

THE KENYAN LAW ON MERGERS AND
TAKEOVERS: IN SEARCH OF GROWTH

A DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT OF THE BACHELOR OF LAWS
DEGREE

BY

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DEDICATION

This dissertation is dedicated to my father, Joseph Maingi, for all the love, patience and time invested in me over the years. I can never thank you enough.

This is also dedicated to the rest of my family: Susan, Andrew and Pauline.

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TABLE OF STATUTES

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6. CONTINENTAL CAN V. COMMISSION EC COMMISSION DECISION 72/21
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10. POLLOCK AND RILEY, INC V. PEARL BREWING CO 498 F. 2d 1240
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11. SHV CHEVRON OIL EUROPE INC EC COMMISSION DECISION 75/95
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12. STANDARD OIL CO OF NEW JERSEY V. US 221 U.S. 1
13. UNITED STATES V. COLUMBIA STEEL CO 334 US 495 535-536 (1948)

INTRODUCTION

Statement of the problem

The Law of Mergers Takeover and Amalgamations in Kenya is contained in The Restrictive Trade Practices, Monopolies and Price Control Act¹ (hereinafter The Act). The preamble of the Act states that the purpose of the act is "to encourage competition in the economy by prohibiting restrictive trade practices controlling monopolies and concentration of economic power and prices"

This statute was enacted to effect Kenyas anti-monopoly policy that is meant to preserve a system of competition and economic freedom and is not only a means of placing legal restrictions on economic power but is also directed towards consumer protection and towards achieving certain economic objectives both macro and micro such as better all round performance in terms of low cost, low prices, better quality technological improvements, conservation of resources, import substitution, employment creation and balanced rural urban development among others. All Anti-monopoly law or Competition law is based on the Theory of competition. According to neo-classical economic theory consumer welfare is maximised in conditions of perfect competition². Under perfect competition economic resources are allocated to goods and service most efficiently in the quantities which the consumers wish (allocative efficiency). Other benefits of perfect competition are that prices at which a good or service is sold never rises above the marginal cost of production and also that competitors will strive to produce new products to capture or maintain their market share.

This is opposed to the conditions that exist in a monopoly market. The monopolist is in a position to affect the market price since he is responsible for all the output he will be able to increase price through reducing the volume of his output. The less output will result in there being less goods on the market. There thus is allocative inefficiency as the resources of the society are not distributed in the most efficient way possible. A monopolist is also x-inefficient ie he does not produce goods and services at the lowest economic cost. X-inefficiency is manifested by general slackness in production and use of outdated production processes. The monopolist may not also feel the need to innovate his products or production process. It can also be argued that as a monopolist is a price maker wealth is transferred from the consumer to him. This happens mostly when he is able to discriminate between what prices he charges to his customers³.

Therefore it can be said that the objective of Competition law or Anti-monopoly law is to promote competition so that the country's economy can benefit from the advantages accruing to a perfect competitor. This was expressed succinctly thus,

"The purpose of regulatory policy, in the protection which it is designed to attend the consumer is to stimulate and substitute the effects of competition and give the consumer the benefits which he would derive from a system of competition"⁴.

In a developing country like Kenya the law of competition complements the development process.

This development function of competition law is advocated by Joseph Spengler⁵ when he notes,

"Competition has been represented as a social process operating in a non-static economy and there making for two not always wholly compatible growth favouring outcomes:

(1) Optimal marginal equivalences, and (2) development-fostering changes. Development proceeds nicely "ceteris paribus" when competition is such as to make for both these effects, in part because growth consequent upon outcome (2) offsets harm consequent upon failure to approximate outcome(1).

This development function of competition law was echoed by the Commissioner of Monopolies and Prices where during a workshop held in 1990 she stated,

"... our law does not only deal with competition policy, but also covers other policy including export, industrial policy etc. This I believe does not surprise you if account is taken of our economic circumstances and level of development.... any policy instrument at this stage of our economic development should aim at achieving as many objectives as possible in our country's development process."

The Commissioner stated that competition law should lead to:

- (a) optimum use of national resources so that the scarce resources available to the country are put to the best use.

- (b) creation of employment opportunities due to the existence of large, medium and small business enterprises in a climate of fair and free competition.
- (c) increased participation of local businesses in the economy
- (d) trade and public liberalization
- (e) the protection of both consumers and producers alike especially those producers engaged in small scale enterprises
- (f) fair income distribution
- (g) general price stability
- (h) economic growth

Government regulation of the market is premised on the realisation that a free capitalistic market tends naturally towards monopoly with the existing firms trying to stifle all their rivals. This has been noted by Ben W Lewis⁶ thus;

"There is something quite special about government regulation of the public utility type: This is the way we have when we are really keyed of about economizing, when we stop acquiescing and "going along", when we feel quite certain that, for reasons we can identify, the processes of the free market cannot be made satisfactorily to perform the economizing job we want done and, hence, that we must perform the economizing functions by specifically designed laws, agencies and measures".

As has already been stated the law relating to Mergers, Take overs and Amalgamations is contained in the act. A firm normally adopts these practices when it seeks to grown externally. The other mode of growth of a firm is by internal growth.

Mergers Takeovers and Amalgamations are classified as either horizontal, vertical or conglomerate. Control of such is essential. Kenya has recently experienced takeovers and mergers of a considerable size that would affect the public welfare. As has been seen earlier one of the major purposes of Antimonopoly law is to safeguard the public interest. A good example is the Lonrho takeover that brought the following Kenyan companies under its control: Toyota Kenya, Kenya Motors, Farm Machinery Distributors, Yamaya Motors, and Bruce Trucks. Another example is the Standard Newspapers takeover whose ownership is still unclear and the Smithkline Beecham/Sterling Health amalgamation among others.

Though the external growth of companies by mergers takeovers and amalgamations certainly does have its advantages in a developing country like Kenya it has several objections⁷. Mergers generally reduce competition in the market place. This lack of competition leads to the dominant firm having monopolist or oligopolist powers in the market place and can dictate prices of the commodities it produces. This has a detrimental effect on consumers who are charged high prices that are not justifiable. In this sense therefore mergers and takeovers are detrimental to the consumer. It must be noted that horizontal mergers have the most significant effect upon competition. Vertical mergers have an adverse effect on competition where they have a foreclosing effect on other participants in the industry.

Other objection is that there is loss of efficiency especially where the management of the taken over company resign. It can also be argued that mergers, takeovers and amalgamations are as a result of the need to make short term profits on the Stock Exchange rather than by serious analysis of the long-term prospects of companies. Mergers can also be objected to as they lead to a concentration of wealth and power. This was noted by Justice Douglas in United States V. Columbia Steel Co.⁸

"We have here the problem of bigness.....the curse of bigness shows how size can become a menace both industrial and social. it can be an industrial menace because it creates gross inequality against existing or putative competitors. It can be a social menace because of its control of prices. In final analysis size in steel is the measure of the power of a handful of men over our economy. That power can be utilized like lightning speed. It can be benign or it can be dangerous for all power tends to develop into a government itself. Power that controls the economy should be scattered into many hands so that the fortune of the people will not be dependent on the whim or caprice or political prejudices the emotional stability of a few self appointed men".

Mergers also cause unemployment and the closure of factories. They also result in the control of the merged company from without the country. In the Lonrho Motors case control will emanate from the London headquarters of the company. Empirical evidence has also proved that in fact mergers do not provide the advantages expected of them. Economies of scale rarely flow from mergers, post merger performance is not noticeably better than before the marriage and that mergers are motivated by a host of different reasons which may have nothing to do with the public interest generally.

Justification/objective of the study

From the foregoing it can be said that mergers, takeovers and amalgamations of companies need to be controlled but Kenyan law on the same can be said to be lacking to deal with these practices with the effect that mergers take place with impunity unregulated by the legislation that was supposed to control them. This occurrence has a detrimental effect on the economic development of the country which development is the only true vehicle for prosperity. Kenyan law further does not take consideration of special circumstances such as newspaper mergers that receive special attention in the United Kingdom. By comparing the Kenyan Law of Mergers with that of the U.K., European Economic Community (EEC) and the United States which are by far more advanced, this study proposes ways to enhance our archaic laws which are not able to meet adequately the regulatory needs of modern day commercial mergers.

It should be noted also that Kenya lacks a comprehensive consumer protection law and consumers get only incidental protection by other laws that are primarily legislated for other functions. One of these laws is monopoly law as contained in the Act. A better mergers and takeover law will therefore also serve the consumer protection regime well as the consumer will be protected against big corporatins and their overpricing tendencies.

Literature Review

It is suprising to note that nothing has ever been written on mergers at the LL.B. dissertation level and therefore the writer will seek to play a pioneering role in this area. The only dissertation written on this broad subject is that of Musambai J. "Regulation of Restrictive Trade Practices in Kenya" 1991. However it can be said that this paper is not relevant to mergers as it is mainly concerned with contracts in Restraint of Trade under Cap. 24 and the Indian Contract Act 1872. The other issue dealt with by the dissertation is Restrictive Trade Practices as enumerated under Sec 6-12 of Cap. 504.

Hypothesis

The study will be premised on the following hypothesis that the inefficacy of Kenyan merger law is caused by the following:

1. That the intellectual conceptional basis of Anti-monopoly law of which merger law is a part of has inherent contradictions which undermines the laws enacted therefrom. This becomes clear especially on an analysis of the Theory of competition which plays a central role in Anti-monopoly law.
2. That the colonial legacy also plays a negative role in todays political & social spheres of life. It has been observed⁹ that the colonial economy in Kenya was one that rested on monopolies.

At independence the transition from colonialism to neo-colonialism was planned to preserve the greater part of the monopolistic colonial economic structure for the benefit of the new petty-bourgeois class. It can therefore be said that modern Kenyan company law is still a reflection of these aims and therefore unable to serve the interests of free enterprise.

3. That government policy on the law of Mergers just as in most of commercial law is not fully developed and therefore does not adequately guide the law in the desired path. Such inarticulate government policy has a long history where in the colonial era metropolitan and local settler interests during this period were clearly divergent. Britain was concerned with utilizing the colonial territory as a source of raw materials for its industries and with preventing the emergence of any manufacturing in the colony which would compete with British goods in the metropolitan and colonial markets. In contrast the settler class backed by the local administration was intent upon developing estate agriculture and secondary industries where a market existed¹⁰. Inconsistencies of policy still exist up to the present day but at a different level.
4. That the enforcement mechanisms of the Kenyan law of Mergers are inadequate. The writer will seek to prove the above hypothesis.

Methodology

A library research method of obtaining information will be adopted.

Scope

This paper will be confined to the Merger and Takeover provisions of the laws of Kenya, The United Kingdom, The European Union and the United State.

Chapter Breakdown

The paper will consist of four chapters thus:

Chapter 1: This Chapter will lay the conceptual basis of competition law based on The Theory of competition. A critique of this conceptual basis will also be provided . Anti-monopoly law controversies will also be briefly mentioned.

Chapter 2: A historical survey of the rise of the modern company in colonial Kenya will be given. Herein the writer will discuss how the first companies in Kenya were formed and the reasons for such. The Kenya law of mergers and, takeovers will be reviewed. The legislative history of this law will also be discussed.

Chapter 3: The U.K., US & EEC laws of mergers will be discussed and a comparison with Kenyan, law will be offered.

Chapter 4: In this chapter conclusions and recommendations for the reform of Kenyan Merger law will be offered.

Endnotes

1. Chapter 504, Laws of Kenya
2. Whish Richard, Competition Law, P.3
3. Ibid P.5
4. National Association of Railroad and Utilities Commissioners, "Proceedings of the 53rd convention" (Washington D.C. 1942) p. 369
5. In his article "Role of Competition and Monopoly in Economic Development" in Competition cartels and Their Regulation by Miller John (Ed).
6. Ben W.Lewis, "Ambivalence in public policy toward Regulated industries" 53 American Economic Review 38, 40 (1963)
7. See Supra note 2 for a full discussion at p 696 - 700
8. 334 US 495 535 - 536 (1948)
9. By Colin Leys Underdevelopment in Kenya: The political Economy of Neo-colonialism 1964 -1971 where at page 254 he adds
"In the first place the colonial economy in Kenya was highly monopolistic capital was appropriated from the African population through primitive accumulation (land alienation and forced labour) and through wage labour. Some of the surplus flowed to Britain and also through unequal trade. The transition from colonialism to neo- colonialism was a planned one aimed at preserving the greater part of the monopolistic colonial economic structure of the interest of large-scale commercial financial and estate capital by coming to terms with those leaders in the nationalist movement - a majority who represented the new petty-bourgeois strata which has been formed throughout most of Kenya under colonialism".
10. Swainson, Nicola, "Company formation in Kenya before 1945 with particular reference to the Role of Foreign capital" in R. Kaplinsty Readings on multinational corporations in Kenya.

CHAPTER ONE

COMPETITION LAW: THE CONCEPTUAL AND POLICY FRAMEWORK

1.1 The Theory of Competition

All Anti-monopoly or competition law is based on the Theory of competition¹ Indeed the preamble of the Act states that the purpose of the Act is

"to encourage competition in the economy by prohibiting restrictive trade practices controlling monopolies and concentration of economic power and prices"²

Therefore it can be said that the Theory of competition is central to competition law. Competition has been described as

".... a striving for the custom and business of people in the market place"³

In economic theory four types of competition are generally recognized for purposes of analysing pricing policies⁴ - pure or perfect competition, pure monopoly, oligopoly and monopolistic competition. These are theoretical models, built upon certain limiting assumptions-assumptions which may not be varied in explaining the price behaviour of a particular firm in real life but are useful as an analytical aid.

1.1.1. Perfect competition

Perfect competition refers to a market situation in which no seller has any influence over the market price of his product. Five assumptions concerning the structure of the market underlie this model. First the products being offered are homogenous so that there is perfect substitutability among them.

Buyers can thus shift quickly from one seller to another in response to a lower price. Second, there is a large number of buyers and sellers each of them small, so that neither the quantity supplied nor the quantity demanded by any one of them will have an effect on the market price. Third, buyers and sellers possess complete knowledge of market conditions so that no individual has an advantage over the others. Fourth, there are no restraints on the market or on the independence of any buyer or seller. Economic forces are free to operate in the market, and individuals are free to act in their own self-interests. Fifth, there are no obstacles preventing the complete mobility of resources both into and out of an industry.

Given this market structure, the final result is a situation in which no seller or buyer can become better off by altering his own behaviour. Equilibrium, in the long run, requires that marginal revenue, equals marginal cost so that at that point the firm is maximising its profit. Producing more units would add more to total cost than to total revenue; producing fewer units would subtract more from total revenue than from total cost. Further since price equals minimum average cost, the plant is being used efficiently. The model indicates that the market determines the price of a product and allocates resources. Each seller by trying to maximise his own profit works for the best interests of the economy as a whole.

The final market equilibrium also defines in a precise way a socially efficient allocation of resources. In the first place

the firms are of optimum size so that total production is maximised and all factors of production are fully utilized. Given existing consumer tastes and available technology and resources no other arrangement of resources would result in an increase in the total value of production. In the second place consumer satisfaction is guaranteed and also maximised. Under conditions of perfect competition the price represents what consumers are willing to pay for the last unit of a product. The price in turn is equal to the cost of producing the last unit that is marginal cost. It follows that the consumers valuation of the last unit and the cost of producing that unit are equal. Producing more of one good involves giving the consumer additional units which he values less than the cost of production to society; producing less involves foregoing units that the consumer values more than the cost of production. Only when price is equal to marginal cost is consumer satisfaction maximised.

1.1.2 Pure Monopoly

Pure monopoly is the opposite extreme to conditions of perfect competition. This situation means there is a single seller of a product. The extent of a monopolist's power, however will depend on the closeness of available substitutes. As used here, pure monopoly implies a situation in which substitutes are lacking. In the long run a monopolist has the same objective as a seller operating under conditions of perfect competition - the maximization of profit.

Being the only supplier, the demand for the monopolist's product is the entire market demand for the product. In seeking to maximise profit, a seller operating under conditions of perfect competition will adjust his total output so that his marginal cost is equal to his marginal revenue. So, too with the monopolist. But there is a vital difference, for what distinguishes the monopolist's position is in the shape of the demand curve. In pure monopoly the monopolist can get a higher price by restricting output and selling less. The results of pure monopoly differ in several important respects from those of perfect competition. The most profitable policy for the monopolist is to produce less and charge more than a firm operating under perfect competition. As noted above, the best allocation of resources for society as a whole is to carry production to the point where marginal cost equals price. Here, the value of the last unit of input just equals the value of the last unit of output. The most profitable adjustment for the monopolist in contrast is where price is greater than marginal cost. The difference is excess profit to the firm. Consequently, fewer resources are being employed than society would be willing to pay them at going rates. As long as price exceeds marginal cost, use of additional resources would add more to the value of output than in their present use.

From the point of view of society, monopoly keeps output from being maximised. And, in addition the monopolist's plant is not being used efficiently.

Society does not get the full potential advantages of economies of scale. In short price is higher, profits excessive, output smaller and fewer resources are used under conditions of pure monopoly as compared with perfect competition.

1.1.3. Oligopoly

Both perfect competition and pure monopoly are uncommon market structures. An understanding of these markets does give a means of analyzing two more realistic types of markets found in the modern economy ie oligopoly and monopolistic competition. Oligopoly is common in our basic industries, monopolistic competition in consumer goods industries and retailing.

Oligopoly exists when there is a small number of sellers in a market. Each seller therefore must take into account the effects of his own price and output decisions on those of his rivals. In other words each seller recognizes that his actions have a definite effect on the final market outcome. The products produced by oligopolists may be virtually identical cement, oil, steel or differentiated but close substitutes - cars or cigarettes. (ie brand names)

In theory the condition for profit maximisation under oligopoly is the output where marginal cost equals marginal revenue. But because of the existence of close substitutes, a seller must also consider what others are likely to do if he takes a certain course of action. Each seller, moreover, faces the same kind of problem. The result is uncertainly; the inherent characteristic of oligopoly.

To illustrate: A price reduction of one seller, assuming that rivals do not follow suit, might lead to a larger sales volume. Yet, can such an assumption be made?

Given a small number of sellers, it could reasonably be expected that each will follow a known price reduction made by another. And if all firms reduce their prices revenue may fall (depending on the elasticity of demand) with little or no change in market shares, but with smaller profits for each seller. The same considerations apply to price increase. No one seller, under normal conditions will want his price to be far above that of his rivals. If one oligopolist wants to raise his price, he will consider whether or not the others will follow suit. Thus, the initiative taken by one seller to either raise or lower his price may be risky. It is not surprising then that price changes in oligopolistic markets may be few and far between. Price leadership is common. Rivalry tends to take the form of quality, advertising research and development and innovation. These terms of competition, more difficult for rivals to match largely determine the market shares held by each producer. Pricing behaviour in oligopoly cannot be precisely formulated but depends on the assumptions that one makes. Competitive prices, monopoly prices, or prices some where between those two extremes are likely outcomes of oligopoly. Some have argued that the most plausible outcome is monopoly pricing or limited joint profit maximisation⁶. Others have rejected the assumption of profit maximisation altogether, substituting in its place the theory of games, preventative

pricing to forestall entry⁷ organizational influences, interfirm organization and limited scales maximization. Little consensus exists on the oligopoly price theory.

1.1.4 Monopolistic Competition

Monopolistic competition stands between perfect competition and oligopoly. Many industries have numerous suppliers but each seller has a differentiated product. Products may differ because of quality, colour, location, packaging, service, or a particular dealer's reputation. Since many sellers are supplying a similar product joint action is not possible. Moreover there is reason for expecting active price competition. For example while there is only one gasoline station on a given location, there may be many within a few blocks. Some may give lower prices, others trading stamps and still others better service. Each automobile dealer normally enjoys an exclusive franchise in a given area, but competition among dealers is keen.

Firms operating under conditions of monopolistic competition will achieve maximum profits at the point where marginal cost equals marginal revenue. Due to product differentiation each seller faces a downward sloping demand curve he will earn excess profits. Such profits may attract new competition. A new producer, of course, cannot produce exactly the same product but he can try for a close enough substitute to capture a share of the market.

At the same time, existing competitors may pursue more aggressive policies through price reductions or advertising campaigns to attract some of the customers of the original firm. In either event occurs, the demand curve facing the original firm will shift to the left. In the long run therefore the equilibrium point may be where profits are normal. It should be noted however that such an equilibrium is at a point where price equals average total cost, indicating a smaller output and higher cost (due to advertising, research, promotional activities and so forth) and price than under perfect competition.

What effect does imperfect competition (oligopoly and monopolistic competition) have on economic efficiency? Clearly imperfect competition does not result in a socially efficient allocation of resources in the same sense as perfect competition. Price is above marginal cost, so that what consumers are willing to pay for the last unit of a good is not equated to the cost of society of the last unit. Stated another way, price is higher and output is smaller under imperfect competition than under perfect competition, and plants are not operated at their most efficient output levels. Taking a broader view of social efficiency, however the perfectly competitive definition may not be applicable. If consumers want product differentiation a situation ignored by the perfectly competitive model imperfect competition is inevitable. In addition, research and development, technological and product innovation, and advertising are all part of

imperfect competition and again the model of perfect competition ignores those factors. Perhaps then, progress and efficiency in line with consumer wants will be greater under conditions of oligopoly or monopolistic competition. Whether or not this is true can only be determined from a case-by-case analysis of actual markets in the economy.

1.2 Objections to The Theory of competition

The Theory of Competition upon which Anti-monopoly law is based has recently come under intense criticism. Does perfect competition as discussed above attend the society the benefits it is supposed to give? The Theory of Competition has in recent times been discounted by the Principle of Workable Competition⁸. Economists have realised that the theoretical models that have been created above do not always work on the ground in the actual contemporary economic structure. They have become increasingly aware of the futility of any public policy which aims at creating an industrial structure within which competition works with perfection. Not only does imperfect knowledge of markets interfere with the smooth functioning of competition but that mass production and distribution inevitably inject an element of monopoly into modern business. Competition is neither pure nor perfect. So remote from reality had become the neo-classical theory of price competition that Piero sraffa writing in 1926 said of it:

"It is a pedadogic instrument, somewhat like the study of classics and unlike the study of the exact sciences and law, it purposes are exclusively those of training the mind, for which reason it is

Clark recognizing the impossibility of achieving perfect competition in our economy argued first that some unavoidable departures from the competitive norm may justify other departures, second that in the long run potential competition and the competition of substitutes may force sellers, even when they are few in number to behave like competitors and third unrestrained competition in periods of weak demand which forces prices down to marginal costs may prove disastrous in the long run because prices in periods of strong demand will not rise enough above average cost to insure that average cost will be covered over both phases of the cycle. In short Clark argued that in the long run rivalry among few sellers approximates the competitive solution, and that in the short run the power of oligopolists to influence prices performs a socially salutary function by holding prices above marginal cost in times of weak demand. He also argued that quality competition among sellers of differentiated products may serve the public as well or better than price competition. This flowed from the recognition that no markets are alike that they vary in the degree and kind of competition and that the social acceptance is judged by its performance.

Joan Robinson has also on a different forum criticised the notion of competition¹².

She argues that the first difficulty about regarding competition as an equilibrium state of affair is the overriding question - if the pursuit of profit is the aim of enterprise

why does not any group of producers in competition raise all their prices and thereby earn more? The persistence of competition must depend upon a tension between the desire to profit on the one hand and countervailing factor on the other, such as love of independence, mutual distrust and this balance may be essentially precarious. She also argues that competition largely consists in destroying competition in the narrow, economists sense by product differentiation, advertisement, and the creation of goodwill which break up the market and reduce the cross-elasticities of demand within it. Thirdly she also argues that competition law limits the size of the firm which in turn warps its productivity . Fourthly she puts forward a fourth difficulty that with stationary real income for the economy as a whole conditions are often such that normal profits are normally impossible to obtain as long as competition prevails. This is corrected with the fact that the short period is not the same length at both ends. Supernormal profits are usually wiped out by new investment more quickly than subnormal profits one raised by disinvestment.

Chamberlin in objecting to the Theory of Competition holds the position that the measurement of monopoly and competition is many sided¹³. Certain aspects of these two categories and of their relations to each other cannot be measured at all; and the indices of other aspects which can be measured merely reduce parts of a complicated problem to quantitative expression.

Another objection relates to the issue of scale¹⁴. In some markets profit can only be made if a firm only produces a set portion of the total output. It may even be that the "minimum efficient scale" of operation is achieved only by a firm with a market share of over 50%. Where scale is such an important feature of a market it is plainly absurd to attempt to achieve perfect competition which would destroy the efficiency of production at the appropriate level. Therefore it can be said that the efficiency of scale presents difficulties for the Theory of Perfect competition.

It may also be argued that social or political value judgments lead to the conclusion that competition is inappropriate in particular economic sectors. In Kenya this has led to the establishment of legislated for monopoly. The Kenya Government has realised that competition in some sectors of our economy would not only be wasteful but also are inappropriate in Kenya's stage of development. Companies such as The Kenyas Railways; Kenya Airways, Kenya Power and Lighting Company are companies that are created monopolies by statute. Such argument is also valid when one considers that the initial investment needed to start up such a venture is prohibitive to the private investor and it is only the government which can put forward such capital. "

It has also be argued that the notion of striving for superiority may be considered ethically unsound. It may also lead to firms charging lower and lower prices so as to keep custom

that in the end they charge below marginal cost leading to the insolvency of the firm. Competition can also be regarded as wasteful where one customer leaves a product for another which is cheaper. Such abandoned product will be wasted. Competitors also waste money and time in advertisements trying to outdo the other. In the field of research where collaboration between rivals would enhance the final product and also achieve economies of scale competition does not foster such as it essentially antagonises the rival companies¹⁵.

Before concluding the discussion on the theoretical framework of Anti-monopoly law brief mention will be made to what has been referred to as Anti-monopoly law controversies.

1.3. Anti-Monopoly Law Controversies

The Anti-monopoly law area of public law has direct and indirect economic impact on the country and as a consequence is therefore bound to be controversial. There is a widely held presumption that this law impedes industrial growth and is inconsistent with the free market system.

However Yash Vyas argues that Anti-monopoly law is not only in conformity with but is also an attempt to preserve the system of free private enterprise¹⁶. Anti-monopoly law controversies stem from differences in opinion as to what is the right degree of government interference in business. The marxists and the communists occupy the extreme position that favours complete nationalisation

and governmental control while on the other extreme free market advocates favour total market liberalisation¹⁷.

One school of thought finds antitrust an proper response to a variety of political and social concerns, including the viability of small businesses, the political power of large corporations and the distribution of income, as well as the needs of an efficient economy. This view has been supported¹⁸ by the majority Supreme Court decision in Brown Shoe V. U.S.¹⁹;

"(We) cannot fail to recognize Congress desire to promote competition through the protection of viable small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization. We must give effect to that decision".

On an opposite side are jurists who contend Antimonopoly law to be useless as a possible restructuring device and therefore should be partially or completely dropped as an expensive or indeed counter productive folly. Professor Galbraith is one of the chief proponents and finds Anti-monopoly law nothing more than a historical aberration sadly at odds with reality. He states

"The antitrust laws, in seeking to preserve the market are an anachronism in the larger world of industrial planning. They do not preserve the market. They preserve rather the illusion of the market. In the past the man who argued against the antitrust laws was often suspected; sometimes rightly of ulterior interest. He wished to violate the laws or was the paid or unpaid theorist for those who did. Now it is the friend of the antitrust laws who serves almost always, unwittingly ulterior purpose. He defends and gives legitimacy to a charade an act that helps to conceal the reality of industrial planning and associated price control

by great corporation"²⁰.

Asseeda and Turner in their book²¹ take a position between these extremes by recognizing the limits of economic theory in ascertaining appropriate roles, the difficulty a court or jury may have in finding economic facts and applying them to the sometimes unclear principles and the scarcity of enforcement resources. But they reject the notion that Antitrust law serves no purpose. Even if it cannot set the economy right at a stroke antitrust can be used to affect the conduct of firms and thereby improve economic performance with certain non economic benefits accruing as incidents of economic policy. The authors on the other level understand the limits and utility of Anti-monopoly law and weakness of antitrust engineering (eg. inadequate economic theories and proof) are magnified in reaching for results beyond the economic system. Insufficient behavioural incentives, conflicting objectives and the availability of more direct and effective tools substantially curtail the usefulness of Antitrust law in economic spheres. Accordingly the authors dismiss the view of Antitrust law as a panacea of all perceived political and social concerns, thereby attempting to maintain its integrity and effectiveness in the appropriate economic realm.

When constraints are put on the free play of market forces due to concentration of economic power and unfair competition only 3 alternatives appear as according to Yash Vyas: tolerance of such power ie. to do nothing, nationalisation or public regulation in the form of Anti-monopoly law²².

The first alternative is objectionable as to permit unchecked economic power is to permit the loss of a principle supposed to be inherent in the free enterprise system ie free entry and action in the market place.

The second alternative is favoured by marxists and other socailists and conflicts with a free enterprise system. Nationalisation has not been confined to the socialist countries as now western countries like France and Britain have nationalised some of their industries with positive results in regard to efficiency and cost effectiveness. A good example is in the production of electricity by use of nuclear generators industry. In such a case no conflict arises with free enterprise as an individual enterprenours would not have the economic capability to set up such a plant.

The third public regulation alternative considered as most compatible with the ideology of free enterprise and not only curbs direct economic activities of private citizens but also checks private power. It should be noted however that such intervention is only or as far as is necessary to protect the market place from abuses that many adversely affect the functioning of free market forces²³.

Endnotes

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3. Supra, note 1
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CHAPTER TWO

2: THE KENYAN LAW ON MERGERS AND TAKEOVERS

2.1 BEGINNINGS: THE RISE OF CAPITALISM AND EARLY COMPANY FORMATION IN COLONIAL KENYA

In order for us to fully understand our present law as it stands we must look at the historical background as law cannot be fully appreciated without looking at the historical forces that shaped it.

Nicola Swainson in her thesis¹ has written comprehensively on the origins of capitalism in Kenya and the underlying forces that moulded subsequent developments. She traces such growth from the precolonial period when primitive accumulation was achieved mainly by methods such as hunting and raiding². Such primitive mode of accumulation of resources was however curtailed by the imposition of boundaries upon Kenya becoming a colony and also by giving local tribal leaders political authority. However by the 1920's this traditional Africa leadership was being superceded by a new class. This class had emerged during the early colonial period from a group of skilled wage labourers. This group had the benefit of having both a permanent employment and private accumulation and exploited its link between trade, community production in the reserves and salarized positions within the colonial government. This form of operation was typical in the formative stages of capitalistic production. It should be noted that where a conflict arose between the indigenous capitalist

and the European estate producer such was usually resolved in favour of the settler.

By 1915 African farming was concentrated in the reserves and in order to increase the flow of labour to settler farms the colonialist government employed taxes³ and other forms of coercion. This had the effect of stunting the expansion of indigenous capitalism in the reserves.

New crops in the form of tobacco, wattle, cashewnuts and potatoes were introduced in the 1930's. The Africans pushed for the removal of the ban on certain cash crops such as coffee. Colin Leys sees such a ban on such well paying commodity cash crops as a symptom of a bigger problem where the colonial economy lay basically on monopoly where the African was excluded from all productive sectors of production⁴. The European had monopoly of high potential land in the highlands under the White Highlands policy. The Europeans also got a monopoly of labour through the various ordinances enacted, government services, and also the marketing system⁴.

"Monopoly in the sense of a significant degree of exclusive control over some resource - land labour capital technology (including crops) on markets - generally conferred by the state through a law or through executive action, permeated the entire sphere of operation of European (or white as opposed to Indian) capital in Kenya"⁵

The growing of coffee was only allowed in 1933 but only on an experimental basis. The large scale growing of coffee on Africa farms was allowed only after the Second World War.

African commodity relations in the reserves were regulated extensively by licensing and quality control provisions.

Such regulations had 2 purposes; to reduce the demand for wage labour on African farms and consequently enhancing the supply of labour to European estates. Such measures limited the growth of indigenous capitalism especially where it would give competition to settlers. As has already been noted such control before the second world war of estate capital in Kenya enabled the settler to almost total control on domestic marketing and processing of commodities while curtailing the extent and location of African production.

It should be noted that despite the restrictive regulations placed on African production the international demand for commodities such as cotton, tea, coffee, sisal maize groundnuts led to the expansion of household commodity production. Trading in these commodities in the reserves was by Africans and Asians while the international marketing was done by foreign merchant houses⁶. Despite such expansion it should be noted that there could be no full production while restriction still in place and political dominance of estate capital still in place. African demands for representation from the 1920's was partly as a result of such frustrations. By 1945 such demands had not been redressed and the Kenya African Union united with the African petty bourgeoisie and the masses to agitate for political independence. However this independence granted in 1963 favoured indigenous

capitalists at the expense of all those who had participated in the struggle especially the mau mau guerilla fighters.

After the Second World War the political and economic strong position of the settlers was reduced and the colonial administration changed its policy towards African commodity production. This policy change was necessarily brought about by changes in the world economy and Britains position therein. African commodity production in tea, coffee and pyrethrum was now favoured.

On the merchant capital front trade in the reserves expanded from the 1920's and there existed great competition between African and Asian traders. The small indigenous trader operating in reserves acted as a link between foreign and Asian merchant firms and African commodity producers. The colonial administration sought to control the proliferation of such traders from 1920 by the use of the license. Africans also were limited to how much they could borrow⁷, they were allowed limited debt collection litigation and also limited was the attachment of property for debt repayment and so was prior sale of crops to raise advance money.

Africans had agitated for state finance to assist local enterprises since the 1930's but this was only implemented after the Second World war. After 1950 colonial funds were directed through the Joint Boards of each province and schemes for training African artisans and trades were set up in most locations.

During such a period indigenous trade expanded urged on by the agriculture commodities demand created by the war. prices of commodities also increased leading to more growth of the indigenous trade. Another groups that sought to enter this rising class of tradesmen was the African soldier who had been demobilised after the war. The colonial administration sought to control such large numbers of entrants by trade licensing.

Such restrictions were condemned by nationalist leaders⁸.

African trade was only encouraged after the war when it was realized that such expansion would favour the settlers. From 1945 Trade Advisors were appointed to guide and advice indigenous merchants. Where conflict existed between Asian and African traders marketing laws were interpreted to favour the African⁹. This was pursuant to the colonial administrations desire to stifle Asian market operation. Colin Leys notes

"The Kenyan businessman whom government sought to establish within the capitalist mode of production were principally small retail traders, bar owners, small-scale transporters, builders and the like. Their numbers expanded as Asian competition was progressively excluded and credit was channelled towards them on favourable terms¹⁰.

In summary it can be said that the position at the colonial administration before independence was to make provision both to encourage and regulate the expansion of African merchant capital.

From 1940's onwards it was clear that assistance programmes to African traders acted to bolster up the more established sections of the petty bourgeoisie. This bulk of assistance to African traders in 1950's was channelled not into new enterprises but into firms and businesses that already existed. Loans to African traders in the 1950's were administered by the Joint Board of the Local Native councils and the colonial government provided advice to traders on accounting.

Between 1958 and 1963 further loans were dispersed to African traders and small scale manufacturers but on a small scale. It is clear that even before independence the larger traders were beginning to move into small scale manufacturing.

Foreign firms also played a major role in stimulating African trade. By the mid 1950's many had extended wholesale facilities to African traders in the reserves for distribution of their products. This included Boustead and Clarke, British East Africa Corporation, Bata Shoe Company, Kettles Roy & Tyson, British American Tobacco. BAT and other foreign firms were not in favour of government supported cooperatives in the 1950's but favoured a more open system of distributorships of manufactured goods, such as tobacco, cigarettes shoes etc. BAT also in 1950's very active in extending their markets in the reserves through African traders.

In summary therefore it can be said that foreign firms tried to encourage the emergence of an African trading class from the 1950's. Firms such as East Africa Breweries, East Africa Tobacco Company, Fitzgerald Baynes, Unga Flour Company and Shell Oil from the 1950's onwards operated credit schemes by which they would guarantee a sum of money in the bank for a trader operating on a narrow cash flow margin. Such support systems encouraged growth of general powerful African traders in each district who by the 1960's would have accumulated enough money capital to move into production. This group managed to accumulate enough merchant capital to enable them move into productive capital despite all the hurdles placed by the colonial state on indigenous capitalism.

Several observations can be made regarding the early companies especially those formed before 1922. First these companies were very unstable with a very short life span. The second aspect was the interlocking nature of ownership. These firms were held by a small number individuals. Lord Delamere owned a share in the capital of three of these companies: Unga Ltd, Nyama Ltd and The Times of East African. Captain ES Grogan another settler politician described also as a timber concessionaire and property speculator had shareholdings in a total to six out of the thirty five companies then registered. Most of these companies were owned jointly with other members of his family notably his wife and his brother. The story is

told of how Grogan sold to the colonial government the Kilidini Harbour in 1925 for KE 350,000 however the same property had a 1920 valuation of £ 37,000, moreover the Government could not use the harbour immediately as it had already been leased out¹¹. Hunter a company secretary had shareholdings in nine companies while W. Fletcher a law clerk in Nairobi had shares in eleven companies.

These settler company owners if not also farmers were engaged in some other kind of profession which they used as a base of accumulation and were accountants, solicitors, jewellers, engineers, architects etc. This early investment was highly speculative and money was put where it would be reproduced rapidly. Because of this there was lack of investment in the manufacturing enterprise as this requires a big capital outlay. It is only after 1922 that small processing and basic manufacturing was ventured into. An exception can be seen in the Mombasa Electric Light and Power Company formed in 1908 to generate electric power in Mombasa.

From 1922 there was greater stability and expansion of the number of companies in Kenya. This can be attributed to the fact of the increase in number, size and activities of both local and foreign firms. Statistics show the extent of European domination in agriculture in property and real estate and in the processing of primary products. The Asians applied their capital to trade as legislation had shut them out

of agricultural production¹². This capital that was accumulated in this period was later to be used in industrial production after the war. Indian industrial empires grew out of these eg. the Madvhanis, Manjis, Chandarias and the Khimasias. It should be noted that between 1945 and 1950 a large number of local settler firms were absorbed either by Asian firms or foreign based operations. This is because of the fact that the settlers were not competitive enough and could not compete with the Asians who were better business managers.

Swainson notes the contradictions that existed in the colonial period which were basically questions of interest between the settlers and the colonial administration thus,

"Metropolitan and local settler interests during this period were clearly divergent. Britain was concerned with utilizing the colonial territory as a source of raw materials for its industries and with preventing the emergence of any manufacturing in the colony which would compete with British goods in the metropolitan and colonial markets. In contrast, the settler class, backed by the local administration was intent upon developing estate agriculture and secondary industries where a market existed therefore while development in Kenya was assisted by central government grants-in-aid, most infrastructural development was financed by the local administration through taxes which fell mainly on non-Europeans ..."¹³

Another interesting observation is that made by Leys when he propounds his concept of neo-colonialism ¹⁴. He notes that at independence the institutions used by the colonial powers to gain economic power were simply passed over to the rising

petty bourgeois to the exclusive of the masses who had actually fought the battle for independence.

"In the first place the colonial economy in Kenya was highly monopolistic. Capital was appropriated from the African population through primitive accumulation (land alienation and forced labour) and through wage labour. Some of the surplus flowed to Britain and also through unequal trade. The transition from colonialism to neo-colonialism was a planned one aimed at preserving the greater part of the monopolistic colonial economic structure of the interest of large-scale commercial financial and estate capital by coming to terms with those leaders in the nationalist movement - a majority - who represented the new petty bourgeois strata which had been formed throughout most of Kenya under colonialism."¹⁵

This will become important when one considers to what extent Kenya's commercial law and in particular Kenya merger law serves such neo-colonial interests in their enactment and implementation.

2.2 THE LEGISLATIVE HISTORY OF THE KENYAN LAW ON ON MERGERS AND TAKEOVER

The Kenya law on mergers AND takeovers is contained in the Restrictive Trade Practices, Monopolies and Price Control Act cap. 504. To consider therefore the legislative history of the law of mergers one must necessarily look at the history of Cap. 504.¹⁶

The Act has a long history that has a genesis in the World War II colonial price regulations.

At first price control was introduced in Kenya at the start of the war as part of war time regulations. This was in the Price of Goods Regulations 1939 which was later revised. The Defense (Control of Prices) Regulations 1945 governed price control in Kenya until 1956 when the first price control ordinance was enacted.

The Defense (Control of Prices) Regulations applied to everything that could be sold and purchased except real estate. Packed groceries (ie articles of strictly defined quantity) were classified as price controlled goods and maximum prices for the importer, middlemen and consumer were fixed and established. Agricultural produce was also price regulated. Producer prices for beans, millet and meat were fixed by the Governor and the Price Control Department was confined to fixing retail price only.

After the war the number of commodities under the price control regulations gradually reduced and the enforcement of the remaining orders somewhat relaxed. As a result of such decontrol the cost of living went up causing alot of political discontent in the colony.

In November 1948 a Select Committee on the Cost of Living which was later elevated to the rank of a Commission of Inquiry was appointed. Its 1950 report recommended among other things, the reimposition of price control on all essential articles in short supply¹⁷.

It can be observed however that such a recommendation was not implemented and on the contrary more commodities had their prices decontrolled.

By 1956 cement, charcoal, firewood, wheat and flour, maize meal and sugar were the only price controlled items. The decontrol of cement finally in 1958 when the Athi River East African Portland Cement factory was completed. Wheat flour was decontrolled in 1961. As the decontrol and enforcement of the remaining price order were relaxed the Price Control Department reduced in size and only a small section was retained in Nairobi to give effect to price control on the few remaining commodities and also to retain the organisation in case some emergency required price controls again.

Upto 1956 price control derived from the Defence (Control of Prices) Regulations 1945 which in turn devired from the U.K. Supplies & Services Transitional Powers Act 1945. As these emergency regulations were to come to an end in 1955, the Price Control Ordinance 1956 was enacted to replace the Defence (Control of Prices) Regulations 1945.

At independence products under price control were maize, wheat and sugar. In 1968 various amendments were made to the Price Control Act to curb the charging of excess prices for goods by applying the Act to goods other than those in the price controlled range. The trader was now required to supply invoices to the purchaser and District Commisioners were

given power to compound offences.¹⁸

This Act was further revived in 1972. It has been observed¹⁹ that in the years immediately after independence price controls covered many products but the impact on the market place was largely invisible due to the fact that the present day economic strains had not yet set in. However in the 1980's the role of the state in the market place began to be put under scrutiny. It is also at this period when the governmental intervention policy in the market place shifted from mere price control to such measures as restricting unfair market practices, limiting monopoly power and regulation of mergers.

This culminated in the publication of The Report And Recommendations of The Working Party of July 1982 (The Ndegwa Report) which, while urging the reduction of direct influence of Government in the market place, it recommended that unfair market practices should be curbed and direct controls may be required over the prices of monopolized production and essential commodities²⁰. The Working Party was also concerned that information on company operations and market practices was not systematically collected and that the machinery for regulating product quality standards, prices and market practices was dispersed and incomplete²¹. It noted the need for monitoring and regulating private sector performance. It finally recommended that legislation with respect to unfair practices be

enacted and that a Monopolies and Price Commission be established to enforce it. The commission would be empowered to collect annually standardized financial information on all public companies and to investigate complaints resulting to unfair market prices and practices²². Such a commission would have quasi-judicial powers analogous to those of the industrial court and should be able to impose sanctions for practices in restraint of fair trade.

In 1983 following the above recommendations from the Working party documents, preparatory work began in earnest. Literature on competition policy and law were collected and reviewed and consultations with various parties including the office of the Attorney General were undertaken.

In 1985 a comprehensive cabinet paper was prepared and submitted to the cabinet by the then Minister for Finance and Planning proposing the enactment of legislation prohibiting restrictive trade practices and the establishment of a Monopolies and Prices Department. Such proposal approved by the cabinet after several amendments to the original draft.

In 1986 the proposed legislation to curb restrictive trade practices, control monopoly power, regulate mergers, and impose price control on commodities was given prominence in the Government policy paper Economic Management for Renewed Growth Sessional Paper No. 1 of 1986²³.

In the same year a regional seminar for English speaking sub-saharan Africa on RTPs sponsored by the UN conference on Trade and Development (UNCTAD) was held in Nairobi at UNEP Gigiri. Officials from the Price Control Department and other Government Ministries attended in. In 1987 a draft Bill was prepared, its final fashion deliberated on and passed by parliament in 1988. The bill came into force in 1989.

The Act has Parts I-VI comprising 75 sections. The provisions relating to the control of mergers and takeovers are contained in sec 27-32 of the Act. These provisions shall now be considered.

2.3 THE LAW ON MERGERS AND TAKEOVERS

The law outlaws the participation in the consummation of a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities or supply of similar services or a takeover of one or more such enterprises by another such enterprise or by a person who controls another such enterprise by making such participation without an authorizing order of the Minister an offence.²⁴

A merger or takeover as described above carried out without the consent of the minister has no legal effect and imposes no legally enforceable obligations.²⁵

An offender under sec 27 is liable to imprisonment for a term not exceeding three years or to a fine not exceeding

two hundred thousand shillings or to both.

A merger or takeover is defined in sec 22 (1) to mean a transaction or other action which involves the implementation of a merger or takeover proposal.

A merger or takeover proposal means a proposed relating to the acquisition or disposition of any shares in a company which together with shares if any to which the transferee already has a beneficial interest carry the right to exercise or control the exercise in the case of a private company more than 50% voting power and for a company other than a private one 50% or more voting power at any general meeting of the transferor company;

- (b) A proposal for acquisition or disposal of the whole of the equity capital of the business or a portion that gives the transferee the whole or more than fifty per cent of the equity capital of the business;
- (c) A proposal for acquisition or disposal of the whole of the assets of a section or portion of the assets of a section which when combined with other equity capital held by transferee amounts to the whole of more than fifty percent of the value of assets used in carrying on that section of the business;
- (d) A proposal that relates to tangible and intangible assets but which is not covered in (b) and (c) above.

(e) A proposal if effected would create a new business whose purpose is to acquire control of other companies by use of methods (a) to (d);

(f) A proposal that causes a company cease operation or restricts competition between the parties.

By virtue of sec 28 application must be made to the Minister through the Commissioner for an order authorizing a merger or takeover as described in sec 27. It should be noted that "the Commissioner" refers to the Monopolies and Prices Commissioner whose office is established under sec 3 of the Act. The Commissioner is the officer responsible for the control and management of the Monopolies and Prices Department of the Treasury. The "Minister" means the Minister for Finance.

Under sec 29, the Commissioner upon such application carries out an investigation and for such purpose has power to require any records that will assist in such investigation.

Criteria for evaluating an application are provided at sec 30:

- A merger on takeover will be advantageous to Kenya if it leads to the production of goods or services for export, or leads to efficiency and a higher marketing thrust that enables competition with imported goods, expands Kenya exports while increasing employment,

- A merger or takeover will be disadvantageous to the

extent that it reduces competition in the domestic market and enables producers to manipulate domestic prices,

- A merger or takeover will be disadvantageous to the extent that it encourages capital intensive production technology as opposed to a labour intensive one.

In addition to the criteria provided by the statute the Monopolies and Price Commission has developed guidelines that it uses to determine the suitability of a merger or a takeover²⁶. These are as follows:

A merger analysis should be guided by the consideration as to whether a merger is likely to create or strengthen a dominant position as a result of which competition would be significantly impeded. The competition assessment of mergers is not mechanistic as every case is unique to some extent and weight is given to various factor to reflect the differing circumstances²⁷

The following steps are used as a guide on evaluating a merger:²⁸

(a) Market Definition:

The relevant market should be defined or identified. In the case of horizontal merger the main issue is whether the increment to market share is likely to lead to a significant loss of competition. Also considered under here is the effect of merger on price, demand, quality and range of products or services.

Market definition is further divided into product market (product/service supplied) and Geographic Area market.

(i) Product market

So as to make an assessment on the above, parties are normally asked to provide information on products or services which they overlap ie they both supply. If it is considered possible that the merged enterprise could raise prices of those products or services above a competitive level without customers readily switching to other products or services, the conclusion may be that these products or services form a distinct "market" and that detriments be more fully investigated. A similar conclusion arrived at if it appears the loss of competition could reduce quality of products of merged company.

(ii) Geographic Area (market)

Market definition requires not only the identification of those products or services which are to be regarded as competing, but also the geographic area in which the competition can be considered to take place.

Factors considered here include the distance and frequency of travel (ie for consumer to get alternative source of supply), means of transport and the significance of such transport costs.

(b) Market share

The market share of companies involved in the merger is considered. If the market share of any company will after the merger be in a position to materially influence or control the market such merger may be denied.

(c) Market structure²⁹

The number of other companies competing in the market (and their market shares) also has to be considered in order to determine whether the merger would result in a market position that could be exploited to the detriment of consumers. However no hard and fast rules exist to determine what size of market share or what increment of market share will lead to a rejection or otherwise.

(d) Relative strengths

The other important consideration, is the strength of both enterprises intending to merge and of those that would remain as competitors as measured by:

- financial and other resources
- access to technology
- trade marks
- distribution/service system
- other backing

(e) Entry conditions

Particular account is taken in regard to information about the relative ease of entry in the assessment of market power. These barriers could include access to raw materials, capital, shortage of skilled personnel, intellectual property rights, economies of scale and other factors. Entry may be facilitated by the growth of a market and made more difficult by stagnation or decline.

(f) International competition

Account is taken of the extent of actual or potential competition from imports for goods and services traded internationally and to assess this the following factors are considered international market shares and the extent of any barriers (eg tariffs) to the free access of foreign goods into the local market.

(g) Price Elasticity of Product

If entry into the relevant market is so easy that existing competitors could not successfully raise prices for any significant period of time it will be unlikely that such a merger will be challenged.

(h) Third Party views

Where it appears that a merger may give rise to competition issues, views of third parties such as customers, suppliers or competitors are sought. Customers views are

valuable in assessing the degree of substitutability between different products or services and hence in defining the relevant market.

After considering the recommendation of the Commissioner the Minister then makes a order concerning the merger/takeover application. Such order may approve, reject or approve it on conditions that steps be taken to reduce negative effects of the merger or takeover on competition³⁰.

Appeal from Minister orders lies to the Restrictive Trade Practices Tribunal and further appeal to the High Court whose decision is final³¹.

Besides the Restrictive Trade Practices, Monopolies and Price Control Act cap 504 other statutes also regulate mergers and takeovers in Kenya. These are the Capital Markets Authority Act cap 485 A and The Companies Act Cap 486 Laws of Kenya.

Cap 485A in its preamble states that it is an Act of Parliament to establish a Capital Markets Authority for the purpose of promoting and facilitating the development of orderly fair and efficient capital market in Kenya and for connected purposes. Part V of this Act contains provisions regulating trading in securities. These provisions are relevant to mergers and takeovers as in order to effect a merger or a takeover the acquiring company will usually do so either by acquiring the assets or shares of the acquired company so as to have a controlling interest in that company.

Under Cap 485 A Sec 2 stocks and shares are included as securities.

Sec. 31 of this Act provides that no licensed person broker or dealer shall trade in listed securities outside the securities exchange of which he is a member except as provided for by the Authority in rules or as authorized by the Authority on a case by case basis. No licensed person broker or dealer shall trade in listed securities in contravention of such rules as the Authority shall prescribe with respect to the clearance, settlement, payment, transfer or delivery of securities. It is an offence to employ manipulative deception or other fraudulent devices to ensure securities transfer. This section also provides that no person holding shares in a public company listed on an approved securities exchange shall sell such shares except in compliance with the trading procedures adopted by such securities exchange.

The Companies Act provides regulations for the transfer of shares and debentures at sec 75 -87. Sec 75 provides that the shares or other interest of any member in a company shall be movable property transferable in manner provided by the articles of the company.

Sec 76 A provides that no transfer of shares to a body corporate which is not a company formed and registered under this Act shall have effect unless such transfer is approved.

Under Sec 17 the Tribunal may under some circumstances order that its proceedings be held "in camera" and also prohibit the publication of any report or description of its proceedings.

The Tribunal may confirm, modify or reverse the order appealed against or part of it³⁶.

The Tribunal may also refer back the matter to the Minister for reconsideration either generally or in specific parts and in such referral advise the Minister of its reasons for doing so and also give directions to be considered in the reconsideration by the Minister. The Minister shall have regard to the Tribunals reasons for giving a direction and to the Tribunals directions³⁷

Where an appeal is brought under Sec. 32 against any order of the Minister under sec. 31 the merger or takeover to which the appeal relates may not be consummated pending the determination of the appeal³⁸.

2.3.2 ENFORCEMENT OF THE KENYAN LAW OF MERGERS AND TAKEOVERS

It is suprising to note that no single provision exists for the enforcement of law on mergers and takeovers. This is in sharp contrast to the price control law³⁹ in the same Act that grant the Commissioner powers to enter and inspect premises where price controlled goods are therein, inspect books and records relating to price controlled goods, powers to

search vehicles and even the power to seize goods that are being transported in contravention of this Act⁴⁰.

The only section in the Act that could have some use towards the end of enforcement is Sec. 75 that empowers the Minister to make regulations generally for the better carrying out of the provisions of the Act but again it should be noted that the minister may not make any regulations in regard to enforcement.

ENDNOTES

1. Nicola Swainson "Foreign corporations and Economic Growth in Kenya" 1977 Unpublished University of London Thesis
2. Ibid P.214
3. Hut Tax introduced by the EA Orders in council of 1897, Poll Tax 1019
4. Colin Leys Underdevelopment in Kenya, The Political Economy of Neo Colonialism 1964-1971 P.34
5. Ibid P.35
6. According to the Agricultural Department the value of exports from Africans rose from £175,000 in 1922 to £ 498,000 in 1938 in 1945 £ 1.04m and £ 4.6m in 1955.
7. Credit to Natives Ordinance 1926
8. For eg. Oginga Odinga, Not Yet Uhuru Heinemann London 1967 P.89
9. Supra note P.221
10. Supra note 4 P.256
11. Supra note 1 P.58
12. 1915 Crown Lands Ordinance
13. Supra note 1 P. 94
14. Supra note 4 Chap 1
15. Supra note 4 P. 254
16. For a fuller account see Thingori M, "Price Controls in Kenya," unpublished MA Thesis 1978 University of Nairobi, Njage M "Price Control" Unpublished 1980 U.O.N. LL.B Dissertation.
17. Cost of Living Commission Report EA Vasey Chairman, Nairobi, Govt. Printer 1950
18. 1967 Kenya Gazette Supplement No. 99
19. Maringa J "Evolution of Competition Politics and Law in Kenya" March 1994 Unpublished Monopolies and Price Commission documents.

20. Recommendation 87
21. Recommendation 89
22. Recommendations 90
23. Economic Management For Renewed Growth Sessional Paper No.1 of 1986 Government Printer, Nairobi, 1986. Ps.100-103
24. Cap. 504 Sec. 27 (1)
25. Cap. 504 Sec 27 (2)
26. These guidelines are contained in the Monopolies and Price Commission document "Control of mergers and concentration of Economic Power" March 1994
27. Ibid P.5
28. Ibid
29. The Monopolies and Price Commission uses the following ways to determine market structure:
 - (i) The number of Firms in the industry (the intensity check/test)
 - (ii) Concentration Ratio (CR4)

This is the share of the market held by the 4 largest sellers. A CR4 of 75% would be a thresh hold for high concentration
 - (iii) Herfindal - Hirshmann Index (HHI)

This is the sum of squares of individual market shares of all firms in industry the share being treated as whole numbers (eg. if the firms has a 25% share it contributes $25^2 = 625$ to its industrys HHI) values of HHI range from 0 (perfect competition) to 10,000 ($100^2 =$ pure monopoly). An HHI of 1800 + signals high concentration while mergers that leave the industry HHI below 1000 are unlikely to be challenged.
30. Cap.504 Sec. 31
31. Cap.504 Sec.32
32. Cap.504 Sec. 64 (2)

33. Cap.504. Sec. 64(3)
34. Cap.504 Sec. 64 (5)
- 35.. Cap.504 Sec.64(6)
36. Sec 67 (3)
37. Sec. 68
38. Sec. 69 (2)
39. Part IV Cap. 504
40. See Sec. 45-63 generally

CHAPTER THREE

THE LAW ON MERGERS IN THE UNITED KINGDOM THE EUROPEAN UNION AND THE UNITED STATES: A COMPARATIVE ANALYSIS

3.0 Introduction

Before an examination of the laws of the United Kingdom, the European Union and the United States of America regarding mergers and takeovers or acquisitions is attempted it should be noted that due to constraints of time and space only a cursory overview of the major provisions of these laws will be offered. For similar reasons again only the provisions that have a possible relevance will be discussed as it can be said that law is applied or enacted to the specific needs of that country and therefore it would be a fallacy to assert that mass importation into Kenya of foreign laws would cure the defects in our laws. To this end therefore only the major provisions of these laws will be discussed and a summary provided thereafter at the end of the chapter.

3.1 UNITED KINGDOM MERGER AND TAKEOVER LAW

The statute under which mergers are controlled in the U.K. is the Fair Trading Act 1973. Before going into the provisions of the Fair Trading Act 1973 (hereinafter The Act) the institutional framework upon which mergers are controlled is going to be considered.

3.1.1 The Institutions

i) Director General of Fair Trading

Although the office of the Director General carries out many tasks competition policy is significant part of its brief. The Director General is assisted by the staff of the office of Fair Trading established under the Fair Trading Act. This office has both a legal division and an economics branch which advises on the economic issues involved in competition law.

The Director General is required to gather information about monopolies and mergers¹. Regarding mergers he advises the Secretary of State whether mergers should be referred to the Monopolies and Mergers Commission². His advice is usually taken. In performing his duties the Director General is assisted by a Mergers Panel that meets in the Office of Fair Trading. Where the commission finds that the merger will operate against the public interest the Secretary of State asks the Director General to enter into negotiations with the firms concerned so as to alleviate any harm to the public interest.

In Kenya it can be said that there is no such institution as the Minister of Finance is not advised by anyone in referring a merger proposal for investigation as seen above.

(ii) The Monopolies and Mergers Commission

This institution is analogous to the Kenyan Monopolies and Price Commission. This commission has several functions under the Fair Trading Act 1973, the Competition Act 1980 and various other Acts. It has no original jurisdiction and only investigates matter referred to it and its role is purely advisory. Under the Fair Trading Act it may be asked to investigate monopoly situations, general references, restrictive labour references and mergers³. It also has other functions in the above stated statutes.

The Commission has 32 members that consist of a full-time chairman who is usually a lawyer by training and three part-time chairmen. The other members all part time and are drawn from businessmen, members of the professions, trade unions and academics.

Investigations are carried out by panels where separate panels deal with particular references.

(iii) Secretary of State

At the top of the system of competition law in the U.K. is the Secretary of State For Trade and Industry. This Secretary of State is advised by a Minister of State for Corporate and Consumer Affairs who deals with competition matters. The Secretary of State is the one responsible for referring mergers to the Monopolies and Mergers Commission. The monopolies

and Mergers Commission reports back to the Secretary of State who decides whether to accept its advice and to implement its recommendation. He has powers to veto references by the Director General to the Monopolies and Mergers commission under the Fair Trading Act or the competition Act.

3.1.2 The Law

The Act provides that certain mergers qualify for investigation and where this the case it is for the Secretary of State for Trade and Industry to decide whether or not to refer the merger to the Monopolies and Mergers Commission. He considers the advice of the Director General of Fair Trading in such decision. The Commission will then decide if the merger operates in the public interest or against it⁴.

The Commission then reports its findings to the Secretary of State and where the findings are that it has an adverse effect on the public interest the secretary of state is empowered to take action to stop the merger or if merger already completed to require separation. As a 3rd option he may allow the merger but require steps that will alleviate any adverse effects of the merger. Where the Commission finds that the merger does not operate against the public interest the merger may proceed.

In considering whether or not the proposed merger will have adverse effect on the public interest the following are considered; namely the desirability of:

- 1) maintaining and promoting effective competition in the United Kingdom,
- 2) promoting the interests of consumers, purchasers and other users of goods and services in respect of prices, quality and variety of goods and services supplied,
- 3) promoting, through competition, reduction of costs, development and use of new techniques and raw materials and facilitating the entry of new competitors into existing markets,
- 4) maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
- 5) maintaining and promoting competitive activity in overseas markets⁵.

In regard to the Director General advising the Secretary of State as to whether a referral is required or not the Director General takes into account the factors specified by the Act and in particular the effects the merger will have on competition. Other factors will be taken into consideration depending on the case. However the primary concern is the effect the merger will have on competition as reiterated by the Government in its 1988 White Paper.

The Director General is determining the effects of the merger will have to consider whether the merger is "horizontal", "vertical" or "conglomerate".

Particular concern is made to horizontal mergers that may reduce competition. Where one of the firms is a leading producer in the market special examination is carried out.

Other relevant considerations include the level of product substitution, the presence or absence of competition from imports and ease of entry into the market⁶.

For vertical mergers the Director General is concerned with the possible foreclosure effect on competitors of the merged company. Conglomerate mergers although having an insignificant effect on competition are also investigated⁷.

Another consideration is whether any efficiency will be gained from the merger⁸. Will employment be created?⁹

Where the merger creates international competitiveness then it will be unopposed¹⁰. Where a sector of strategic importance is in foreign hand the Director General might regard such merger as against the public interest¹¹.

A merger that involves the rescue of an ailing company will not be challenged by the Director General¹².

In order for a merger to qualify for investigation¹³;

- 1) the merger must involve two or more enterprises ceasing to be distinct. Enterprises cease to be distinct in two ways :
 - a) where two or more enterprises are brought under common control or ownership,

- b) where an arrangement or transaction exists whereby either of the enterprises ceases to be carried on in consequence of any arrangement or transaction entered into to prevent competition between the enterprises.
- 2) at least one of the enterprises must be carried on in the United Kingdom or be under the control of a body corporate incorporated in the U.K.,
- 3) the merger, unless it has taken place in secret must have taken place not more than six months before the reference is made,
- 4) either one or both of the following conditions are satisfied:
 - a) as a result of the merger the enterprises which cease to be distinct will together supply or be supplied with at least 25% of any goods or services of the same description supplied in the U.K. or substantial part of it,
 - b) the gross value of the world -wide assets taken over exceeds £ 30 million.

4 (a) & (b) above are generally known as the "market share test" and the "assets test" and the Secretary of State may specify only one test or if one test used, the commission should not use the other 14.

It can be seen that in the UK the law provides for

mergers that qualify for investigation a provision that is lacking in Kenyan law.

Regarding the period during which the Secretary of the State can refer a completed merger made public to the Commissioner for investigation, such is limited to six-months. This serves the purpose of limiting uncertainty. This provision for time is lacking in Kenyan legislation.

In relation to newspaper mergers, the Fair Trading Act treats such in a special category. Here the "market share" test or the "assets" test is not followed. A newspaper merger requiring the consent of the Secretary of the State is one whereby a newspaper or newspaper assets are transferred to a newspaper proprietor whose newspapers, including that taken over have an average circulation per day of publication of 500,000 or more. Without such consent the transfer will be unlawful and void¹⁵.

A report from the Monopolies and Mergers Commission is required before the Secretary of State can consent to the transfer of a newspaper¹⁶. However such report not needed if the newspaper concerned is not economic as a separate paper¹⁷.

Newspaper mergers receive special attention due to the special public interest arising out of such mergers and their effect on the dissemination of news. Such provisions do not exist in our law.

Mergers of water or sewerage undertakings receive special attention in the U.K. just like newspaper mergers. This is because of the importance of ensuring competition in the water industry. Where it appears to the Secretary of State that it is or may be the fact that arrangements are in progress which if carried into effect will result in a merger of two or more water enterprises or that such a merger has in fact taken place the Secretary of State is required to make a reference to the commission¹⁸.

Such a provision however may not have any relevance to our law as water and sewerage services are still provided for by the local authorities and not by private enterprises.

3.2 EUROPEAN UNION CONCENTRATIONS LAW

The European Economic Community was founded by the Treaty of Rome. The Community seeks European economic prosperity through unification of their markets. Articles 2 and 3 of the Treaty provide.

'The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it"

It should be noted therefore that the EEC is concerned with a multitude of economic objectives of which competition law plays only a part thereof.

On concern will therefore be restricted to the EEC competition law. Article 3 of the Treaty of Rome provides for the institution of a system ensuring that competition in the common market is not distorted.

3.2.1 The Institutions

(i) The Council of the European Union

This is also referred to as the Council of Ministers. This is the supreme legislative body of the EEC. Here the member states legislative for the union, set its political objectives, co-ordinate their national policies and resolve differences between themselves and with other institutions. It is not involved in competition policy on a regular basis but has delegated important power to the Commission through regulations to enforce the competition rules and to grant block exemptions in respect of agreements caught by Article 85 (1) but worthy of exemption under Article 85 (3).

(ii) The European Commission

This Commission based in Brussels is centrally involved in developing competition policy, fact finding, taking action against infringements of the law, imposing penalties and granting exemptions. One of the 17 commissioners takes responsibility for competition matters while the DGIV is the Directorate of the Commission specifically responsible for competition policy.

The DGIV has a Director General, his deputy and a Hearing Officer who safeguards the rights of the defence in any hearings. The Legal Service represents the Commission in proceedings before the Court of Justice

(iii) The court of Justice and Court of First Instance

In matters of competition law the European court of justice hears appeals from decisions of the commission and deals with points of law referred to it by national court. The court delivers opinions on cases before it and which opinion is not binding. The Court of First Instance¹⁹ now has jurisdiction to deal with all actions brought by individuals and companies against decisions of the Commission. Its judgements appealable to the Court of Justice.

(iv) Advisory Committee on Restrictive Practices and Monopolies

This body considers draft decisions of the Commission and makes appropriate comments upon them and also discusses draft legislation and the development of policy generally.

The national courts of individual member states are also required to apply the EEC competition rule which are directly applicable and invocable by individuals.

3.2.2 The Law

Despite the fact that no specific provisions deal with concentrations in the EEC Treaty (concentrations is the term used to mergers and takeovers in community literature) Articles, 85²⁰ and 86²¹ have been construed as applying to mergers and takeovers. This is because the principles of statutory construction followed in EC law are different from those employed in English law. Indeed controversy still rages as to the applicability of the two above articles.

When construing, in particular, the Merger Regulation and the legislative measures adopted by the Commission for its implementation it is important to bear in mind that a purposive construction is generally to be preferred over a literal interpretation; that all the authentic language versions of EC legislation must in principle be taken into account; and that reference may be made to recitals in the preamble to a legislative measure²². In regard to Article 85 Richard Whish points out that EEC competition law is continually influenced by the political goal of achieving single market integration and therefore produces controversial results. Secondly the economic context as well as the legal context of agreements is also considered by Article 85²³. Article 86 on the other hand does not contain an exhaustive list of the matters within its mischief and has therefore been applied to several practices not specifically mentioned in it.

The Memorandum on the Concentration of Enterprises in the Common Market²⁴ published by the Commission in 1966 concluded that Article 85 was not applicable to agreements whose purpose is the acquisition of total or partial ownership of enterprises on the recognition of the ownership of enterprises. The position for many years has therefore been that structural changes in the market were essentially a matter for Article 86 and not Article 85. This applied in SHV Chevron Oil Europe Inc.²⁵ However the later case of BAT V. Commission²⁶ widened the ambit of Article 85 and now this article plays a greater role in merger regulation.

The applicability of Article 86 to mergers was on the other hand confirmed by the Continental Can V. Commission²⁷ case. Article 86 was sought to be applied by the Commission in 1971 although at the time it was doubtful whether it could apply. In the case the Commission held that the takeover by Continental Can of the USA by Thomassen and Drijver - Verblif NV CTDV, a Dutch company, was an infringement of Article 86. Its view was that Article 86 could be applied to prevent mergers which would result in the strengthening of a dominant position. Such view was upheld by the European Court of Justice²⁸.

Articles 90 and 92 also apply to mergers. By virtue of Article 90 a member state must not infringe the competition rules in its relations with public undertakings or undertakings to which it grants special or exclusive rights.

Article 92 prohibits the grant of state aids which might distort competition.

The scope of Articles 85 and 86 is very wide considering the definition of "undertakings" to which the Articles apply to. Any agreement whose object or effect is anti-competitive is subject to these Articles. Therefore any natural or legal person of whatever juridical character capable of carrying on some commercial or economic activity in the goods or services sector should qualify as a undertaking. In such a wide definition state-owned corporations may be deemed as undertakings.²⁹

Due to the fact that Article 85 seeks to prohibit any cooperation between undertakings which prevent, restrict or distort competition, its scope is not limited only to legally enforceable agreements³⁰ but also to "gentlemen's agreements" and simple understandings³¹.

Article 86 is unique from other merger legislation as it applies not to any specified mergers (eg. in the U.K. law) but to firms that occupy a dominant market position. The other aspect of Article 86 is that the economic aspects of a market action are also considered.

It should also be noted that additionally mergers in the EV are also subject to Council Regulation No. 4064/89 on the control of concentrations between undertakings. All concentrations with a community dimension are subject to the system of merger control laid down in the Merger Regulation³².

The Merger Regulation provides that no member state shall apply its national legislation on competition to any concentration that has a community dimension³³. The Merger Regulations entered into force on September 21 1990.

The procedure to be followed in the case of a concentration having a community dimension can be broken down into the following stages;

- a) notification of the concentration to the Commission,
- b) suspension of its implementation pending assessment by the Commission,
- c) preliminary examination of the concentration
- d) examination of the concentration and either clearance or initiation of proceedings,
- e) where proceedings are initiated, appraisal by the Commission or referral to the competent authorities of a member state,
- f) termination of proceedings and the powers of the Commission (or where applicable of the competent authorities of a member state) to prohibit the concentration, impose conditions on its implementation or impose sanctions on the undertakings concerned,
- g) review by the European Court of Justice (or, where applicable, the courts of the member states concerned)

All such concentrations with a community dimension must be notified to the Commission and such notification must be effected not more than one week after the first in time

of the following events; the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

In appraising a concentration to establish whether or not it is compatible with the Common Market the commission is required to take into account the need to preserve and develop effective competition within the common market. The relevant economic considerations are provided at Article 2 (1) (b)

- a) the market position of the undertakings concerned and their economic and financial power
- b) the alternatives available to suppliers and users
- c) the access of suppliers and users to supplies or markets
- d) any legal or other barriers to entry
- e) supply and demand trends for the relevant goods and services
- f) the interests of intermediate and ultimate consumers
- g) the development of technical and economic progress provided that it is to the advantage of consumers and does not form an obstacle to competition

Special rules are also applicable to takeover and merger activity in specific sectors of the economy eg. coal and steel, the public sector and defence.

3.3 US MERGER AND ACQUISITIONS LAW

US antitrust law is basically found in 3 statutes. These are i) The Sherman Act; ii) The Clayton Act 1914; iii) The Federal Trade Commission Act 1914. These statutes deal with all antitrust activities but for the purposes of this paper only the provisions of these statutes that deal with mergers and acquisitions will be considered.

The Sherman Act of 1890 is the first statute that was enacted to regulate monopoly in the US. Its purpose has been described in the case Northern Pacific Railway V. US³⁴ where the US Supreme Court held,

" The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premises that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions".

The Sherman Act provides,

- Section 1: "Every contract, combination, conspiring, in restraint of trade or commerce among several states or with foreign nations, is hereby declared to be illegal..."
- Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among several states or with foreign states shall be deemed guilty of a misdemeanor ..."

When this statute is applied however it produces a very high test as it condemns all restraints of trade in interstate or foreign commerce.

This is what is termed as the "perse" rule. Such a rule is not practicle as all contracts in their very nature restrain trade and therefore application of such a rule would necessarily bring commerce to a grinding halt. This was however rectified by the US Supreme Court in Standard Oil Co. of New Jersey V. US³⁵ where the "rule of reason" was formulated. Under this rule only undue or unreasonable restraints of trade are condemned and reasonable restraints are allowed.

The rule was restated by Justice Brandeis in Board of Trade of Chicago V. U.S.³⁶ where he stated

"... the legalization of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider, the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting th particular remedy, the purpose or end sought to be attained, are all relevant facts"

Thus 2 standards or tests are used to judge antitrust activities of enterprises. One is the "perse rule" as seen in the Sherman Act and the other is the rule of reason under which the courts must consider economic evidence to determine whether competition was actually hampered.

Although mergers can be attacked as illegal combinations in restraint of trade under the Sherman Act it can be said that the Clayton Act 1914 is the one that deals expressly with mergers and acquisitions. Besides corporate mergers, the Clayton Act is also concerned with price discrimination, exclusive and tying contracts and interlocking of corporate directories.

Section 7 of the Clayton Act, (as amended by the Celler - Kefauver Act 1950, the Antitrust Improvements Act 1976 and the Antitrust Procedural Improvements Act 1980) provides:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly".

It can be seen that this provision only applies to mergers and acquisitions that lessen competition or tend to create a monopoly. This approach differs from the strict "per se" approach of the Sherman Act. These provisions apply to all three types of mergers ie horizontal, vertical and conglomerate. The Merger Guidelines however do not restrict a merger when it leads to efficiency³⁷ of the merged companies and where the merged company is on the brink of collapse. This termed as the "failing company" defence.

As earlier stated the Sherman Act can also be used to control mergers as illegal combinations in restraint of trade under Section 1 and as attempts to monopolize or outright monopolization under section 2.

Mergers and acquisitions in the US are also subject to the US Department of Justice Merger Guidelines as amended on June 14 1984.

Merger Guidelines

These guideline state in outline form the present enforcement policy of the U.S. Department of Justice concerning mergers and acquisitions subjects to section 7 of the clayton Act or section 1 of the Sherman Act. They describe the general principles and specific standards normally used by the Department in analyzing mergers.

The unifying theme of the guidelines is that mergers should not be permitted to create or enhance "market power", or to facilitate its exercise. While challenging competitively harmful mergers the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral.

In order to realize and appreciate the effect of a merger the Department will define and measure the market for each product or service of each of the merging firms so as to realize the market power. Under here the following will be determined:

1. The Product market
 2. Identification of firms that produce the Relevant Product
 3. The Geographical market
 4. Implications of the merger on foreign competition
- The market share of the merging firms will also be determined

In order to interpret market data the Department uses the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms included in the market. Market concentration is generally categorized to three categories: HHI below 1000 reflects an unconcentrated market, moderately concentrated (HHI between 1000 and 1800) and highly concentrated (HHI above 1800).

In evaluating horizontal merger the Department will consider both the post - merger market concentration and the increase in concentration resulting from the merger. If entry into a market is so easy that existing competitors could not succeed in raising prices for any significant period of time the Department is unlikely to challenge mergers in that market.

The conduct of the firm in the market is also considered by the Department in assessing the merger application.

For non-horizontal mergers the factor of the elimination of specific potential entrants will also be considered as

such leads to lost opportunity and the performance of the market is adversely affected.

3.3.1 Enforcement

A tripartite approach is adopted in the enforcement of antitrust law. These laws and regulations are enforced by the United States Department of Justice, the Federal Trade Commission (FTC) and private individuals or entities. Additionally state Attorney General's have authority under section 4C of Clayton Act to bring federal antitrust suits as "parens patriae" on behalf of natural persons residing within the state.

The Antitrust Division of the Department of Justice enforces the Sherman, Clayton and Robinson Patman Acts either by civil or criminal prosecution. The FTC is the sole enforcer of the Federal Trade Commission Act except for Section 12 and has concurrent jurisdiction with the Antitrust Division over sections 2,3,7 and 8 of the Clayton Act.

In investigating a civil change the Antitrust Division may discover and examine records of a business under investigation by issuing a civil investigative demand (CID) before a formal complaint has been filed. A criminal proceeding is generally commenced by the Anti-trust Division through the use of a grand jury to investigate allegations of antitrust violations.

The FTC only has authority to enforce the Clayton Acts civil provision.

The FTC composed of five commissioners appointed by the President functions through its power to issue cease and desist orders enforced by civil penalties and court injunctions.

Any person (individual, business entity or government) who has suffered injury due to antitrust conduct may sue to recover treble damages, costs of the suit and attorney's fees.³⁸ Treble damages awarded automatically on proof that violation caused to plaintiff and such treble figure cannot be varied:Pollock & Riley, Inc. V. Pearl Brewing Co.³⁹. Such a provision is designed to create deterrence to provide monetary incentive to sue for violations and compensation to victims.

Under sec. 16 Clayton Act injunctive relief is also available for threatened loss or damage. The section also gives attorneys fees to a prevailing plaintiff. However to the plaintiff to succeed in a private antitrust action he must prove: (1) injury suffered, (2) to business or property, and (3) the violation of an antitrust law:Brunswick Corp. V. Puelio Bowl-O-mat, Inc.⁴⁰

Other remedies of a civil nature employed are:

- 1) Dissolution, divestiture and divorcement. This is where for example order is made to sell stock. It is designed primarily to neutralize and deny defendants the fruit of illegal practices.
- 2) A consent decree. This is usually worked out between the defendant and the Justice Department or the Federal Trade Commission without a court trial.

Here the defendant promises to abide by the rules of business behaviour set down in the decree and such a consent decree is enforceable as any other court or agency order.

3.4 SUMMARY

In our above discussion it can be seen that UK, EU & US antitrust law contains alot that is lacking from our own merger law. This can be summarised thus:

UK

- The office of the Director General of Fair Trading who advices the Secretary of State on what mergers to refer
- A Mergers Panel that assists the Director General
- A Monopolies and Mergers Commission that has a lawyer chairman and other members, who are professionals, businessmen, trade unionists and academics
- The use of the public interest criteria to determine whether a proposed merger is to be allowed
- More criteria are used to determine the desirability of a merger
- The emphasis on the consideration that a merger must not lessen competition when the Director General vets a proposed merger
- The concern on vertical mergers causing possible foreclosure on competitors of the merged company.
- The investigation of conglomerate mergers

- The Director General employing considerations of efficiency, employment and international competition being created by the proposed merger
- The use of the "market share" and "assets" tests in referral of mergers
- A different definition of "control"
- A time limit of six months set for Secretary of State referrals to completed mergers
- Special provisions for newspaper mergers

EU law

- An Advisory Committee on Restrictive Practices and Monopolies that considers draft decisions of the Commission and comments on them and also discusses draft legislation and the development of policy generally.
- The considerations of the economic aspects of a proposed merger by Article 85 beside the legal considerations also employed
- The fact that Article 86 is read broadly with the spirit of the Article in mind so that several practices not spelt out can be brought under its mischief.
- Article 92 prohibits the grant of state aids which might distort competition
- The wide definition of "undertakings"

- Applicability of Article 85 to agreements not legally enforceable
- Application also of Article 86 to mergers of companies that occupy a dominant market position
- The requirement of notification as provided for by the Merger Regulations No. 4064/89
- US LAW
- The policy guideline found in the Sherman Act that is aimed at preserving free and unfettered competition
- The use of the "rule of reason" to complement the "per se" test
- The promulgation of the efficiency and "the failing company" defence
- The availability of civil charges for antitrust offenders
- The appointment of Federal Trade Commissioners by the President but with Senate confirmation
- The fact that any injured party has standing to sue personally
- The awards of treble damages, costs of the suit and attorneys fees
- The award of civil remedies of injunctions, dissolution or divorcement and the signing of consent decrees.

ENDNOTES

1. Fair Trading Act 1973 sec 76 (a)
2. Ibid sec 76 (b)
3. Supra note 1 sec 69 (1) (a)
4. Supra note 1 sec 69 (1) (b)
5. Supra note 1 sec 84 (1)
6. Supra note 1 sec 69
7. Office of Fair Trading (OFT) Guide to Mergers 1987 chap 2 para 14
8. OFT Guide to Mergers 1987 chap 2, para 16
9. OFT Guide to Mergers 1987 chap 2, para 17
10. OFT Guide to Mergers 1987 chap 2, para 18
11. OFT Guide to Mergers 1987 chap 2, para 19
12. OFT Guide to Mergers 1987 chap 2, para 20
13. Supra note 1 Sec 64 generally
14. MA1 plc and London and continental Advertising Holding plc (cm.258,(258) (1987). This is a Monopolies and Mergers Commission reference
15. Supra note 1 sec 58 (1)
16. Supra note 1 sec 58 (2)
17. Supra note 1 sec 58 (3) (a)
18. Water Act 1989 sec 29 & 30
19. Operation from 1st September 1989
20. Article 85 provides:
"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- a) directly and indirectly fix purchase or selling prices on any other trading conditions;
- b) limit or control production, markets, technical development, or investment
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices

which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of their objectives
- b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

21. Article 86 provides

"Any abuse by one or more undertaking of a dominant position within the common market or is 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 there by 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 subjects of such contracts".
22. See generally Halsburys Laws of England (4th ed) vol 51, paras 2. 265-2.290
 23. Richard Whish, Competition Law, (2nd ed) p. 12
 24. EEC Competition Series Study No. 3 (Brussels 1966)
 25. EC Commission Decision 75/95 (1975)
 26. 35/83 (1985)
 27. EC Commission Decision 72/21 (1972)
 28. In case 6/72 Europem ballage Corpn and Continental Can Co Inc V. Commission (1973) ECR 215, (1973) CMLR 199
 29. See eg case 155/73 Italian State V. Sacchi (1974) ECR 409, (1974) 2 CMLR 177
 30. Cases 41/69 ACF Chemiefarma NV.V. Commission (1970) ECR 661
 31. National Panasonic OJ (1982) L 354/28, (1983) 1 CMLR 497
 32. Art 1 (1)
 33. Art 21 (2)
 34. 365 US 1 (1958)
 35. 221 US 1
 36. 246 US 231
 37. This efficiency defense is however controversial see Sullivan & Hovenkamp, Antritrust Law Policy and Procedure 1984 p.634

38. Clayton Act Sec. 4
39. 498 F. 2d 1240 (5th cir. 1974)
40. 429 V.s 477 (1977)

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The following conclusions necessarily arise from the foregoing discourse.

It can be safely concluded that competition law, which is a law controversial in itself suffers a serious conceptual deficiency. This problem applies to all economic systems that are capitalistic as all competition law where enacted has the same concepts underlying the resultant regulation of market power. The concept of The Theory of Competition which forms the basis of competition law has been in Chapter One shown to be seriously flawed. Perfect competition which is the ideal state of the market place and which state competition law tries to achieve has been shown to be entirely Utopian. The Theory of Competition itself has been in recent times been superseded by The Theory of Workable Competition advanced by such acclaimed economists as Edward Chamberlin, Joan Robinson and John M. Clark. These developments undermine competition law and policies leaving them on precarious ground indeed. In the American case for example despite the long standing policy in favour of competitive market structure, the Anti-trust laws have not been successful in halting the trend toward concentration in American industry. The market structure in many important industries today is highly oligopolistic with the bulk

of production accounted for by a few dominant firms. Traditional Anti-trust concepts are often quite difficult to apply to the behaviour of firms in such highly concentrated markets.

An alternative conceptual basis must therefore be sought to legitimize the existing competition laws. Robert Borkel¹ summarises this point in the following words:

"During the past twenty years or so, the protectionist, anticompetitive strain in the law has undergone a spectacular acceleration, bringing to pass ... the "crisis in antitrust" The resolution of this crisis will determine antitrusts future. The law must either undergo a difficult process of reform based upon a correct understanding of fundamental legal and economic concepts, or resume its descent to the status of an internal tariff against domestic competition and the trade."

Another conclusion that can be made is the negative role the colonial legacy plays in Kenyas political and economic spheres. As has been noted above the colonial economy was one that rested on monopolies and at independence this monopolistic colonial economic structure was taken over by the new petty-bourgeois class. This point is controversial but not entirely lacking in accuracy. It can therefore be concluded that the present leadership has abused state power to monopolize certain industries especially in the import/export sector. In such a climate therefore competition law cannot be successfully implemented especially where it conflicts with the interests of powerful public figures who double up as businessman in all forms of trade. A case in point is the current debacle² in

the electronic mass media industry where licenses have been granted selectively to such point that only those in political favour may set up private broadcasting stations.

Flowing from the above point is the fact that government policy on the law of mergers is not fully developed and does not therefore adequately guide commerce in the desired path. It is interesting to note that the Government policy paper Economic Management for Renewed Growth Sessional Paper No.1 1986³ which recommended the enactment of competition law makes no mention of the government policy on mergers. This has the obvious consequence that merger law is not as well drafted as this discussion has revealed. Such policy should be formulated. Such a clear policy if formulated will lead to a comprehensive merger law being enacted with provisions such as those of enforcement which are presently lacking being included.

Another point that makes the enforcement of merger law difficult is graft or corruption. Greed has permeated all sectors of Kenyan life to the extent that industrialists and businessmen will not stop at corrupting public officials so that they get away with prohibited practices that eventually harm the country's economy. The writer observed this aspect while doing research at the Monopolies and Prices Commission offices where officers sent to investigate certain business would be bribed to write favourable reports. Something should be done as this institutionalized corruption and greed for excessive wealth can only lead to the downfall of our country.

RECOMMENADATIONS

It is surprising to note that despite the fact that our law on mergers and takeovers is clearly inadequate for the purposes it was enacted for the legislature has taken no steps to revise it. The last revision was in 1990. Moreover several bodies ie The Kenya Association of Manufacturers (KAM)⁴, The Federal Trade Commission/Department of Justice (FTC/DOJ),⁵ Clive Grey⁶ and the Monopolies and Price Commission (MPC)⁷ have all published recommendations for amending the Act but the Attorney General seems oblivious of all this. The following is recommended to enhance our law on merger and takeovers:

It has been suggested that the definition of control as found in section 22 of the Act as the power to make decisions after only nominal consultation is done is ambiguous. Both the FTC/DOJ⁸ and Clive Gray⁹ have suggested that a better definition of control is the possession of more than 50% of the voting power of any general meeting of a company.

Section 27 of the Act that prohibits all mergers between firms engaged in manufacturing or distributing substantially similar goods or services without approval should also be amended. This defination of goods and services should be expanded to include goods and service that are reasonable substitutes in use for one another¹⁰.

This is because of the fact that goods and services in a competitive market are not always substantially similar.

Again not all mergers should be considered. Small mergers should not be the concern of regulation. A market share or assets test as employed in the UK and EEC should be devised. This threshold stage if created will act to filter out insubstantial mergers.

The Act should provide for both the efficiency and "failing company" defences as provided for by US law. This latter defence will have the effect of expanding the economy as the failing company will be rendered productive again.

At present only horizontal mergers are subject to the Act by virtue of section 27. Vertical as well as conglomerate mergers should be brought under the ambit of the Act¹² as vertical mergers may in appropriate circumstances eliminate competition and result in the disappearance of independent retail outlets.

The Restrictive Practices Tribunal as it stands is subject to the excessive power of the Minister who may decide when it meets, how it meets, the allowances payable to its members. This may have a detrimental effect on the operations of the Tribunal and should therefore be rectified. Its role should be strengthened so that it is a tribunal of first instance. In this regard the High Court should not have original jurisdiction in merger cases¹³.

This will cure the problem of aggrieved parties bypassing the Tribunal and going straight to the High Court¹⁴. It has also been suggested that the Tribunal should be headed by a High Court Judge while its members should have knowledge and experience in commerce and industry¹⁵. It has also been suggested elsewhere that appointments of the Tribunal members by the President should be approved by the National Assembly to ensure autonomy¹⁶. Such a suggestion draws heavily from the US system whereby steps are taken to safeguard the integrity of the competition law enforcement process by the Federal Trade Commission being independent and reporting to Congress with its five commissioners nominated by the President and confirmed by senate.

A time limit upon which the minister is to approve or reject a merger should be set to avoid uncertainty. The Monopolies and Price Commission has suggested that failure of the Minister within 90 days following notification to disapprove of merger or takeover or failure of the Commissioner in 90 days to request additional information on basis of which the minister is to approve/disapprove transaction shall be equivalent to Minister's statement of no objection thereto¹⁷.

Failure of the Minister within a period of 90 days following parties full compliance with the Commissioners request for information to indicate his disapproval of monopoly or takeover shall be taken as a no objection.

Sec 28 of the Act should be amended to enable a third party to apply for disapproval of the merger or takeover¹⁸. Presently the third party may only apply for approval.

The FTC Report also noted the contradiction in terms of the requirement that a merger should enhance international competition before it is approved. International competitiveness can create domestic inefficiency and to that extent such a requirement should be done away with. In the US a merger that creates market power in the US cannot be justified on the ground that it has facilitated competition overseas.

Merger Guidelines should be published by the Monopolies and Price Control Commission to enable the business community operate with a degree of certainty. As already seen above merger regulations have been published in the US, and the EU. The Kenya guidelines mentioned in chap 2 are not guidelines in the strict sense but are only applied generally. These should be published.

Civil proceedings should be introduced to complement and even to replace criminal sanctions that are applied to offenders. The FTC submitted on this point that criminal punishments for violations of substantive provisions of mergers unduly harsh and may deter combinations.

The successful plaintiff should also be awarded treble damages, costs of the suit and attorneys fees as is the law in the US¹⁹.

This will help to create deterrence, to provide for the monetary incentive to sue for violations and also compensation to the victims. The remedies of injunction, dissolution and divorcement, signing of consent decrees should be introduced to our law as these remedies will serve better the interests of the plaintiff than by merely locking up the offender.

The mergers of newspapers should be given special consideration as in the UK²⁰. The dissemination of accurate information is very essential in a country like Kenya that is undergoing an economic as well as political transformation. As has been said before the press form the fourth estate in any trully democratic state. Takeovers of newspapers that would therefore hamper the free flow of information to the masses should therefore be vetted thoroughly before approval is granted.

It can also be said that insider trading especially in stocks and shares of companies contributes to the hostile or contested takeovers of companies as the new holder of the shares will be able to use inside information to unfairly gain control of the takeover company. The Capital Markets Authority Act²¹ contains provisions prohibiting insider trading ²² but it can be said that such provisions not strictly enforced. These provisions provide that a person connected with a body corporate not to deal with its securities for a period of 6 months if such connection caused such a person to have access to confidential information.

These provision should be strictly implemented.

Company Law provides for different shares types; preference, ordinary ending and deferred. Preference shareholders have no voting power, ordinary shares have a voting power while deferred shares which are normally issued to promoters or directors carry the heaviest voting power. This means that preference and ordinary shareholders who form the bulk of shareholders have very little to say in the running of the company with the result that a minority may vote for a merger or takeover against the wishes of the weak majority. In such a case their interests are not taken care of. The Companies Act²³ should be amended to ensure that all shares in a company carry equal voting power irrespective of its class.

ENDNOTES

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2. Daily Nation **13th May 1996**
3. Government Printer, Nairobi, 1986
4. The Kenya Association of Manufacturers, "The Restrictive Trade Practices, Monopolies and Price Control Act, 1988 - A Critique", December, 1990
5. Amendments to RTP Act as suggested by the US Federal Trade Commission and Department of Justice, March 1993
6. "The Restrictive Trade Practices Act, cap 504, Some Suggested Amendments" Clive Gray, consultant, Harvard Institute of International Development April 1993.
7. "Report on suggested/proposed Amendments to The Restrictive Trade Practices Monopolies and Price Control Act cap 504" monopolies and Prices Commission September 1993.
8. Supra note 5 p.9
9. Supra note 6 p.8
10. Supra note 5 p.12
11. Supra note 4 p.84
12. Ibid
13. Supra note 6 p.12
14. This happened in a previous case that involved Mohan Meakin Distillers
15. Supra note 4 p.85
16. Supra note 5 p.16, Supra note 6 p.12, Supra note 7 p.11
17. Supra note 7 p.10
18. Supra note 7 p.10, Supra note 4 p.84
19. See chapter 3 above

20. Ibid
21. Cap 485A Laws of Kenya
22. Ibid Sec. 33
23. Cap 486

Glossary

Merger- An arrangement where by the assets of two companies become vested in, or under the control of, one company (which may or may not be one of the original two companies) which has as its shareholders all, or substantially all, the shareholders of the two companies. A merger effected by the shareholders of one or both of the merging companies exchanging their shares (either voluntarily or as the result of a legal operation) for shares in the other or a third company.

Take-over - A transaction or series of transaction 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 obtaining control of the management of the company.

Take-over bid - A technique for effecting either a take-over or a merger: in the case of a take-over, the bid is frequently against the wishes of the management of the offeree company; in the case of a merger, the bid is generally by consent of the managements of both companies.

Horizontal merger/take-over - A takeover or merger is horizontal if it involves the joining together of two companies, which are producing essentially the same products or services, or products or services with compete directly with each other (eg. sugar and artificial sweeteners)

Vertical mergers/take-overs - A takeover or merger is vertical where one of the two companies is an actual or potential supplier of goods or services to the other, so that the two companies are both engaged in the manufacture or provision of the same goods or services but at different stages in the supply route (eg where a motor - car manufacturer takes over a manufacturer of sheet metal, or a car distributing firm)

Conglomerate merger/take-over - A conglomerate take-over or merger involves the coming together of two companies in different industries, ie the businesses of the two companies are not related to each other horizontally nor vertically but rather involves diversification. This consists of a company, deriving all or the greater part of its revenue from a particular industry, acquiring subsidiaries operating in other industries.

Agreed merger/take-over - The directors of acquired company agree to the take-over or merger, accept the offer in respect of their own shareholdings and recommend other shareholders to accept the offer. The directors of acquired company may agree right from the start or after early negotiations or even after public opposition to the bid or the directors of acquired company may actually have approached acquiring company to suggest the acquisition.

Unopposed merger/takeover - The directors of acquired company while not making a deal with acquiring company do not offer

the offer nor recommend rejection.

Defended merger/take-over - The directors of acquired company decide to oppose the bid recommending shareholders to reject the offer and perhaps taking further defensive action. The decision to defend may be with the intention of stopping the take-over or with persuading the bidder to improve its terms.

Competitive merger/takeover - A second bidder (and perhaps even a 2nd bidder) comes onto the scene with a rival bid. This may be an independent action on the part of the rival bidder or it may be at the invitation of the directors of acquired company who deciding that a take-over is inevitable feel that they would rather the company came under the control of a bidder selected by them than the original bidder.

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