia, UK and Uganda. Trufoods sold a value of Kshs 179,126,749 in the local market while Kshs 8million 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.
- d) 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 Delmonte 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, and Robertson etc. Numerous Jua Kali sector (MSE'S) players were also involved in this business.
- e) 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, 86 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 Ltd. 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 takeover. 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 Kshs 187,126,751 for Trufoods, Kshs 179,994,596 for premier and Kshs 126, 631,367 for Kabazi.

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 business which were dissimilar to that of the firms involved in this transaction, there was little possibility that there could ensure unwarranted concentration of economic power.

Since the three firms manufactured and sold products to the wider EAC and Comesa markets, there was 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 subsector 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 Ltd 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 having any material dominance in the market that could lead to any dominance by premier foods Ltd. 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' that were now competing with the established formal industry. This enhanced competition in the 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.

Premier food Industries Ltd was only purchasing the assets of the two target companies. This being the case, it was not legally assuming any responsibilities or any contractual-cum-legal responsibilities subsumed by 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 employment creation and the sustenance of existing employment, the commission therefore obtained confirmation from Industrial promotion services (Kenya) Ltd that it would, post-acquisition, ensure that the current employment levels would be maintained. Mr. Lutaf Kassam, the Managing Director, of Industrial promotion services (Kenya) Ltd 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 those 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.

In view of the above it was unlikely that the coming together of the assets of the three firms would pose a threat to competition. In any case, Trufoods 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 and this could only lead to greater and efficient production and more employment. It should also be noted that with the emergence of EAC and 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 RTPA that the takeover be approved on the following conditions:-

- Trufoods Ltd and Kabazi canners Ltd would pay all their pre-takeover employees their full employment benefits in accordance with the contractual arrangements governing their employment.

- Premier food Industries would enter into new employment contracts with those of the said employees who would wish to become its employees.
- 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.

### 3.2.1. Horizontal Mergers

These are mergers that occur between competitors in the same product and geographic market and at the same level of the productive or distributive cycle and consequently pose the greatest danger to competition.

Under the Kenyan law only this type of mergers and takeovers are subject to inquiry under the Act.

In the US the fundamental theme of the legislation amending section 7 of the Clayton Act in 1950 was due to concern with the rising tide of economic concentration in the economy, which the Federal Trade Commission (FTC) had reported as being primarily as a result of horizontal mergers<sup>19</sup>. Such concentration was thought to be undesirable since it was likely to facilitate direct and indirect collusion among sellers in a market as well as result either in fewer firms or in the smaller firms having a reduced share of the market. With limited exceptions, S7 forbids the acquisition by one corporation in commerce of the stock or assets of another corporation in commerce the effect may be substantially to lessen competition or the tendency to create a monopoly in any line of commerce in any section of the country. In the case of horizontal mergers, it must be shown that the acquiring and acquired firms actually or potentially compete and that the merger alters structure in a way that threatens competition throughout the market to an unacceptable degree.

The Supreme Court's decisions on horizontal mergers have sought to deal with the above concerns though not always with satisfactory results<sup>20</sup>. The leading case which is also the benchmark for horizontal mergers in unconcentrated markets is *Brown shoe*<sup>21</sup>. There was no contention that the merger posed a threat to competition among shoe manufacturers, of which there were almost 900;the

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<sup>19</sup> Gellhorn, *supra* note 4, at pg 354

<sup>20</sup> Ibid

<sup>21</sup> *Brown shoe v United States*, 370 U.S 294, 82 S.ct. 1502, 8 L.ED. 2d 510 (1962)

District court had held that the merged firm's control of less than 5 percent of shoe manufacturing was economically too significant to violate section 7, and the government did not appeal that finding. The fear was as a result of the merger of two large retailers. Brown was the third largest shoe retailer (by dollar volume) with 1,230 stores while Kinney ranked eighth; between them they would control some 1,600 shoe stores throughout the nation and would become the second largest shoe retailer having 7.2 percent of all shoe stores and 2.3 percent of total retail shoe outlets. In deciding whether the Brown-Kinney retail merger violated section 7, the Supreme Court announced a functional standard for determining whether a merger adversely affected competition. Instead of establishing specific tests such as the market shares of the merging firms, the degree of concentration of the industry etc the court indicated that it would look at the actual and likely effect of merger<sup>22</sup>.

In considering the horizontal effects of the merger the court first defined the geographic market. It noted that shoe store customers shopped only within their cities of residence. It however rejected Brown's further argument for a detailed analysis of buying patterns in particular cities as impractical and unwarranted<sup>23</sup>. In later cases the courts seemed to deviate the language of Brown shoe, which had indicated that all issues were open. In the case of *United States v Philadelphia National Bank*<sup>24</sup> the court applied section 7 to bank mergers and held that a merger creating the largest bank in the Philadelphia area with almost one-third of the market in a highly concentrated industry would substantially lessen competition. In so doing, the court outlined a minimum threshold where mergers were presumptively illegal and hence did not require evaluation of their economic impact<sup>25</sup>.

While the key words are general, the doctrine focused on market share, held a merger resulting in a 30% share to be unlawful, and allowed for a series of finer articulations as time went on about what percentage would be considered "undue" and what increase would be "significant". Indeed, at the outset the court gave some clues to the kind of development it envisaged, for it cited economic literature indicating that shares of from 7 to 20 or 25% might be deemed presumptively too great<sup>26</sup>.

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<sup>22</sup> Gellhorn, *supra* note 4, at pg 356

<sup>23</sup> Ibid

<sup>24</sup> *United States v Philadelphia National Bank* 374, U.S 321 (1963) (PNB)

<sup>25</sup> Gellhorn, *supra* note 4, at pg 359

<sup>26</sup> L. A. Sullivan, *Handbook of the Law of Antitrust*. (Minnesota, West Publishing Co., 1977) pg 594

Although the legal test in PNB is not very different from that announced in Brown shoe, it is not necessarily inconsistent as Brown shoe applied to deconcentrated industries where the court said that an examination of economic factors was required while PNB set forth an outside limit of presumptive or per se illegality for horizontal mergers in concentrated markets. The court further extended the Brown shoe PNB rule in *United States v Aluminium co. of America*<sup>27</sup> (*Alcoa-Rome*). Here nation's leading producer of aluminium and aluminium conductor was prohibited from acquiring Rome, one of the largest producers of copper conductor and also a "substantial" manufacturer of aluminium conductor. In the aluminium conductor "market" Alcoa's share was 27.8%; Rome accounted for 1.3%; and the nine largest firms, which included Alcoa and Rome, produced 95.7%. The court held that the dominant firm in a concentrated industry could not purchase a significant competitive factor without unlawfully impairing competition. Also in *United States v Continental can Co*<sup>28</sup>, the court enjoined the merger containers. In the combined "container" market, continental ranked second with 21.9 percent; Hazel-Atlas, the acquired firm had 3.1 percent; and the six largest firms held 70.1 percent of the market. While the court also emphasized the impact of this merger on future and potential competition, its judgment relied primarily on the total market share and the increasing concentration in the industry. Looked at together these decisions lowered the percentages at which mergers were presumptively illegal; but each also involved a major merger in a concentrated industry. The court did not alter the aim and effect of merger law as applied in PNB<sup>29</sup>.

However, the court appeared to abandon PNB's standard of presumptive illegality in favour of an even more stringent rule which would forbid almost all mergers of consequence in the case of *United States v Von's Grocery Co*<sup>30</sup>. Von's the largest retail grocery store in the Los Angeles market, with 4.7 percent of all sales, acquired the sixth largest retailer. Together they accounted for 7.5 percent of all grocery store sales in the area, which was only slightly less than the leader, Safeway. In finding that the merger was contrary to section 7, the court emphasized the trend toward mergers and chains as well as toward the decline of independent firms in the market. The court placed primary reliance on the Clayton Act's purpose of preventing powerful combinations from

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<sup>27</sup> *United States v Aluminium Co. of America*, 148 F.2d 416 (2d Cir.1945)(Alcoa)

<sup>28</sup> *United States v Continental Can Co.*, 378 U.S.441 (1964)

<sup>29</sup> Gellhorn, *supra* note 4, at pg 362

<sup>30</sup> *United States v Von's Grocery Co.* 384 U.S 270 (1966)

driving out smaller competitors and held that since this merger would further reduce the number of independent firms in the market it violated section 7. The court in Von's read the antimerger law as a mandate, wherever possible, to encourage markets composed of small competitors. Even though the market was far from concentrated with over 3,500 independent firms, and with only mixed evidence of increasing concentration, the court found that competition might be adversely affected. The court appeared to have made all but the most trivial horizontal mergers illegal per se<sup>31</sup>.

However in *United States v General Dynamics Corp*<sup>32</sup>, the Supreme Court seems to have backed away from further application of the Von's test. In this case, the court upheld a district court decision approving a merger of two leading coal producers even though a rapid decline in the number of coal producers had occurred, the merger increased the concentration of the top two firms in the market by over 10 percent, and the merger resulted in the two largest firms now controlling about half of all sales. The court concluded that the acquired firms exhausted coal resources, indicated it was no longer a significant force in the market and its disappearance as an independent firm would not adversely affect competition.

The department of justice issued a new set of rules in 1982 outlining when it would prosecute mergers as a violation of section 7, and revised them two years later<sup>33</sup>. They substituted the Herfindahl-Hirschman Index (HHI) for 4 firm market share measures of concentration. The HHI seeks to measure concentration in a way that reflects both the absolute level of concentration and the degree to which larger firms are dominant in the market.

The primary aim of the new guidelines is to prevent acquisitions likely to create monopoly or oligopoly power through collusive practices<sup>34</sup>. However, the threshold measures of when intervention is appropriate are now relatively higher; while the guidelines do not take note of trends toward concentration they however emphasize the ease of entry into the market. Where entry is so easy that existing competitors could not raise their prices for a significant period of time there is no reason to challenge a merger since it does not pose danger to competition or consumer welfare.

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<sup>31</sup> Ibid

<sup>32</sup> *United States v General Dynamics Corp* 415 U.S. 486 (1974)

<sup>33</sup> Gellhorn, *supra* note 4, at pg 367

<sup>34</sup> *Ibid.*, at pg 368

Under the EU law, when the commission is considering the compatibility of a horizontal concentration with the common market, the main concern is usually the ‘unilateral effects’ it might produce<sup>35</sup>. The 15<sup>th</sup> recital of the ECMR states that where the combined market share of the undertakings concerned in a concentration does not exceed 25% in the common market or in a substantial part of it; this is an indication that the concentration is compatible with the common market<sup>36</sup>. In order to establish whether a concentration could have undesirable horizontal effects, the commission will mainly consider the increase in the combined entity’s market share though it will not confine itself to only numbers but will also put into consideration the extent to which other factors are likely to lead to enhanced market power on the part of the merged entity<sup>37</sup>. This is for the reason that market share figures normally don’t provide insight into the loss of potential competition that will involve a concentration. The commission will also want to determine whether a horizontal merger might strengthen the merged firms’ market power other than by way of market share. It will thus consider possible ‘indirect effects’. Where the commission investigates mergers in the ‘new economy’ it may want to take commitments to overcome the possibility of ‘transient dominance’ while a new market becomes established and while existing barriers to entry are reduced. In the case of *Vodafone Airtouch/ Mannesmann*<sup>38</sup> commitments were accepted for a period of three years which effectively would give third parties access to the merged entity’s Pan-European mobile telephone network.

### 3.2.2. Vertical Mergers

These mergers occur where a firm at one level of the market takes over another further up or further down the distributive chain. The former is known as ‘backward integration’ and the latter as ‘forward integration’. Vertical integration may have a harmful effect on competition especially if it results to the market being foreclosed to third parties<sup>39</sup>.

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<sup>35</sup> Whish, *supra* note 2, at pg 837

<sup>36</sup> Ibid

<sup>37</sup> Ibid., at pg 838

<sup>38</sup> *Vodafone Airtouch/Mannesmann* Case No. Comp/M.1630

<sup>39</sup> Whish, *supra* note 2, at pg 780

Antitrust law applications to vertical mergers should be designed so that they generally prescribe only those mergers whose anticompetitive consequences outweigh possible efficiencies<sup>40</sup>. Under the Kenyan law vertical mergers are not controlled under the Act.

In the U.S.A only two significant vertical merger cases have been decided by the Supreme Court under section 7. They illustrate the difficulty which the court has encountered in defining and applying the “relevant market” as well as demonstrate its ready reliance on market shares to infer adverse competitive effects. Also they establish a strict but not necessarily rigid standard for measuring the legality of vertical mergers under the Clayton Act<sup>41</sup>.

Before the case of *United States v E.I. du Pont de Nemours & Co*<sup>42</sup>. It was generally assumed that the original section 7 did not apply to vertical mergers. However, du Pont’s purchase of 23 percent of GM stock before 1920 was held to have foreclosed sales to GM by other suppliers of automotive paints and fabrics between 1920 and 1949 and thus to have had an illegal anticompetitive effect. The decision has continuing significance because the legal focus on foreclosure to measure anticompetitive effect has continued. Also the court’s effort to define the product market and its finding of significant foreclosure were to become harbingers of difficulties which it would encounter in applying the anti merger laws to other vertical, horizontal and conglomerate mergers<sup>43</sup>. According to the court, locating the relevant market is necessary in determining whether the merger will “substantially lessen competition” in violation of the Clayton Act<sup>44</sup>. It is only by examining the effects of the merger in its product market can its impact on competition be assayed.

Du pont sold finishes and fabrics to GM, which used them to paint and upholster its cars. Even though GM’s purchases constituted a negligible percentage of the total market for these materials, the court ruled that “automotive finishes and fabrics have sufficient peculiar characteristics and fabrics have sufficient peculiar characteristics and uses “which made them distinctive as a “hire of commerce” under the Clayton Act. In deciding whether du pont’s stock acquisition violated section 7, the court ruled that two elements had to be established. First, the market affected must be

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<sup>40</sup> Gellhorn supra note 4, at pg 344

<sup>41</sup> Ibid

<sup>42</sup> *United States v E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (Cellophane)

<sup>43</sup> Gellhorn, supra note 4, at pg 345

<sup>44</sup> Ibid

substantial and the government had to show a likelihood that competition would be “foreclosed” in a substantial share” of the relevant market. The court relied on GM’s substantial purchases of paints and fabrics from du pont to infer that du pont’s stock ownership in GM was a decisive factor in the latter’s decision to buy du pont’s products. It then concluded that the stock acquisition had resulted in a foreclosure of a substantial share of the market to du pont’s competitors and therefore had the necessary anticompetitive effect. The Supreme Court’s first opportunity to interpret amended section 7 came in *Brown shoe Co. v United States*<sup>45</sup>. The case involved both horizontal and vertical integration in that both Brown and Kinney manufactured shoes and distributed them through their respective retail outlets. The primary impact of the vertical merger however was likely to be in the foreclosure of Kinney’s retail outlets to other shoe manufacturers. An analysis of the effect of this vertical merger on competition among shoe manufactures, who would be adversely affected by a shift of purchases by Kinneys outlets to Brown, required an initial consideration of the product market. The court adopted the District Court’s finding that men’s, women’s and children’s shoes were separate markets. However the court later ignored these findings and lumped all shoes together in examining the effect of the vertical merger in the market place.

In the case of *Ford Motor Co. v United States*<sup>46</sup> the court emphasized heightened barriers to entry in condemning Ford’s attempted acquisition of autolite, a spark plug manufacturer. The argument is not persuasive, and it has increasingly been challenged just like the foreclosure argument.

The 1982 and 1984 Department of Justice merger guidelines take a distinctive approach that focuses on the “horizontal effect from non horizontal mergers.” They begin from the view that vertical mergers do not generally pose a significant threat to competition and they abandon the foreclosure theory of Brown shoe and limit vertical merger investigations to increased barriers to entry, the facilitation of collusion, and the avoidance of rate regulation<sup>47</sup>.

Under the EU law parties to a concentration are required to provide information in relation to mergers where a party’s market share in a market whether is upstream or downstream of any market

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<sup>45</sup> *Brown Shoe v United States*, 370 U.S. 294, 82 S.ct. 1502, 8 L.ED.2d 510 (1962)

<sup>46</sup> *Ford Motor Co. v United States* 405 U.S 562 (1972)

<sup>47</sup> Yash Vyas, “Anti-monopoly policy and the structure-conduct-performance paradigm: The Kenyan approach” (1994) Vol 10(1) *Eastern Africa Economic Review.*, pg 26

on which another party is present exceeds 25%<sup>48</sup>. The commission will consider the issue of whether the vertical effects of concentration could foreclose access to the market on the part of third parties. In the case of *Skansa/Scancem*<sup>49</sup> where the merged entity would have been a powerful presence on the market for raw materials, the construction materials market and the construction market itself, the commission required Skanska to divest Scancem's cement business in Finland and to divest Skanska's entire shareholding in Scancem. The commission has had similar concerns about the vertical foreclosure effects in relation to several concentrations in the telecommunications and media industries. In the case of *Time-Warner/ AOL*<sup>50</sup>, the commission investigated a merger between Time-Warner and AOL. Its particular concern was that the vertically integrated merged firms would have dominated the emerging market for internet music delivery on line. The concentration was cleared after commitments were given to sever the links between AOL and Bertelsmann another media and entertainment company. The commission will also consider whether a vertical merger might facilitate tacit coordination on the market<sup>51</sup>.

### 3.2.3. Conglomerate Mergers

It involves the union of two companies that produces or supply unrelated goods or services<sup>52</sup>; that is two firms operating in a market not horizontally connected. However this type of mergers can have both desirable social effects as well as impair competition. Conglomerate mergers may be divided into three main types.

- Product line extension: Where one firm by acquiring another, adds related items to its existing products.
- Market extensions: Where the merged firms previously sold the same products in different geographic markets. This is also a type of horizontal merger.
- Pure conglomerates: This is where there is no functional link between the merged firms.

Irrespective of the type of conglomerate the transaction encompasses firms which are in separate markets and the merger consequently does not have a direct effect on competition. This is due to

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<sup>48</sup> Whish, *supra* note 2, at pg 840

<sup>49</sup> Skansa/Scancem case No. IV/M.1157 OJ [1999] L 183/1,[2000] 5 CMLR 686

<sup>50</sup> Time-Warner/AOL case No. Comp/M, 1845

<sup>51</sup> Whish, *supra* note 2, at pg 840

<sup>52</sup> Vyas, *supra* note 47, at pg 26

the reason that there is no change in the number of firms in either the acquiring or acquired firm's market<sup>53</sup>.

The potential competition doctrine which is the mainstay of the attack on conglomerate mergers under section 7 has had a checkered and not wholly satisfactory history<sup>54</sup>. Its first application in connection with conglomerate acquisitions was to a joint venture between two chemical companies in the case of *United States v Penn- Olin chemical Co*<sup>55</sup>. Pennsalt an Oregon producer of Sodium Chlorate (a bleaching agent used primarily in the paper and pulp industry) which it sold in the west, joined with Olin Mathieson, an industrial chemical firm which was intermediate user of sodium chlorate, to build a sodium chlorate plant in Kentucky and to sell that product in the southeast. Before Penn- Olin's entry into the market, only two firms had plants in the southeastern area, with control of over 90 percent of all sales. The evidence indicated that prior to forming the joint venture both Pennsalt and Olin Mathieson had considered but not completely rejected the possibility of entering the southeastern market independently. The District court, relying on the competitive value of an additional market entrant, upheld the joint venture. The government had now shown "as a matter of reasonable probability" that both firms would have entered the market if Penn- Olin had not been created. On review the Supreme Court remanded the case for further findings, however, ruling that if one of the firms probably would have entered with the other remaining "at the edge of the market, continually threatening to enter," the venture should be disapproved. According to the court the possible elimination of a potential entrant, even if the evidence failed to show a reasonable probability of entry by the second firm, would be enough to violate section 7.

The court next considered the legality of a conglomerate merger in *FTC v Procter & Gamble co*<sup>56</sup> (*P&G*). Procter, a large and a diversified manufacturer of detergents and other household products sold in supermarkets, bought Clorox, the largest seller of household liquid bleach. Procter dominated the detergent market, accounting for 54 percent of sales; but it neither made nor sold bleach. Clorox controlled almost 49 percent of the bleach market; its nearest rival purex accounted for less than 16 percent of bleach sales. In ruling that Procter's acquisition of a producer of

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<sup>53</sup> Gellhorn, *supra note* 4, at pg 376

<sup>54</sup> Ibid

<sup>55</sup> *United States v Penn-Olin chemical Co.* 378 U.S 158 (1964)

<sup>56</sup> *FTC v Procter & Gamble Co.* 386 U.S. 568 (1967)

complementary products violated section 7, the court relied on two somehow contradictory grounds: First that the merger would give Clorox supported by Procter a decisive competitive advantage in the bleach market, allowing it to discipline competitors and raise new barriers to entry; and second that Procter was the leading and perhaps only potential candidate for entry into the bleach market. Based on these contentions, the court held that the merger adversely affected actual and potential competition. Following its success in P& G, the federal trade commission sought to extend the potential competition doctrine by applying it to instances where the acquiring firm admittedly was not likely to enter the acquired firm's market by external expansion<sup>57</sup>.

In the case of *United States v Falstaff Brewing corp.*<sup>58</sup>, the meaning of who should be considered a "potential competitor" was expanded by looking beyond the acquiring firm's actual intentions<sup>59</sup>. The District court had dismissed the government's complaint after finding that the acquiring firm had decided not to enter the market except by acquisition of a significant competitor. The Supreme Court took a broader view of potential competition and reversed the decision on the ground Falstaff might still have been "perceived" by the firms in the market as a potential entrant and consequently have forced them to constrain their pricing practices. Where barriers are high, the acquiring firm may be unlikely entrants, where the barriers are low, the market is competitive and the elimination of a potential entrant is irrelevant<sup>60</sup>.

Under the EU law jurisdictional test in the regulation of conglomerate mergers is based on turnover but not on the impact of a concentration on competition so that any transaction may be caught, whether it is horizontal, vertical or conglomerate. The question however is whether a conglomerate merger could be held to create or strengthen a dominant position and thus be declared incompatible with the ECMR. In *Tetra Laval v commission*<sup>61</sup> the CFI confirmed that Article 2 (2) and (3) of the ECMR do not draw any distinction between mergers having horizontal and vertical effects, as a consequence the commission is able to prohibit a merger which solely or mainly has a conglomerate effect, provided that the two conditions in Article 2(3) that is the creation or strengthening of a dominant position as a result of which effective competition is significantly impeded are met. In

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<sup>57</sup> Gellhorn, *supra* note 4, at pg 380

<sup>58</sup> *United States v Falstaff Brewing Corp* 410 U.S 526,537 (1973)

<sup>59</sup> Gellhorn, *supra* note 4, at pg 381

<sup>60</sup> *Ibid.*, at pg 383

<sup>61</sup> *Tetra Laval v Commission* ECR 11-4381 [2002] 5 CMLR 1182

*Guinness / Grand Metropolitan*<sup>62</sup> the commission conducted a phase II investigation into the concentration of the spirits businesses of those two undertakings. Its view was that each spirit-whisky, vodka, gin etc was capable of forming a separate 'niche' product market. The commission looked to see what horizontal effects the concentration might have, and required commitments to deal with problems it had identified. In the case of *Tetra Laval v Commission*<sup>63</sup> the CFI annulled the decision since in its view the commission had failed to prove any of the alleged negative effects of the modified merger on competition. The CFI particularly noted that Tetra Laval had offered commitments to address the commission's concerns, and that Article 82 renders unlawful certain tie-in practices, this being so the commission was under an obligation to demonstrate why, there would be adverse effects on competition nevertheless. The judgment in Tetra Laval acknowledges that a merger could have conglomerate effects that are adverse to competition; it however raises the bar very high if the commission is to proceed successfully against a conglomerate merger.<sup>64</sup>

### **3.3. Beneficial Effects of Mergers upon the Public Interest**

#### **3.3.1. Economies of Scale**

This can be improved to a certain extent since if firms become too large bureaucracy develops and corruption could also develop. However mergers are beneficial to this extent since a firm will produce goods at the lowest marginal cost where it is able to operate at the minimum efficient scale. If it operates on a smaller scale than this, marginal cost will increase and thus will result in loss of allocative efficiency.<sup>65</sup> Whereas economies of scope are as a result of carrying on more of the same activity, economies of scale are the economic benefits generated from carrying on activities that are related.

#### **3.3.2. Other Operating Efficiencies**

A merged enterprise may be able to operate more efficiently for other reasons other than economies of scale and scope. It may be less expensive to takeover a distributor than to start a distribution network on a contractual basis since backward integration may assure supplies to a firm concerned

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<sup>62</sup> Case No. IV/M.938 OJ [1998] L 288/24, [1997]5 CMLR 760

<sup>63</sup> *Tetra Laval v Commission*, Supra note 196

<sup>64</sup> Whish, supra note 4, at pg 842

<sup>65</sup> *Ibid.*, at pg 783

with the availability of raw materials and following a merger a firm may find itself with improved access to loan and equity capital than it had when operating alone.<sup>66</sup> A merger may also result to a firm that is able to carry out research and development in a better way as well as having access to a larger pool of industrial technology.<sup>67</sup>

**3.3.3. Barriers to Entry and Exit**

A firm which is large normally has more resources at their disposal and is therefore can outdo their competitors. Smaller firms will also hesitate entering the market because they fear the large firm. The mere presence of a conglomerate firm in a market will discourage small firms thus creating entry barrier. The incentive to set up a firm, invest risk capital and develop new products may be diminished if it is not possible to sell the enterprise in question as a valuable going concern. Firms commonly acquire small undertakings which possess useful know-how or intellectual property rights and, from the perspective of the innovator of such technology, the freedom to sell could be an important reward for the risks taken.<sup>68</sup> However a strict approach to mergers has the ability to have an effect which is undesirable in such circumstances particularly if exit was made unduly difficult.

**3.3.4. Other Arguments in favour of Mergers**

There are other ways that mergers could be of benefit to the public interest. If there is takeover of an ailing firm then its life can be prolonged instead of closing down. Consequently the social costs of redundancy and unemployment would be avoided.

**3.4. Detrimental Effects of Mergers upon the Public Interest**

**3.4.1. Effects on Competition**

Horizontal mergers have the most significant effect upon competition, for example a merger between two or three oligopolies will clearly have a serious effect on the level of competition in the market. Vertical mergers could have an adverse effect on competition where they have a foreclosing effect on other participants in the industry. However they may enhance competition for example by

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<sup>66</sup> Ibid., at pg 784  
<sup>67</sup> Ibid  
<sup>68</sup> Ibid

improving the promotion of a particular branded good and thus stimulating inter-brand competition. Even conglomerate mergers have the ability to harm competition. According to the “deep-pocket” theory, a large, diversified firm could be able to cross-subsidize from one product (where it is earning monopoly profits) to another. Where a firm can sell below marginal costs the argument is that a conglomerate merger could entail a reduction in potential competition if the target firm might in future have become a rival to the predator.<sup>69</sup> Other possible reasons are that such mergers could trigger off similar mergers between other firms, they could raise barriers to entry and that the existence of a conglomerate giant could dissuade anyone from entering the particular market or from aggressively competing with it.

#### **3.4.2. Loss of Efficiency and “Short Termism”**

One of the arguments against mergers is that instead of promoting economic efficiency, they could have an eruptive effect on the management of one or both of the merged firms and thus be detrimental to their long-term prospects. This is true particularly in regard to contested takeover bids where it is possible that the management of the target company will either be removed by the new shareholders or will resign rather than stay on new conditions. This is because generally takeovers are motivated more by short term profit taking than by serious analysis of the long term prospects of the company.

#### **3.4.3. Concentration of Wealth**

Mergers can be objected to for the reason that they lead to firms which are large in terms of both size and power such that the balanced distribution of wealth is adversely affected. In the U.S the anti-merger laws were strengthened at a time when this problem was a dominant concern.<sup>70</sup>

#### **3.4.4. Unemployment and Regional Policy**

Mergers are also undesirable as they may result to closure of firms and thus unemployment. Mergers that result in “asset-stripping” and which appear not to have any regard for the social problems that follow attract particular opprobrium from skeptics of the free market.<sup>71</sup>

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<sup>69</sup> Ibid., at pg 669

<sup>70</sup> Ibid., at pg 790

### 3.4.5. Overseas Control

Mergers could lead to the control of indigenous firms passing to overseas companies in which case any economic advantages of the merger may be thought to be outweighed by

The desire to maintain the decision making process and profits at home.

### 3.4.6. Special Sectors

Some sectors of the economy e.g. the media are especially sensitive and this could mean that concentration of ownership within them requires special consideration.

## 3.5. Weaknesses of the Kenyan Law

The main drawback in the Kenyan law is that there is no limit of the firms to be controlled and thus even small firms fall under the Act. Section 27 (1) covers all mergers irrespective of their impact upon the structure of the market or on the size of the resulting undertaking. This is likely to bog down the commissioner's office.

The provisions relating to mergers and takeovers suffer from several weaknesses.<sup>72</sup> The first drawback is that Section 27 covers only horizontal mergers and thus they are the ones that are subject to inquiry under the Act. This can be construed to mean that vertical and conglomerate mergers and takeovers do not adversely affect the economy or they do not prevent, restrict or distort competition.<sup>73</sup> This is not true since as we have seen above vertical mergers can lead to disappearance of independent vertical outlets with the result of competitors of the integrated firms being unable to release goods into the market. On the other hand conglomerate mergers have the ability to increase conglomerate concentration of power and thus lead to adverse political and socio-economic effects.<sup>74</sup>

Another drawback is the criteria provided for evaluation of a merger or takeover application. This is because the RTPA fails to provide any criteria upon which a merger or takeover of undertakings whose products or services are specially for the domestic market shall be deemed advantageous.

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<sup>71</sup> Ibid., at pg 791

<sup>72</sup> Vyas, supra note 47, at pg 27

<sup>73</sup> Ibid

<sup>74</sup> Ibid

Another weakness is that mergers and takeovers are subject to the inquiry and investigation by the commissioner. The tribunal's role is secondary in that it conducts inquiry and investigations into merger and takeover proposals and on its recommendations, the minister make an order. Also the procedural mechanism to be invoked by undertakings wishing to merge or takeover could be tedious and time consuming.

Finally, currently a merger or takeover application has to be made before the merger or takeover has taken place. This may cause problems for the parties concerned and this prior approval of the minister should not be necessary.<sup>75</sup>

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<sup>75</sup>Ibid., at pg 28

## 4.0 CHAPTER FOUR: RESTRICTIVE TRADE PRACTICES

### 4.1 Introduction

One of the crucial phases of industrial organization is conduct at the market place. This involves the pattern or behaviour that firms follow in adapting or adjusting to the market in which they sell or buy. The conduct or behaviour involves the practices or policies pursued by firms whether acting individually or collectively in relation to price, product or sales promotion<sup>1</sup>. It also comprises the means of coordination and gross adoption of prices, product and sales promotion policies of competing firms, such means may be by collusion or agreement, interdependence of pricing and related adjustment, exercise of predatory or exclusionary tactics directed against either established rivals or potential entrants. Most of these phases or conduct are conveniently labelled as restrictive trade practices and every large firm having economic power has the ability to adopt such trade practices which can damage or destroy competitors or may put restraints on competition or even could be unfair to the ultimate consumers<sup>2</sup>.

The RTPA seeks to regulate such restrictive trade practices and they have been defined in section 4(1) as follows:

4(1) "restrictive trade practices": refers to an act performed by one or more persons engaged in production or distribution of goods or services which:

- a) In respect of other persons offering the skills, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate; or
- b) In respect of other persons able and willing to pay fair market prices of 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 practices", 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 this does not introduce the per se rule as has been done in the USA for price fixing agreements, the objective test

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<sup>1</sup>Yash Vyas, "Anti-monopoly policy and the structure-conduct-performance paradigm: The Kenyan approach" (1994) Vol 10(1) Eastern Africa Economic Review., pg 28

<sup>2</sup>Ibid

applied by the law here is able to capture even the most incipient and insidious restrictive trade practices. Other than the practices covered by the above general definition of restrictive trade practices outlined in section 6 to 12 are also declared to be restrictive trade practices for the purposes of the Act<sup>3</sup>.

#### **4.2. Types of Restrictive Trade Practices**

Restrictive trade practices fall under three categories that is vertical agreements, horizontal agreements and unilateral practices. Under the Kenyan law, the RTPA covers all the three types of trade practices. Section 6 of the Act categorizes the following trade agreements arrangements as being restrictive trade:

- a) (i) Hindering or restricting or preventing the sale, supply or purchase of goods or services;
- (ii) Limiting or restricting the terms and conditions of sale, supply or purchase of goods or services;
- b) Between manufacturers, wholesalers, retailers fixing prices or terms for selling goods;
- c) Between manufacturers, wholesalers, retailers or contractors fixing prices or terms for buying goods;
- d) Between manufacturers, wholesalers, retailers, contractors or any combination of persons other than a partnership fixing prices or terms for selling goods or performance of services;
- e) Between manufacturers or between wholesalers for fixing price and conditions of sale for retailers;
- f) Between sellers or between sellers and buyers to grant discriminatory rebates in regard to the quality or value of total purchase;
- g) Between sellers so as not to sell goods to any particular kind of buyers in any particular kind of sellers or in any particular form;

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<sup>3</sup> Ibid., at pg 29

- h) Between manufacturers, wholesalers or retailers not to employ or to restrict or favour the employment of any method, machinery, process, labour, land or other resources;
- i) To limit or restrict output or supply of goods, or withhold or destroy supplies of goods, or allocate territories or markets;
- j) To enforce the carrying out of an agreement of arrangement referred to in (a) to (i) above.

The above provisions however do not apply to agreements between consumers relating to goods which are bought for consumption and for sale<sup>4</sup>. Under the U.S law the main role of the Sherman Act has been in dealing with various anticompetitive practices such as agreements among competitors to fix prices, to restrict output, to divide markets or to exclude other competitors.<sup>5</sup> These activities have been prosecuted both under section 1 and 2 of the Sherman Act.<sup>6</sup>

#### 4.2.1. Horizontal Restraints

Horizontal agreements refer to implicit or explicit arrangements between firms competing with identical or similar products in the same level of production. These types of agreements can be through arrangement among two firms or through trade associations. There are various types of horizontal restraints and they include:-

##### Cartels

Cartels are agreements between persons at the same (horizontal) level of production, distribution or supply cycle, or agreements between a group of suppliers or a group of acquirers inter se.<sup>7</sup>

Horizontal agreements which are intended to foreclose competition from other firms so as to protect the privileged position of cartel members are usually a target for any system of competition law.

Cartels are normally formed as a result of substantive economic reward that the cartel members are likely to enjoy. In Kenya cartel agreements are prima facie valid under the Contracts in Restraint of

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<sup>4</sup> Ibid

<sup>5</sup> E.Gellhorn, Antitrust Law and Economics, (Minnesota, West Publishing Co., 3<sup>rd</sup> ed.,1990) pg 153

<sup>6</sup> Ibid

<sup>7</sup> Yash Vyas, "Anti- Competitive Trade Practices", (2003) Vol 1 University of Nairobi Law Journal., pg 123

Trade Act, but can be declared void by the High Court if they are not reasonable in the interest of the parties and the public.<sup>8</sup>

In Europe the organization for economic co-operation and development has pointed out that cartels are an increasingly international phenomenon and that they frustrate the gains that should follow from global market liberalization<sup>9</sup>. However three significant hurdles to cartels stand out:

First the industry may be unable to solve internal administrative problem such as the assigning of production quotas and the sharing of aggregate profit data. Secondly the established firms may fear that if they succeed to raise their immediate profits to a maximum, it would be an incentive to new producers to enter the market. Third the participating firms often do not, in fact know the output level which will maximize their profits over the short run.<sup>10</sup>

During the celebrated price-fixing conspiracies of electrical equipment manufacturers in the 1950s<sup>11</sup> there was widespread cheating among the conspirators which often touched off bitter price wars. One executive of the company in a moment of candor revealed that his group had temporarily refused to adhere to the arrangement and he said "No one was living up to the arrangement and we... were being made suckers".<sup>12</sup> These difficulties are not automatically eradicated when market rigging arrangements are supported by law. The International Air Transport Association (IATA) lawfully fixed passenger fares on almost all international airline routes. However the definition of a "sandwich" supplied passengers' enroute required a plenary session in 1958, and lengthy debate preceded the Association's subsequent decision to raise the surcharge for in-flight movies.<sup>13</sup> Market rigging arrangements are likely to falter due to two central problems:-

First the various firms participating in the arrangement most likely have different costs and market share and consequently they will have different ideas in regard to price as well as equitable distribution of market shares. This will thus make it difficult to reach an agreement that will be

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<sup>8</sup> Ibid., at pg 124

<sup>9</sup> R. Whish, *Competition Law*, (London, Sweet & Maxwell, 5<sup>th</sup> ed., 2003) pg 455

<sup>10</sup> Gellhorn *supra* note 5, pg 156

<sup>11</sup> Ibid., at pg 157

<sup>12</sup> Ibid

<sup>13</sup> Ibid

acceptable to the concerned parties and which will be observed. Secondly even if the firms agree to fix a price above the marginal cost, each of the participants will have a strong incentive to cheat<sup>14</sup>.

Maintenance of a cartel also depends on erecting barriers to entry or co-opting new entrants by admitting them into the cartel. If the latter takes place it will destroy the cartel since it will with time eliminate all reason for its existence as the cartel members will have to be satisfied with a smaller market share or alternatively output will increase and price will be reduced.

The EU has in the recent past attached a higher priority to cartels than any other time.<sup>15</sup> The commission's commitment to a tougher policy towards cartels is demonstrated in various ways. We find that the Leniency notice encourages participants in cartels to provide evidence to the commission of their unlawful behaviour in return for a reduction in fines and in the U.S the amnesty for whistleblowers introduced by the Department of justice has been very successful in bringing cartels to light.<sup>16</sup> Another manifestation of the commission's determination to fight cartels is that this is a key driving force behind the EC Modernization Regulation. Since the beginning of May 2004, the commission shares the competence to apply Articles 81 and 82 with national competition authorities and national courts and the system of notifying agreements to the commission for an individual exemption is abolished thus enabling it to redeploy its resources and consequently enabling it inter alia to concentrate on tracking down serious infringements of Articles 81 and 82.<sup>17</sup> The commission has adopted various cartel cases and most of the times it fines the firms concerned. In the *Vitamins case*<sup>18</sup> the commission imposed fines on eight undertakings totalling EUR 855.23 million. Senior executives of two undertakings Roche and BASF also served terms of imprisonment in the US for their roles in this cartel. Considering that the participants in this cartel are also subject to actions for damages which in the case of US litigation are liable to be trebled, it is obvious that the consequences of cartelization can be very serious.

Cartels may earn supra-competitive profits through the following:-

### **Price Fixing**

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<sup>14</sup> Ibid., at pg 158

<sup>15</sup> Whish supra note 9, at pg 456

<sup>16</sup> Ibid

<sup>17</sup> Ibid., at pg 457

<sup>18</sup> Vitamins case OJ [2003] L 6/1, [2003] 4 CMLR 1030

Horizontal price-fixing would be regarded by many people as the most blatant and undesirable of restrictive trade practices. Adam Smith in the *wealth of Nations* in 1776 said:

“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”<sup>19</sup>.

Price fixing is prohibited under the RTPA section 6 (1) (b) to (e) as outlined above.

The following is a case that involved the Commission of Monopolies and Prices and The Association of Kenya Insurers (AKI) in regard to collusion/price fixing and it addresses:-

1. The problem created by a powerful Cartel in the Insurance industry in Kenya.
2. 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 it boasts of 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 but as it is common with cartels, it was difficult to get hard evidence.

The repression of competition in the insurance industry in Kenya caused uproar and especially among insurance brokers and players in the transport industry. At one time, all Matatus (minibuses used in an estimated over 90% of public passenger transportation 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 break through and obtained a copy of the AKI Motor Rating Schedule dated 4<sup>th</sup> June, 2002 which set rates, terms and benefits to apply to all motor policies issued after 1<sup>st</sup> 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 1<sup>st</sup> January, 2003.

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<sup>19</sup> Whish supra note 9, at pg 469

The Commission consequently wrote the following letter to AKI in 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:

- You have been making, directly or indirectly, recommendations to your members which relate to the prices charged or to be charged by your members.
- 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 calculations of prices.

We 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 1<sup>st</sup> July, 2002. By powers conferred upon my office by Section 15 of the Restrictive Trade Practices, Monopolies and Price Control Act, I request you to furnish your response to me latest, by 24<sup>th</sup> February, 2003.

Commissioner

Monopolies and Prices Commission

AKI replied on 19<sup>th</sup> February, 2003 as follows:

*Restrictive Trade Practices*

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

The Association of Kenya Insurers (“AKI”) is a Society registered under the Societies Rules (1968) and under Certificate of Exemption for Registration number 2166 of 5<sup>th</sup> January, 1988. 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.”

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 (Cap 487 of the Laws of Kenya). 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 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.

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(1)(a) 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 and no insurer is permitted to charge rates outside those parameters. It is therefore mandatory for insurers to charge premium within those specified parameters under the Act.

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

- (1) For the purpose of this act, "restrictive trade practices" refers 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 markets 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 purpose 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 purpose 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 and in any event, Section 5 of the restrictive Trade Practices, Monopolies and Prices 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.”

Insurers in Kenya clearly fall 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 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.

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 i.e. 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.

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 those injured by motor vehicles that the Commissioner of Insurance requires rates to be approved by his office.

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,

Fred R Njeru

Executive Director

Association of Kenya Insurers

The Monopolies and prices Commission 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 letter is reproduced below:

20<sup>th</sup> August, 2001

### Premiums Rates

Please refer to my address to the Chief Execution Officers of Insurance Companies of 8<sup>th</sup> 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 with effect from 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 Commissioner's position was that it did not agree with AKI and replied as follows on 5<sup>th</sup> March 2003:

### *Restrictive Trade Practices*

I acknowledge receipt of your letter dated 19<sup>th</sup> February, 2003.

Please note that our letter of 7<sup>th</sup> February, 2003 made reference to two specific allegations made against you which principally related to the AKI Motor Rating Schedule effective from 1<sup>st</sup> July, 2002. The said schedule is in your possession as you authored it; vide your letter AKI CIRCULAR NO. 86/2002/MNW of 4<sup>th</sup> 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 19<sup>th</sup> February, 2003 not sufficient to remove the grounds for the allegations made against you as to contain in our letter of 7<sup>th</sup> 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, 25<sup>th</sup> March, 2003 at 11.00 am.

Commissioner

Monopolies and Prices Commission

On 23<sup>rd</sup> 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 23<sup>rd</sup> 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.”

Since the 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.

**Source: Monopolies and Prices Commission**

Under the US law agreements by competing firms or independent firms to fix prices are a major concern of section 1 of the Sherman Act<sup>20</sup>. In their application of antitrust law US courts have held that price fixing is illegal per se. The first section 1 case to reach the Supreme Court was *United*

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<sup>20</sup> Gellhorn *supra* note 5, at pg 165

*States v Trans-Missouri Freight*<sup>21</sup> It involved an effort by 18 railroads controlling traffic west of the Mississippi to eliminate fratricidal rate wars. The railroads created an association to establish freight rates for all participants. When challenged by the government, they conceded that their contracts limited each railroad's freedom of commercial action. The railroads, however argued that they were exempt from the Sherman Act, and that in any case the rates they fixed were legal because they were reasonable and therefore valid under common law. The lower court sustained this argument but a closely divided supreme court reversed the decision and held that railroads were not exempt from the Sherman Act, and that it was necessary to consider whether the restraint was valid at common law. The court further stated that Section 1 condemned "every" restraint of trade and recognized no exceptions.

However the court in *Hopkins v United States*<sup>22</sup> the court read Trans-Missouri as applying only to agreements in restraint of trade; that is, "direct" agreements in restraint of trade; that is only those agreements whose main purpose was to fix prices were condemned. In the case of *United States v Joint-Traffic*<sup>23</sup> the court distinguished price agreements from ordinary sale, lease, partnership and incorporation contracts on the ground that the elimination of actual or potential rivalry was permissible where it served to support an integration of the parties' productive economic activities or facilities. The scope of Trans-Missouri's condemnation of "every" trade restraint was thus placed in doubt<sup>24</sup>.

The law was further developed in the case of *United States v Addyston Pipe & steel Co.*<sup>25</sup> where Judge Taft read the prevailing common law as voiding all price fixing agreements unless they were ancillary to some legitimate cause. According to the Judge the law made naked restraints in which the "sole object" is the elimination of competition per se illegal. In the case of *Standard Oil of N.J v United States*<sup>26</sup> Chief Justice White re-read Section 1 of the Sherman Act as condemning only every undue or unreasonable restraint of trade. He said applying a "standard of reason" to determine whether an agreement is prohibited as a restraint of trade depends on the purpose of the

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<sup>21</sup> *United States v Trans-Missouri* 166 U.S 290 (1897)

<sup>22</sup> *Hopkins v United States* 171 US 578, 892 (1898)

<sup>23</sup> *United States v Joint-Traffic* 171 US 505 (1898)

<sup>24</sup> Gellhorn *supra* note 5, at pg 166

<sup>25</sup> *United States v Addyston Pipe & Steel Co.*, 85 Fed 271 (6<sup>th</sup> Cir. 1898)

<sup>26</sup> *Standard Oil v United States* 221, U.S. 1 (1911)

arrangement, the character of the parties and the necessary effect of their actions. In effect the court seemed to create a new rule of uncertain content which emphasized behaviour and recognized that agreements between independent firms have broad possible effects, yet it also acknowledged that some conduct may be inherently unreasonable.<sup>27</sup>

Perhaps, recognizing some of the problems in regard to price-fixing, the Supreme Court dispelled at its next opportunity any notion that price-fixing could be tested by a reasonableness standard. In the case of *Trenton Potteries Co.*<sup>28</sup> who were the makers of 82 percent of toilets and other bathroom fixtures and belonged to an association that had fixed prices of sanitary pottery and also had limited sales to legitimate “jobbers” the court held proof of the mere existence of a price fixing agreement establishes defendant’s illegal purpose and that the prosecution need demonstrate nothing further, that is, the action of agreeing to fix prices is in itself per se illegal. However current developments indicate that the application of a label of per se illegality to particular conduct may or may not deny a defendant an opportunity to justify the practice and demonstrate that its effect is likely to be beneficial. At the least the burden will be on the defendant and the courts will view such justification skeptically.<sup>29</sup>

Under the EU law Article 81(1) specifically provides that agreements, decisions and concerted practices which ‘directly or indirectly fix purchase or selling prices or any other trading conditions’ may be caught. The community courts and the Commission regard price –fixing agreements as having the objective of restricting competition for the purposes of Article 81(1) so that there is a need to show that they are capable of doing so.<sup>30</sup> However for there to be an infringement of Article 81(1) it is necessary to show that an agreement has an appreciable effect on competition in a quantitative sense as well as an appreciable effect on trade between member states.<sup>31</sup>

In IFTRA Rules on *Glass Containers*<sup>32</sup> the Commission condemned rules of a glass manufacturers’ association which might reduce price competition by including an obligation not to offer discounts, an open information scheme, the adoption of a common accounting procedure and a term providing

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<sup>27</sup> Gellhorn *supra* note 5, at pg 167

<sup>28</sup> *United States v Potteries Co.*, 273 U.S. 392 (1927)

<sup>29</sup> Gellhorn *supra* note 5, at pg 201

<sup>30</sup> Whish *supra* note 9, at pg 469

<sup>31</sup> *Ibid*

<sup>32</sup> IFTRA Rules on Glass Containers OJ [1975]L 228/10, [1975] 2 CMLR D20

for the charging of uniform delivered prices. The commission in this decision pointed out that in the particular product market the potential for non-price competition was weak, the corollary being that maintenance of price competition was particularly important.

### **Market sharing**

This involves firms agreeing to divide markets and it may take many forms. Firms may agree to allocate markets geographically, assign customers functionally by class or technically by type of product.<sup>33</sup> Market division agreements may in some aspects have an even greater impact on competition than even price-fixing since by eliminating competitors, the remaining firm has a monopoly. Geographical market-sharing agreements may be more effective than price fixing from the cartel's point of view, because the expense and difficulties of fixing common prices are avoided. Policing the agreement is also relatively simple, because the mere presence of a competitor's goods on one's own 'patch' will be an indication of cheating<sup>34</sup>. From a customer's perspective geographic market sharing is restrictive as it restricts choice of goods and services.

On the other hand market sharing may be beneficial since it might enhance efficiency by enabling firms to compete more effectively with large undertakings for example where a number of small retailers may decide to combine to promote their own 'house-label' in order to try to match other multiple chains. They may be weak individually and unable to undertake the enormous costs involved in advertising and promotion but in combination they may be able to do so.<sup>35</sup>

Under the US law Courts have generally treated horizontal market division arrangements as they have price fixing. In the case of *Timken Roller Bearing Co. v United States*<sup>36</sup> a division of markets among competitors was directly ruled unlawful. The court condemned an allocation of territories throughout worldwide markets between the dominant American producer of tapered roller bearings and British and French firms. However it was not clear whether a per se or rule of reason approach was being applied. This was resolved in the case of *United States v Topco Associates*<sup>37</sup> where the

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<sup>33</sup> Gellhorn *supra* note 5, at pg 204

<sup>34</sup> Whish *supra* note 9, at pg 477

<sup>35</sup> *Ibid.*, at pg 478

<sup>36</sup> *Timken Roller Bearing Co. v United States* 341 U.S 593 (1951)

<sup>37</sup> *United States v Topco Associates Inc.*, 405 U.S 596 (1972)

court explicitly ruled that market allocations are per se illegal whether or not ancillary to price-fixing or other market rigging arrangements.

Under the EU law market sharing is mentioned in Article 81(1) (c) and there have been many decisions under this Article owing to the fact that geographical market sharing can be achieved relatively easily in the EU context since there are many ways of segregating national markets from one another. Also the commission's policy is to take action to prevent anything which might inhibit market penetration and it therefore has had a tendency of expending much of its resources on dealing with this problem.<sup>38</sup> In *Peroxygen Products*<sup>39</sup> fines totalling EUR 9 million were imposed on five producers which, from 1961 until at least 1980 operated a 'home market' agreement which covered most of the EC. This resulted in consumer prices varying widely between different geographic markets. Also in *Solvay/ICI*<sup>40</sup> the commission imposed fines on Solvay and ICI for geographic market sharing. Article 81(1) has also been applied to horizontal agreements involving customer restrictions.<sup>41</sup>

### **Quotas and other restrictions on production**

Cartels may earn supra competitive profits by agreeing to restrict its members' output since if output is reduced prices will rise for example the OPEC does not fix prices but it determines how much oil each member country will export.<sup>42</sup> The cartel members will normally agree on a quota system whereby they will each supply a specified proportion of the entire industry output within any given period.

Article 81(1) (b) applies to agreements to 'limit or control production, markets, technical development, or investment' and has been applied to agreements to limit production in many instances and straight forward quota systems have often been condemned.<sup>43</sup> In *Peroxygen Products*<sup>44</sup> the commission found that as well as sharing markets geographically, members of the cartel had entered into a series of detailed national agreements dividing markets in agreed

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<sup>38</sup> Whish *supra* note 9, at pg 478

<sup>39</sup> *Peroxygen products* OJ [1985] L 35/1, [1985] 1 CMLR 481

<sup>40</sup> *Solvay/ICI* OJ [1991] 1, [1994] 4 CMLR 454

<sup>41</sup> Whish *supra* note 9, at pg 479

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid.*, at pg 481

<sup>44</sup> *Peroxygen Products* OJ [1985] L 35/1, [1985] 1 CMLR 13

percentages. Firms are not allowed to establish joint ventures in order to apportion orders between competitors nor will the commission allow joint production which simply limits competition without producing any compensating benefits. In the case of *Associated Lead manufacturers Ltd (white lead)*<sup>45</sup> firms producing white lead in the UK, Germany and the Netherlands agreed that each would supply one third of the white lead to be exported to non-EC countries and a central office was established which gathered information from them on their deliveries of white lead. The commission held that in practice the quota scheme related to all exports, that is to intra-community as well as extra-community trade and that it clearly amounted to an attempt to limit and control markets within the terms of Article 81(1) (b). The commission further held that it was irrelevant that the quotas were not always observed.

### **Collusive tendering**

This is where firms agree amongst themselves to collaborate over their response to invitations to tender and it is common in the engineering and construction industries where firms compete for big contracts.<sup>46</sup> Under section 11 of the RTPA the practice of collusive tendering is prohibited. It is an offence under this section for two or more persons to tender for supply or purchase any goods or services at prices or on terms agreed or arranged between them; or to agree or arrange for any of them to abstain from tendering. Also under section 12 it is an offence for two or more persons to enter into an agreement or arrangement as to prices which any of them will bid at an auction sale of goods; or to any agreement or arrangement to abstain from bidding at an auction sale.

Collusive tendering is caught by Article 81(1). In *Pre-Insulated Pipes*<sup>47</sup> the commission concluded that the allocation of contracts on the basis of 'respect for existing "traditional" customer relationships' as well as various measures to support the bid-rigging, amounted to an infringement of Article 81(1)

### **Information agreements**

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<sup>45</sup> *Associated Lead Manufacturers Ltd* OJ [1979] L 21/16, [1979] 1 CMLR 464

<sup>46</sup> Which supra note 9, at pg 483

<sup>47</sup> *Pre-Insulated Pipes* OJ [1999] I 24/1, [1999] 4 CMLR 402

Exchange of information between competing or related firms often raise antitrust problems especially where the data is disseminated through a trade association.<sup>48</sup> When competitors agree to divulge to one another detailed information about their pricing policies, investment plans or research and development projects it becomes easier for them to act in concert.

Under the Kenyan law, categories of trade agreements declared to be restrictive trade practices are enumerated in section 6. Section 7 subjects trade associations to antitrust law. Trade association has been defined by section 2 (b) as “a body of persons (whether incorporated or not) which is formed for the purposes of furthering trade interests of its members or of persons represented by its members”. Section 7 (1) provides that the following trade practices when conducted by or on behalf of a trade association can be regarded as restrictive trade practices for the purposes of the Act;

Exclusion from a trade association of any person carrying on or intending to carry on the trade to which the association is formed which is unjustifiable.

Trade Association making directly or indirectly recommendations to its members, which is in regard to prices that should be charged, margins including discount, credit, delivery and product and service guarantee terms which directly affect prices, profit margins or the formula of pricing which is used to calculate those prices; or which relates to terms of sale including discount, credit, delivery, and product and service guarantee terms which directly affect prices, profit margins or pricing formula.

An important case was handled by the Monopolies and Prices commission in 2001, when the commission prohibited TESPOK<sup>49</sup>, the Association of Internet Service providers from colluding to fix prices for browsing from Kshs 1 to 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.

In the US the application of section 1 of the Sherman Act 1890 to information agreements has produced some anomalous decisions.<sup>50</sup> In *American Column and Lumber Co. v United States*<sup>51</sup> the

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<sup>48</sup> Gellhorn supra note 5, at pg 230

<sup>49</sup> Unreported case from the Monopolies and prices commission

Supreme Court ruled that an agreement to exchange price information in an atomistic market where conditions for collusion were unpropitious infringed the Act whilst in *Maple Flooring Manufacturers' Ass v United States*<sup>52</sup> it reached the opposite conclusion where the market was oligopolistic and the opportunity for price fixing much greater. There is no per se rule against the exchange of information rather a rule of reason standard is applied, though information agreements are presumptively illegal where the market is oligopolistic.<sup>53</sup>

Businessmen selling the same product or competing with one another may join together for a number of reasons, many of which are not the concern of antitrust and are often seen as promoting competitive markets. However on the other hand associations or similar information exchanges can also be used as instruments through which firms fix prices, allocate markets or boycott others.<sup>54</sup> Where there may be no obvious reason to fix prices or otherwise limit competition among its members, the exchange of information facilitated by a trade association is usually tested under a rule of reason approach<sup>55</sup>. In the case of *Maple flooring v United States*<sup>56</sup> the court acknowledged that it is not “open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practices” the mere exchange of information is not “an unreasonable-restraint or in any respect unlawful”. Another illustrative case is *Container Corp*<sup>57</sup> where cardboard box sellers had established an informal price exchange whereby suppliers would provide each other, on request, price information on their most recent sales to a particular customer. This system was struck down because it would freeze competition by exposing price cutting more quickly and because buyers did not have equal access to the prices.

Under the EU law exchange of information is caught under Article 81(1). However, to infringe the Article, undertakings must have agreed to exchange information and not just dwell on the fact that they are able to obtain information about each other' behaviour. Where a third party compiles and

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<sup>50</sup> Whish *supra* note 9, at pg 489

<sup>51</sup> *American Column and Lumber Co v United States* 257 US 377 (1921)

<sup>52</sup> *Maple Flooring Manufacturers' Association v United States* 268 US 563 (1925)

<sup>53</sup> Whish *supra* note 9, at pg 489

<sup>54</sup> *Gellhorn supra* note 5, at pg 231

<sup>55</sup> *Ibid.*, at pg 234

<sup>56</sup> *Maple flooring v United States* 268 US 563 (1925)

<sup>57</sup> *US V Container Corp. of America*, 393 US 333,1969

supplies information to customers, Article 81(1) would not be infringed. In *Wood Pulp*<sup>58</sup> the ECJ ruled that the fact that pulp producers announced price rises to users before those rises came into effect was not, in itself, sufficient to constitute an infringement of Article 81(1). On the other hand exchanges of information which were not obligatory in a contractual sense could amount to a 'gentleman's agreement' or a concerted practice and so be caught by Article 81(1) where they have the effect of restricting or distorting competition. The commission in making its decision will consider the structure of the market in which the information agreement is operable and the more concentrated the market the more likely the commission is to hold that competition is being restricted. The commission will also consider the type of information that is being exchanged.<sup>59</sup> In *Re VNP and COBELPA*<sup>60</sup> the commission said that whilst it was permissible to exchange general statistical information which could give a picture of aggregate sales and output in an industry without identifying individual companies, it would be contrary to Article 81(1) for firms to provide competitors with detailed information about matters which would normally be regarded as confidential.

## Boycotts

Boycotts or concerted refusal to deal occur through exclusionary agreements through which several competing firms agree to deal with or isolate another firm. Under the US law if one's refusal to deal with another is the result of an agreement with others who also agree not to deal with a particular party, a violation of Section 1 of the Sherman Act may arise. In the case of *Eastern States Retail Lumber Dealers Association v United States*<sup>61</sup>, where a large number of retail lumber dealers organized themselves into associations, one of the aims of which was to stop wholesaler lumber companies from selling directly to the consumer, the court noted that although there was no agreement among retailers that they would refrain from dealing with a blacklisted wholesaler and there was no penalty if they did, "he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply

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<sup>58</sup> Wood pulp [1993] 4 CMLR 407

<sup>59</sup> Whish *supra* note 9, at pg 491

<sup>60</sup> Re VNP and COBELPA OJ [1977]L 242/10, [1977 2 CMLR D28

<sup>61</sup> Eastern States v Retail Lumber dealers' Association v United States 234, U.S. 600 (1914)

the trade which they regard as their own". The court held that there was a violation of the Sherman Act.

### **Tactic collusion**

Tacit collusion consists of what the treaty of Rome refers to as concerted practices. It is a very subtle form of collusion. However when collusion is discovered antitrust laws are applied to it. Two cases will illustrate the treatment of tacit collusion. In the Interstate Circuit<sup>62</sup> 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 may 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. The court said such evidence "was not a prerequisite to an unlawful conspiracy. It was enough 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 case*<sup>63</sup>. In this case 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. There was no evidence of agreement among the other companies though the court found the plan to be illegal and consequently holding that each of them must be "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 wasn't a whit of evidence that a common plan had been contemplated or proposed," the court relied on admittedly wholly circumstantial evidence to convict American Tobacco<sup>64</sup>.

### **Collective dominance**

Article 82 of the Treaty of Rome prohibits collective dominance. In the narrow view collective dominance refers to the market power of undertakings within the same corporate group while in the wide legally and economically independent firms would be considered to hold a collective dominant

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<sup>62</sup> Interstate Circuit Co. v U.S., 306 US 208,226

<sup>63</sup> US v Masonite Corp., 316 US 265, 275

<sup>64</sup> American Tobacco v US, 328 US 78,810

position.<sup>65</sup> Important light is shed on the meaning of collective dominance by the judgement of the ECJ in *Compagnie Maritime Belge Transports v Commission*<sup>66</sup>, an Appeal from CFI's judgement upholding the commission's decision in Cewal<sup>67</sup> that there had been an infringement of Article 82. The ECJ in its judgement states that collective dominance implies that a dominant position may be held by two or more economic entities legally independent of each other provided that from an economic point of view 'they present themselves or act together on a particular market as a collective entity.' The ECJ further states that, in order to establish collective dominance, it is necessary to examine 'the economic links or factors which give rise to a connection between the undertakings concerned and whether the economic links that exist enable them to act independently of their competitors.

For there to be an infringement of Article 82 there has to be a conduct which amounts to an abuse.<sup>68</sup>

### **Joint ventures**

Joint venture is created by two or more firms. When set up by competing firms, they obviously make for common interests and may reduce competition in all the firm's activities. In the US the economic criteria is examined and if found antitrust, action is taken. Horizontal joint ventures have been found illegal whenever there is a cartel behaviour or boycotts and exclusion of competitors. In *Timken Roller Bearing Co. v United States*<sup>69</sup> the court refused to accept the defendant's "joint venture" analysis of its agreement with a British manufacturer of roller bearings. Looking at all the provisions of the arrangement which included worldwide price agreements and market allocation covenants the court concluded that "prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Sherman Act." This analysis was also applied in *United States v Sealy*<sup>70</sup> where a group of small manufacturers of small mattresses created the "Sealy" trademark and sought to exploit it through joint advertising. While the Court appeared to accept the combination as a legitimate collaborative effort, it also ruled that the horizontal territorial divisions, whereby each participant agreed to

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<sup>65</sup> Whish *supra* note 9, at pg 520

<sup>66</sup> *Campagne Maritime Belge Transports v Commission* [2000] 4 CMLR 1076

<sup>67</sup> Cewal OJ[1993] L 34/20, [1995] 5 CMLR 273

<sup>68</sup> Whish *supra* note 9, at pg 526

<sup>69</sup> *Timken Roller Bearing Co. v United States*, 341 US 593 (1951)

<sup>70</sup> *United States v Sealy Inc.*, 388 U.S. 350 (1967)

confine its sales to an assigned area were illegal under the Timken. From the ruling we can see that the court declined to weigh the benefits of the arrangement against its harms in competition. However since the 1970s the Supreme Court has adopted an economically oriented approach. It is far less willing to approve the application of per se approach and rely solely on a rule of reason.<sup>71</sup> Under the EU law Article 81(1) applies both to agreements that have as their aim the restriction of competition and to agreements that have this effect. The relevance of the nature of agreement to its assessment under Article 81(1) is that some forms of cooperation are entered into between undertakings that are unlikely to affect the marketing of goods or services. In *Screensport/EBU Members*<sup>72</sup> the commission considered that a joint venture to establish a transnational satellite sports channel covering most of Western Europe infringed Article 81(1) partly because of its foreclosure effects on third parties; thus individual exemption was refused.

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 joint-venture.

#### **4.2.2. Vertical Restraints**

Vertical agreements are agreements between persons at different (vertical) levels of production, distribution or supply cycle or agreements between a supplier and one to whom he supplies.<sup>73</sup>

Vertical agreements are divided into two main groups, that is restrictions on distribution and exclusionary practice as discussed below:-

##### **4.2.2.1. Restriction on Distribution**

###### **Resale Price Maintenance (RPM)**

This involves firms that are vertically integrated agreeing not to sell goods or services below a certain price or above a certain price. Consequently there are two types of RPM:-

- a) Maximum RPM which means that the buyer will not sell above a certain price.

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<sup>71</sup> Gellhorn *supra* note 5, at pg 255

<sup>72</sup> *Screensport/EBU Members* OJ [1992]5CMLR 273

<sup>73</sup> Vyas *supra* note 7, at pg 125

b) Minimum RPM which means that the buyer will not sell below a certain price.

Maximum RPM is not a subject of competition law but minimum RPM is.

Under the Kenyan law RPM are covered under section 9(d) of the RTPA which provides that refusal or discrimination in selling of goods or supply of services on the ground that the buyer is likely to resell or supply of services or has in the past sold or supplied goods or services, at a lower price than a specified amount or at other price proposed or recommended or charged by any other person or trade association; or that the buyer refuses to impose on any third person the condition that the resale or supply may not take place at a price lower than a specified amount or lower than some other price proposed or recommended or charged by any other person or trade association are restrictive trade practices.

Under the U.S.A law an agreement between a seller and its buyer (in absence of an antitrust exemption) fixing the price at which the buyer may resell the product is a per se violation of Section 1 of the Sherman Act because such an agreement forecloses price competition among buyers on the resale of the product<sup>74</sup> In the leading case of *Dr Miles Medical Co. v John D. Park & Sons Co.*,<sup>75</sup> a manufacturer of a proprietary medicine sued a wholesaler on the ground that the latter obtained the plaintiff's medicine at cut prices by inducing others to breach their price agreement with Dr Miles. In turning aside the manufacturer's effort to enjoin breaches of his established resale prices, the court ruled that a manufacturer who sells his medicine to a wholesaler is not entitled to restrict its resale through interference with the purchaser's pricing decisions.

Under the EU law, imposition on distributors and retailers of minimum or fixed resale prices is held to infringe Article 81(1) as such agreements have the effect of restricting competition. In the case of *Pronuptia de Paris v Schillgalis*<sup>76</sup> the ECJ held that resale price maintenance in the context of a franchising network infringed Article 81(1) and was not entitled to exemption under Article 81(3). The court however did not have a problem with recommended prices.

### **Consignments and Distribution through agents**

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<sup>74</sup> L. A. Sullivan, *Handbook of the Law of Antitrust*. (Minnesota, West Publishing Co., 1977) pg 377

<sup>75</sup> *Dr Miles Medical Co. v John D. Park & Sons Co.*, 220 US 373 (1911)

<sup>76</sup> *Pronuptia de Paris v Schillgalis* [1986] 1 CMLR 414

Here the issue of principal-agent relationship arises. Paragraph 12 of the EU Commission's Guidelines defines agency agreements as those that cover a situation where one person negotiates and/ or concludes contracts on behalf of another for the purchase of goods or services, by or from the principal<sup>77</sup>. If there is an agency arrangement the manufacturer does not pass title. He is still the owner of the goods and the agent is thus selling on his behalf. The question that arises is whether the vertical rule in *Dr Miles* applies against price fixing applied where the retailer was the manufacturer's agent and, instead of taking title to the product received them on consignment. In the case of *United States v General Electric Co.*<sup>78</sup>, the court answered that where it is clear that the arrangement is legitimate and that the manufacturer both retains title and bears substantial risks of ownership, the antitrust laws do not prevent him from dictating the terms of sale including retail prices; and in this circumstance price fixing is not illegal.

Under the EU law, where an agent which simply negotiates on behalf of a principal is appointed it is treated as forming part of the business organization of the principal and consequently the agreement between the parties is an internal matter of the economic entity and thus the agreement will normally not be subject to competition law. Paragraph 13 of the Commission's Guidelines states that in the case of genuine agency agreements, Article 81(1) does not apply to the obligations imposed on the agent; however 'non-genuine' agency agreements may be caught.<sup>79</sup>

### **Territorial and customer restriction**

This is where a supplier agrees to sell its products to a distributor who will resell only to a particular class of customers. Under the EU law it was argued in *Grundig v Commission*<sup>80</sup> that Article 81(1) should not apply to vertical agreements at all, and that it was simply concerned with horizontal arrangements between independent firms. The ECJ rejected this argument and proceeded to lay down an exclusive agreement conferring absolute territorial protection upon a distributor was caught by Article 81(1) and could not be granted an exemption under Article 81(3).

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<sup>77</sup> Whish *supra* note 9, at pg 585

<sup>78</sup> *United States v General Electric Co.*, 272 US 476 (1926)

<sup>79</sup> Whish *supra* note 9, at pg 587

<sup>80</sup> *Costen Grundig v Commission* [1966] CMLR 418

Under the US law Judicial concern with the “costs” of such output levels sharply limited vertical restraints on distribution until, the court ruled in *United States v Schwinn*<sup>81</sup> that territorial or customer restrictions on the resale of goods were per se illegal. The court in this case examined on its merits Schwinn’s scheme for distributing its bicycles. Schwinn, once the leading manufacturer of bicycles in the U.S had seen its market share almost halved in the preceding decade as competitors selling to sears and other mass merchandisers captured an increasing share of the market. Schwinn distributed most of its bicycles through sale to wholesale distributors who resold them to franchised distributors and under the “schwinn plan”. The Schwinn plan was a consignment arrangement whereby the bicycles were shipped directly to franchised retailers. Distributors and retailers were restricted as to the class of persons to whom they could sell whereof distributors could sell only to retailers within their exclusive territory and retailers could sell only to ultimate customers and not to other franchised retailers. In this case the court announced a partial per se test namely that where the manufacturer sells the product subject to territorial or other restrictions upon resale, he commits a violation of the Sherman Act. However where title, dominion and risk are retained by the manufacturer and the distributor takes the goods on consignment, the territorial restriction will only violate section 1 if the restraint on competition is unreasonable.<sup>82</sup>

#### **4.2.2.2. Exclusionary Practices**

##### **Refusals to deal**

The term refers to a situation in which a firm refuses to sell to certain customers. Under the Kenyan law 8 (1) of the RTPA applies to refusal or discrimination in supply as a restrictive trade practice. According to the Act, ‘discrimination’ means the act of a person in selling or supplying, goods or services to another person, whether for use in production, for resale or final consumption, under conditions less favourable to that person than those on which he sells or supplies or offers to sell or supply substantially similar goods or services to third persons. Section 8(3) provides that a person commits a restrictive trade when being a manufacturer or wholesaler or retailer or supplier of

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<sup>81</sup> *United States v Schwinn Co.*, 388 US 365

<sup>82</sup> Gellhorn *supra* note 5, at pg 300

services refuses to sell or supply or discriminates in selling or supplying goods. Under section 9(a) refusal to sell or supply or discrimination in selling or supplying intermediate goods to down stream processors is a restrictive trade practice.<sup>83</sup>

In the US, the leading case is *United States v Colgate & Co.*<sup>84</sup> where bound by the trial court's interpretation of a criminal indictment which charged Colgate only with refusing to sell to a dealer though not pursuant to a resale price agreement, the court ruled that a manufacturer's mere advance announcement that he would not sell to price-cutters was not a violation of the Sherman Act. The rule in this case is limited to those situations where the person refusing to sell does not have a "purpose to create or maintain a monopoly".<sup>85</sup>

### **Tying Arrangements**

A tie exists when a seller who has a product which buyers want, refuses to sell it alone and insists that any buyer who wants it must also purchase another product. To exercise this, the seller must have monopoly power or economic power since if he doesn't the buyers would go to the competitors.

Under the Kenyan law, section 9 (b) of the RTPA declares that refusal to supply or discrimination in selling or supplying goods or services except on the condition that the buyer also purchases other goods or services from the seller or supplier or from a third person is a restrictive trade practice.

In the US, initial efforts to exercise legal control over tie-ins involved patent laws and efforts by the owner of a patented product to assert a right to tie a second, usually unpatented product. In the case of *Motion picture patents Co. v Universal film*<sup>86</sup> the patentee of a motion picture projector sold it on the condition that it would be used only to project the films of the patentee. When a licensee used the projector to show other films the patentee sued for contributory infringement- invasion of the patentee's rights under the patent grant. In denying the patentee's claim for infringement, the court ruled that the patent grant did not give the patentee the right to restrict the use of the machine to particular materials; the court expressed its concern with any attempt to extend the monopoly grant

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<sup>83</sup> Vyas supra note 1, at pg 29

<sup>84</sup> *United States v Colgate & Co.*, 250 U.S 300 (1919)

<sup>85</sup> Gellhorn supra note 5, at pg 310

<sup>86</sup> *Motion pictures patents Co. v Universal film Mfg Co.*, 243 U.S 502 (1917)

of the patent. The tying arrangement was condemned because the holder of a legal monopoly in one market was using that leverage to monopolize another market.

The reasoning was first applied to tying arrangements under section 3 of the Clayton Act which makes it unlawful to lease or sell goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, ... on the condition... that the lessee or purchaser thereof shall not use or deal in the goods... of a competitor(s) of the lessor or seller, where the effect of ... such condition..., may be to substantially lessen competition or tend to create a monopoly in any line of commerce.<sup>87</sup> Consequently in *International Business Machines v United States (IBM)*,<sup>88</sup> the two leading makers of business machines were enjoined from leasing their machines with the condition that their lessee purchase unpatented tabulating cards exclusively from the lessors. Since the machines of IBM and Remington Rand were the only ones in the market capable of performing mechanical tabulations and computations, without intervening manual operation, the court apparently concluded that the companies possessed monopoly power in the tying (business machine) market and that they were using this power to eliminate competition and to monopolize the manufacture and sale of tabulating cards. In this case the court was following a rule of reason approach in deciding whether a tie-in condition covered by section 3 adversely affected competition as it first considered whether the seller had power in tying product as well as the quantitative effect of the tie-in on sales in the tied market.

However a more rigorous legal standard was applied in *International Salt v United States*<sup>89</sup> where the court held that the lessees violated Section 3 of the Clayton Act. On reaching this finding the court relied on International salt's patents as establishing its market power in the tying product's (the machines') market and on the substantial dollar volume of business in the tied product which was foreclosed to competitors as establishing the requisite competitive effect. The defense that the condition was necessary was rejected.

Since the Clayton's application is limited to the sale or lease of commodities, tie-ins have also been judged under the Sherman Act standards, which for sometime seemed different. In *Times Picayune*

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<sup>87</sup> Gellhorn *supra* note 5, at pg 315

<sup>88</sup> *International Business Machines v United States*, 298 U.S. 131 (1936)

<sup>89</sup> *International Salt Co. v United States*, 332 U.S. 392 (1947)

*Publ. Co. v United States*<sup>90</sup> where a publisher of both a morning and evening newspapers faced competition from one other evening paper, the government challenged as a Sherman Act violation, the defendant's "unit plan" which required advertisers to take space in both morning and evening papers and not in either separately. While concluding that the defendant did not in fact occupy a "dominant" position in the tying product and thus could not have foreclosed advertising markets to competition the court also expressed the view that under the Sherman Act, the plaintiff must show both a monopolistic position in the tying product and that a substantial volume of commerce in the tied product was restrained. However the rule of reason approach to tie-ins under the Sherman Act seemed to have been short-lived and the courts seem to apply a per-se type rule<sup>91</sup>

Under the EU law, tying may infringe Article 82 where the supplier enjoys a dominant position. A vertical agreement imposing a tie may also infringe Article 81(1) where it has a 'single branding' effect in relation to the tied product.<sup>92</sup> Tying is less likely to be a problem if the customers possess buying power.

### **Exclusive dealing**

An exclusive dealing contract involves a commitment by a buyer to deal with only a particular seller. A manufacturer can also impose restrictions on their wholesalers or retailers that they will buy exclusively from them and will not buy from their competitors. The practice falls under the prohibitions of the antitrust laws because the supplier using them forecloses markets to suppliers of competing products. Under the Kenyan Law there is no particular provision dealing with exclusive dealing.

Under the EU law exclusive dealing is caught under Article 81(1) and as far as this article is concerned, the commission states that the market position of the supplier and its competitors is of major concern since the loss of intra-brand competition is problematic only if inter-brand competition is limited<sup>93</sup>.

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<sup>90</sup> *Times Picayune Publ. Co v United States*, 345 U.S 594 (1953)

<sup>91</sup> Gellhorn *supra* note 5, at pg 322

<sup>92</sup> Whish *supra* note 9, at pg 613

<sup>93</sup> *Ibid.*, at pg 605

Under the U.S law, exclusive dealing is covered under section 1 of the Sherman Act as well as section 3 of the Clayton Act. The leading case is *Standard Oil Co. of California v United States(standard stations)*,<sup>94</sup> where the largest seller of gasoline in seven western states made exclusive dealing contracts with independent stations constituting 16 percent of all retail outlets, whose sales involved almost 7 percent of all retail gas sales in the area. The court held that a violation of section 3 had been established because the agreements relating to 7 percent of retail sales created a potential clog on competition which was “foreclosed in a substantial share” of the market. Subsequent cases have reflected a retreat from this position although they have not expressly altered the rule of standard stations.<sup>95</sup>

### **4.3. Weakness of the Kenyan Law**

The definition of restrictive trade practices as provided by section 4 of the Act appears to be too awkward and intricate. The Act introduces certain new concepts such as reduction or elimination of “opportunities”. It is not clear why the concept of “opportunities” is introduced in place of the concept of competition which is well established<sup>96</sup>. Also we find that the Act’s intention is to regulate horizontal, vertical and unilateral restrictive trade practices. However it appears that the practices of tie-in (section 9 (b) and individual resale price maintenance (section 9 (d) are subject to regulation only if they are accompanied by refusal or discrimination in supply. These are restrictive trade practices on their own and such should be provided for.

In regard to trade practices such as predatory trade practices, collusive tendering and collusive bidding, the Act prohibits them as such and committal of these practices is an offence. However the Act is silent in respect of some restrictive trade practices such as exclusive dealings and purchasing arrangements and as demonstrated above they have the effect of foreclosing competition.

We also find that excessive powers are given to the Commissioner and the minister in regulation of restrictive trade practices and hence the possibility of abuse of such powers cannot be ruled out since there is no criteria to judge the alleged practices<sup>97</sup>.

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<sup>94</sup> *Standard Oil Co. of California v United States*, supra note 236

<sup>95</sup> Gellhorn supra note 5, at pg 332

<sup>96</sup> Vyas supra note 1, at pg 31

<sup>97</sup> *Ibid.*, at pg 32

## **5.0 CHAPTER FIVE: INSTITUTIONS**

### **5.1. Introduction**

Under the Kenyan law the RTPA is administered through an unusual blend of political, administrative and judicial structures.<sup>1</sup> The competition cases are handled by four main institutions which include Legislature (Parliament), Office of the Minister of Finance, the office of the Commissioner for monopolies and Prices (hereinafter referred to as Commissioner), the Restrictive Trade Practices Tribunal and the High Court. Each of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.

### **5.2. Institutions under the Kenyan Law**

#### **Legislature (Parliament)**

Parliament is the principal custodian of public interest in Kenya and it is empowered to create both the institutional and legislative frameworks for the promotion and protection of public interest. In the sphere of competition, it is parliament that enacted the current legal instrument that is, the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 of the Laws of Kenya. Since the market is dynamic, the law that regulates its functioning must be reviewed from time to time in order to keep up with the market trends. Therefore 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 in order to further the economic interests of the public as well as the efficiency of business.

#### **Office of the Minister of Finance**

The Minister for Finance has the overall responsibility for competition policy in Kenya and has the powers to make orders in matters relating to restrictive trade practices and concentration of economic power, and to make orders authorizing mergers and takeovers. The Minister also has powers to fix the maximum or minimum price charge in regard to sale of any goods or rendering of any service, to prescribe the percentage fixed goods; and to determine the cost of any goods or

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<sup>1</sup> Yash Vyas, "Competition Law of Kenya: Imperfections and Weaknesses" (2000) Vol 13 (1 & 2) Lesotho L.J., pg 15

rendering of any service under sections 35, 36 and 37 of the Act. Orders made in these regards are not appealable to the Restrictive Trade Practices Tribunal nor to the High Court, however by virtue of section 38 they must be laid before Parliament as soon as may be possible after they are made.<sup>2</sup> Section (3) (2) of the RTPA subjects the Commissioner to the control of the Minister and he obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister on the other hand is heavily dependent upon 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.

### **Office of the Commissioner for Monopolies and Prices**

The Commissioner's appointment is provided for under section 3 (1) of the RTPA. The law does not however provide the authority that is responsible for the appointment of the Commissioner but once appointed he is independent and has a range of statutory duties and responsibilities. He heads the Monopolies and Prices department of the Treasury and he acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever the need arises. The commissioner also has the primary responsibility of conducting investigations into all possible situations of anti-competitive practices. Such investigations are normally carried out by the staff in the Monopolies and Prices Commission department. This entails responding to complaints by a firm's competitors or customer as well as carrying out informal research into markets where competition problems are thought or alleged to be present. Further the Commissioner seeks to maximize consumer welfare in the long term as well as protect the interests of vulnerable consumers by:-

- Promoting competitive and responsible supply
- Protecting them by preventing abuse
- Empowering consumers through information and redress.

However it is worth noting that the Commissioner has no powers to help individual consumers in their private disputes with traders.

### **The Restrictive Trade Practices Tribunal (RTPT)**

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<sup>2</sup> Ibid

The RTPT which is a quasi-judicial authority is normally appointed every other five years since eighth February 1991, in pursuant to Section 64(1) of the RTPA. Although the Tribunal is considered to be an independent body, it falls administratively under the Ministry of Finance. The Tribunal 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 Tribunal have a five year secure term of office and may be appointed for other terms of office at the expiry of the five years.

Once constituted by the Minister for finance, the Tribunal is absolutely independent of the office of the Commissioner for Monopolies and Prices. The main function of the tribunal is to arbitrate competition policy disputes resulting from ministerial orders made on the recommendation of the Commissioner. The Tribunal has the powers to overturn, modify confirm and/or refer back to the Minister orders appealed against by aggrieved parties.

Orders and decisions of the Tribunal can only be appealed to the High Court of Kenya and such appeals must be within 30 days after the communication of the Tribunal's decisions/ orders to the concerned parties.

### **The High Court of Kenya**

All appellants to the RTPT decisions pursuant to the provisions of sections 20(1), 251 and 31(1) and in regard to the provisions of sections 18(1), 24(1) and 31(1) respectively who are dissatisfied with the decision of the RTPT may appeal to the High Court of Kenya within thirty days from the date on which a notice of that decision was served on them and the decision of the High Court is final.

### **5.3. Institutions under the United States Law**

Under the US law action against alleged violation 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 Act and the FTC on the Federal Trade Commission Act. It's also concerned with concentrates on collusion, restraints, monopolization and mergers. Its suits are filed in federal district courts.

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 but the Clayton Act, the federal Trade Commission Act, and the various amendments to these statutes enjoy

most of the FTC's attention. Since 1941 the FTC and the Justice department had by 1991 together filed nearly 2,800 cases.<sup>3</sup> Private persons or firms 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 succeed in court. The Justice department and the FTC do not obtain treble damages but can impose substantial penalties. They can force a firm to break up through dissolutions or divestitures, and criminal actions can be filed by the Justice department for violations of the Sherman Act. A guilty finding can also result in fines and/or prison sentence.

### **Institutions under the European Union Law**

Under the EU law there are various institutions which deal with institutions and they include:-

#### **Council of Ministers**

The Council of ministers is the supreme legislative body of the European Community and often it doesn't involve itself with competition policy but acting on powers conferred by Article 82 and 308 EC, the Council has adopted several major pieces of legislation, including the ECRM. Also it has delegated important powers to the Commission through regulations to enforce the competition rules in the treaty, Regulation 17/62 specifically was replaced with effect from 1<sup>st</sup> May 2004 by the Modernization Regulation and it has given the Commission power to grant block exemptions in respect of agreements caught by Article 81 (1) but which satisfy the criteria of Article 81 (3)<sup>4</sup>

#### **European Commission**

The European Community in Brussels is at the core of the development of Community competition policy and is responsible for fact-finding, taking action against infringements of the law, imposing penalties and granting individual exemptions under Article 81(3)<sup>5</sup> The commission is also involved in the International aspects of competition law including co-operation with competition authorities in other jurisdictions such as the US.

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<sup>3</sup> Lawrence J. White, Private Antitrust Litigation. (Cambridge, Mass: MIT Press, 1988), pg 118

<sup>4</sup> R. Whish, Competition Law. (London, Sweet & Maxwell, 5<sup>th</sup> ed., 2003) pg 53

<sup>5</sup> Ibid

The Directorate General of the Commission for competition policy (DG COMP) is specifically responsible for competition policy and has a Director General and three Deputy Directors General. There is also a Chief competition economist, who is directly answerable to the Director General. DG COMP is divided into nine administrative units and its composition is as set out in the diagram below:-<sup>6</sup>

Following the modernization Regulation, the Commission shares the competence to enforce Articles 81 and 82 with the national competition authorities of the member states and national courts.

### **Court of First Instance**

Actions against the Commission in competition cases are generally brought in the first instance before the CFI member states actions are taken to the ECJ as occurred in the case of *France v Commission*<sup>7</sup> where it was established inter alia, that the ECMR is capable of application to collective dominance. If at any point similar matters are before both the CFI and ECJ simultaneously then CFI will suspend its proceedings pending the judgement of the ECJ as was the case in **Irish Ice-cream war**<sup>8</sup> where the CFI stayed the appeal of Van den Bergh foods Ltd against the commission's decision finding infringement of Articles 81 and 82 pending the outcome of the Article 234 reference in the case of **Masterfoods Ltd v HB ice-cream**<sup>9</sup>

### **European Court of Justice (ECJ)**

The ECJ hears appeals from the CFI on points of law only. It has been strict about what is meant by an appeal on a point of law, and it will not be drawn into factual disputes.<sup>10</sup> It also deals with points of law referred to it by national courts under Article 234 EC.

The ECJ is assisted by an Advocate General, drawn from a panel of six, who delivers an opinion on each case that comes before it, and although the opinion is not binding the ECJ frequently follows it.

### **Advisory Committee on Restrictive Practices and Dominant Positions**

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<sup>6</sup> Ibid., at pg 54

<sup>7</sup> *France v Commission* [1998] 4 CMLR 829

<sup>8</sup> *Masterfoods Ltd & Valley Ice cream Ltd v Van den Berg foods Ltd* [1998] 5 CMLR 536

<sup>9</sup> *Masterfoods Ltd v HB Ice-cream* [2001] 4 CMLR 449

<sup>10</sup> Whish supra note 4, at pg 56

It comprises of officials from each member States and they attend oral hearings, consider draft decisions of the Commission and give their comments. They also discuss draft legislation and the development of policy generally.

### **Advisory Committee on Concentrations**

It consists of officials from each member state who attend oral hearings and must be consulted on draft decisions of the Commission under the ECMR.

### **National Courts**

They are increasingly asked to apply the EC Competition rules, which are directly applicable and may be invoked by individuals. The role of national courts is likely to be enhanced as a result of the abolition of the system of notification of agreements to the Commission for individual exemption by the Modernization Regulation.

### **Parliament and ECOSOC**

The European Parliament's standing Committee on Economic and Monetary matters and the Economic and social Committee (ECOSOC) are consulted on matters of competition policy and may have influence in the legislative process or in persuading the Commission to take action in relation to a particular issue.<sup>11</sup>

## **5.4. Weaknesses of the Kenyan Law**

In the hierarchy of the Kenyan institutions it is possible to argue that the Commissioner is not a separate institution under the Act since the Monopolies and Prices Commissioner is subject to the control of the Minister. This leads to speculation about how independent is the Commissioner in making decisions. The Act also does not provide for any qualifications for a person to be appointed as a Commissioner or as an officer assisting him in the administration and such it is possible to have an incompetent person occupying the all important seat.

In regard to the tribunal we find that the Act does not provide for any qualifications for a person to be appointed as a member of the tribunal. The members of the tribunal are also appointed by the

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<sup>11</sup> Ibid., at pg 57

Minister and administratively fall under the Ministry of Finance and thus it is a matter of conjecture how far the decisions of the tribunal can be independent.<sup>12</sup> The tribunal's role is also secondary as the powers to determine economic matters rests with the Commissioner who is a statutory officer in the Ministry of Finance and this thwarts the purpose of setting up a Tribunal in the first place.

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<sup>12</sup> Vyas supra note 1, at pg 196

## **6.0 CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS**

### **6.1. Conclusions**

It is very clear that all the three jurisdictions which have been examined by this study profess the need to promote competition both within their national borders as well as internationally as each of them have promulgated antitrust laws in their localities. The oldest antitrust measures were enacted by the USA and as can be seen from the various cases the momentum has not weathered down. There have been various amendments to the law and judicial activism evidenced in the American courts has enabled the antitrust laws to develop.

Under the EU, the main antitrust laws encompassed in Article 81 and 82 of the Treaty of Rome have not been amended over the years. However like the USA system it has employed judicial activism to spread to the required areas and thus enabling the development of the antitrust law. The Commission through authority delegated by the council of ministers has had quasi judicial powers.

As has been pointed out by this study the Kenyan law suffers from various imperfections which make its enforcement not only difficult but also time consuming. The RTP Act adopts a form based approach and instead of embracing activities carried on by undertakings according to economic impact it is applicable to their technical form. When conduct which has no impact on competition but which happens to fall within one or more of the provisions of the Act is covered it tends to divert attention away from substantive competition issues.

The study has also demonstrated that quite a number of the provisions of the Act are vague and ambiguous. Sections 2 and 35 where “monopoly undertaking” is defined, the use of the word ‘or’ after dominant undertaking indicates that a monopoly undertaking may be either a dominant undertaking or an undertaking described in the latter part of the definition. The study has also demonstrated that the Act does not define what a dominant undertaking is and thus enforcement agencies and private parties will be involved in a guessing match as to which undertakings are covered by the term dominant undertaking in order to attract enforcement attention. Such ambiguities make the law unpredictable and consequently difficult to predict what is legal or illegal.

The Act also suffers from deficiencies. The study has for example pointed out that the Act applies to horizontal mergers and takeovers only. Vertical and conglomerate mergers and takeovers are not

covered by the Act and as the study has discussed they can have several adverse effects on competition. The Act also suffers from deficiencies in regard to provisions dealing with concentration of economic power. By virtue of S23 the Minister is empowered to control unwarranted concentration of economic power only in regard to a chain of distributing units. They do not apply to a distributing enterprise not a part of a chain even if its sales exceed one-third of the relevant market. One thus fails to understand the rationale behind excluding a single manufacturing and distributing unit having a market share of more than one third of a particular product or good even though they have the potential of having anti-competitive effect.

The Act also applies to trivial matters as provisions in regard to concentration of economic power apply to vertically integrated firms irrespective of their market share, total turn over or total assets. Also when it comes to the issue of mergers and takeovers they are subject to the authorizing order of the Minister irrespective of the market share, total assets or turnover of the resulting firm.

The study has pointed out that the Restrictive trade practices enumerated under the Act fall under three categories. Predatory trade practices, collusive tendering and collusive bidding are per se illegal. Restrictive trading arrangements which are caught by section 6 (1) are not enforceable in legal proceedings and in regard to contract law such practices are void but not illegal. The rest of restrictive trade practices including activities of trade associations are per se restrictive trade practices and are neither illegal nor void. Consequently the last two types of practices are not illegal but an offence will be committed when an order made in relation to them is contravened. However no restrictive trade practice can be justified on any ground whatsoever.<sup>1</sup> This categorisation does not make sense as in practice it has caused confusion even in enforcement agencies.

Under the Kenyan regime we find that the law has not developed much as there hasn't been much going on in terms of litigation in this area and in fact some institutions can be said for all intents and purposes to be redundant; for example when we look at the Tribunal it has only dealt with one case since its inception in 1991 and for the High court not even a single appeal has gone to it<sup>2</sup>. The system does not also allow the highest court in the land to participate in the development of the law. This is an undesirable position especially when contrasted with the other two regimes where the

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<sup>1</sup> Yash Vyas, "Competition Law of Kenya: Imperfections and weaknesses" (2000) Vol 13 (1& 2) Lesotho L.J., pg 192

<sup>2</sup> Ibid

Supreme Court (in the case of USA) and the European court of Justice (in the case of EU) have made great contributions to the antitrust laws of their jurisdictions sometimes through sheer judicial activism.

There is also a conflict of loyalties in the appointment of the Restrictive Trade Tribunal as members are appointed by the minister and yet aggrieved persons appeal to the Tribunal against the minister's orders. The Tribunal is also empowered to give the minister directions and thus it is only natural to speculate how far the decisions of the tribunal can be independent. The members of the tribunal can also be intimidated as they are paid on an ad hoc basis. The remuneration is in the form of subsistence and travelling allowances which is determined by the minister. This is clearly against the rules of natural justice that require an adjudicating body to be free from bias. It is also a ground for corruption to thrive.

The Kenyan position is also peculiar when compared to the other two jurisdictions as it is the only regime where citizens are denied recourse to the antitrust agency, to the Tribunal and to the High court unless they are the parties being investigated or are directly affected by the minister's order.

Kenyan antitrust agency lacks autonomy. When for example we look at the area of restrictive trade practices, the complainant writes to the minister through the commissioner yet it is the commissioner, who is responsible for the control and management of the Monopolies and prices department of the treasury<sup>3</sup>. Thus the responsibility given with the right hand is taken away with the left hand. However the law expressly grants the commissioner ex proprio motu powers to initiate investigations.

In the case of control of concentration of economic power, the Commissioner only investigates an economic sector after receiving directions from the minister and thus he is deprived of ex proprio motu powers. When we look at the area of mergers, the Kenyan system prohibits unauthorized mergers per se. This is a system that may be abused especially when businessmen are subjected to negative bureaucracy and in our admittedly corrupt environment it accords unscrupulous civil servants a rich hunting ground for corrupt deals. Also we find that the Kenyan law in some areas promotes whimsical tendencies; section 16 of the Act allows the Commissioner to authorize any

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<sup>3</sup> Restrictive Trade Practices Monopolies and Price Control Act Cap 504 S 3(2)

person in writing to conduct all or any portion of any hearing on his behalf. The calibre of the person is not defined and hence it can be any person even an uneducated successful businessman.

It seems as though too many powers have been bestowed upon the Commissioner and the Minister for the regulation and control of restrictive trade practices, concentration of economic power and mergers and takeovers and hence the arbitrary use of such powers cannot be ruled out. As has been seen from the study, the Kenyan law is also unpredictable and uncertain as the Act suffers from various imperfections which include ambiguity, complexity, deficiency as well as inconsistency. Such imperfections are a fertile ground for unnecessary litigation as well as serve as an incentive to undertakings to prolong proceedings for long and also provide perfect opportunity for corruption at the enforcement agency level.<sup>4</sup>

## **6.2. Recommendations**

As seen from the study, the Kenyan Antitrust system has a lot to learn from the well established USA and EU systems. Under the two jurisdictions the antitrust agencies have been accorded independence and autonomy and Kenya should borrow a leaf and make her institutions independent as well as autonomous. They should be reorganized so that they can be independent of the political set up.

Various weaknesses of the institutions established under the Act have been pointed out by the study and their reorganisation has been suggested. The institutions must be independent of the political set up. The Tribunal should be given the primary role to investigate, adjudicate and make final orders. We have also seen that it operates on an ad hoc basis; it should be made permanent by law and its members adequately remunerated and thus discard the notion of receiving only subsistence and travelling allowances. The Tribunal should also have rules that govern its procedure clearly spelt out as it is not proper that the Minister, whose orders are appealed in the Tribunal should make rules on how appeals against his orders will be determined. The Commissioner or the Director of investigations should be an officer of the tribunal in order to assist it in investigations and institution of proceedings before it.

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<sup>4</sup> Vyas, supra note 1, at pg 197

Under the USA and EU jurisdictions, antitrust cases reach the highest court. The courts handle antitrust matters and have consequently contributed to the development of the antitrust law of the two systems. In Kenya, even though no case has reached the High court so far it is necessary to have provisions for antitrust appeals to be heard by the highest court that is Court of Appeal.

In regard to mergers, we have seen that the Act prohibits unauthorized mergers per se. This situation subjects businessmen to unnecessary bureaucracy especially when the intended mergers are de minimis. A minimum aggregate market share should be determined and thus all mergers and takeovers which are below the set threshold should be exempted from the authorization order required. The Act should also not apply to trivial matters as this is likely to bog the enforcement agencies with too much trash and thus prevent them from investigating more important issues.<sup>5</sup> The dominant position of a firm should not be condemned as such under the new legislation, but only where there is subsequent abuse of such position that is, where the behaviour of an undertaking in a dominant position is likely to influence the structure of the market where due to its presence the level of competition is weakened.

As has been demonstrated by this study the RTPA has numerous weaknesses which impact negatively on its effectiveness and because of these imperfections amendments to the existing provisions need to be redrafted. It is therefore vital that the existing law be replaced by a new legislation.

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<sup>5</sup> Ibid., at pg 191

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