

**ENFORCEMENT OF COMPETITION POLICY AND LAW IN KENYA
INCLUDING CASE STUDIES IN THE AREAS OF MERGERS AND
TAKEOVERS, PREVENTION OF POSSIBLE FUTURE ABUSE OF
DOMINANCE AND COLLUSION/PRICE FIXING**

By
Peter Muchoki Njoroge
Commissioner
Monopolies and Prices Commission
KENYA

**1.0 THE CURRENT LEGAL AND SITUATIONAL STATUS OF KENYA IN
THE AREA OF COMPETITION**

Regarding unbridled pursuit of self-interest by businesses, Adam Smith said: “It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner but from their regard to their own interest.... people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”¹

What Adam Smith observed in England in 1776 has indubitably proved prophetic over the last few centuries and withstands the test of time up to this day. As testimony to the immutability of Smith’s statement, it has become one of governmental or intra-governmental regulatory functions to encourage fair and open Competition. This has been done through anti-trust laws.

There are inherently conflicting interests among businesses. As W.G. Shepherd and Clair Wilcox have opined, “The business Community is like a continent full of Warlike tribes. There is strife among firms, among industries. Among sectors, big versus small, local versus international and so forth. Firm A’s gain usually causes a loss to some firm B,C,H or Z. Good public policy recognized these natural contraries, and it often puts such opposed private interests to work. The deepest single contrast is between established firms and newcomers; between old-line, blue chip, established firms and new outsiders.”²

Businesses invariably have deep public effects. Businesses Commonly Marshall and employ the capital of thousands of investors (Shareholders), employ thousands of workers, buy from hundreds of suppliers, and sell to thousands or millions of customers. They affect jobs, prices, local prosperity, future resources, national security, and often the quality and meaning of life. The behaviour of many business firms is properly a matter of public concern. To take care of these disparate interests there is need for a macro-regulatory regime.

¹ Adam Smith:The Wealth of Nations, (Harmondsworth,Eng:Penguin Books) pg. 782.

² W.G.Sheperd and C.Wilcox:Public Policies Toward Business,(R.D.Irwin,1979) pg 13.

Whereas political vibrance assures political democracy, robust competition assures economic democracy. Competition is the best general process for optimizing efficiency and equity. Efficient producers can undersell others, who must cut costs or be weeded out. The fittest survive. Competition also forces sellers to advertise their wares informatively. Competition fosters progress, by giving a free run to new blood and new ideas. It rewards the innovator and compels the others to imitate rapidly. It spreads income and wealth widely, by averting monopoly for the few, and by feeding rewards to new operators and innovators. It provides the widest opportunity for seeking success. Competition enlarges freedom of choice for most citizens. It also gives a certain cultural richness by catering to the full range of consumer wants. To assure the sustenance of these benefits demands the existence of a competition regime.

With the obtaining ubiquitous untrammelled liberalization/globalization, promotion of competition has been internationally embraced. The International Community through specialized agencies such as the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD) have decreed the supremacy of competition in the International Market place.

Kenya is part of the International Community. Relatively, and in juxtaposition with more developed economies such as the USA, the UK, Japan and Korea, Kenya is a debutante in the competition matters domain. Kenya must, however, recognize that all the successful developed economies have vibrant competition authorities which dispassionately oversee the Market place. Kenya does not need to reinvent the wheel. For its economy to succeed, it requires a strong competition regime similar to the regimes subsisting in the developed World. As the rookie, Kenya must learn from the experience of the denizens and accordingly, take appropriate measures. This is why the Monopolies and Prices Commission deems the Dar Es Salaam conference on “Competition, Competitiveness, And Investment In A Global Economy” veritably apposite. The Commission would like to take this opportunity to profusely thank UNCTAD, The World Bank Group and The European Commission for facilitating its participation in this Forum.

Regionally, Kenya is a member of the East African Community and COMESA. Both groupings have embraced promotion of competition in their Charters. Specifically, Article 75 of the EAC- Treaty recognizes the need for coordinated competition policies to be incorporated in the protocol that will establish the proposed East African Customs Union.

1.1 Historical Perspective

Prior to Kenya's attainment of Self-Rule in June 1963 and full Independence on 12th December 1963, the degree of industrialisation and liberalization of the economy was rudimentary (very low). Most consumer items such as sugar, fats, razor blades, pangas, jembes, etc which were needed by the settler community were imported from U.K. in support of Her Majesty's motherland. In Kenya itself, the interests of the consuming settlers were protected through a Price Control Regime which ensured that consumers of

essential goods and services were not exploited by tenders through the Price Control Act of 16th October 1956.

Kenya embarked on a process of rapid industrialisation and indigenisation of the economy on the attainment of independence on 12th December 1963 through the setting up of import substitution industries to meet Kenyan and East African Community requirements and the transfer of non-citizen firms to Kenyans. To this end, the independent Administration of Kenya enacted the Trade Licensing Act, Cap. 497 of the Laws of Kenya which legalised the take-over of non-citizen firms by citizens of Kenya through denial of Trading Licenses to certain Trades and Businesses. The Administration also legalised the control of the importation and exportation of goods of any description and the control of supplies essential to the life or well-being of the community through Legal Notice No. 303 of 1964 under the Imports, Exports and Essential Supplies Act, Cap.502 of the Laws of Kenya.

Briefly, therefore, the commercial activities of Kenya were regulated mainly through instruments provided under the Price Control Act, Trade Licensing Act and Imports, Exports and Essential Supplies Act which included among others the following instruments:

- i) Fixing of prices of certain goods and services.
- ii) Transfer of certain businesses from non-citizens to citizens of Kenya.
- iii) Establishment of imports substitution industries.
- iv) Imports and Exports licensing.
- v) Establishment of import quotas for certain goods.
- vi) Complete banning of imports of certain goods.
- vii) Letters of No Objection.
- viii) Allocation of Foreign Exchange.
- ix) Fixed Exchange Rate.

Kenya's industrialization programme through imports substitution strategy reached saturation point in mid 1970s and the programme was hard hit by the collapse of the East African Community which resulted in Tanzania and Uganda opening their markets to imports from China, Taiwan, Korea, India, etc. with the loss of the larger captive East African market. Kenya's domestic industries found themselves with a very small domestic market and products which could not compete in the export markets because of their high prices, low quality, poor packaging, poor design etc. This was followed by falling (decreasing) employment opportunities and falling standards of living for Kenyans.

To reverse the trend of economic decline, it became abundantly clear that Kenyan industries must produce not only for domestic market but also for the export market. The Government therefore decided in the mid 1970s to expose them to competition first in the domestic market by allowing some imports so as to prepare them for export market competition. Competing imports were selectively allowed into the Kenyan market;

banned items were progressively removed from the list of banned items and price controlled items removed from price control lists progressively. In addition, additional industries were licensed to boost domestic competition, lower consumer prices, increase employment opportunities, improve the efficiency in the use and allocation of scarce resources to competing needs.

The policy was aimed at the improvement of the marketability (competitiveness) of Kenyan products in the export market, increase job opportunities, lower the cost of living and raise the standard of living for Kenyans throughout the Republic.

The proposal for the Development of a Competition Policy and the enactment of a law to support the implementation of such a policy in Kenya was advanced in 1982 by the Working Party on Government Expenditures (WPGE). The proposal is contained in Chapter III, Pages 24-27 of the WPGE Report which noted that, as direct Government intervention in the economy via state-owned commercial enterprises diminishes, "more reliance will be put on policy instruments to influence farm management and industrial decisions on product choice, investment and employment." The Report further noted that, "as private sector activities and community efforts increase in scope and magnitude, opportunities for abuses, favouritism and exploitation may also increase."

More specifically, paragraphs 87-91 spelt out the WPGE views on the type of legislation and institutions that Kenya needed to facilitate the desirable changes from a controlled economy to a market oriented free economy. Paragraph 90 in particular stipulated that, "It is, therefore, recommended that legislation with respect to unfair practices be enacted and that a Monopolies and Prices Commission be established to enforce it. This Commission should also assume the functions of the present Price Control Division. The Commission should be empowered to collect annually standardized financial information on all public companies and to investigate complaints relating to unfair market prices and practices. Such a commission should 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 as defined in the legislation."

Paragraph 91 touched on the manning of the institution that the economy would expect to be able to regulate the conduct and the structure of the market so as to obtain the desired performance in the market place and noted "The Commission will require a staff of economists and financial analysts to report on market conditions, paying particular attention to movements in prices and costs at all levels of production and distribution and their effects on both supply and demand. Apart from its regulatory function it should contribute to Government policy formulation in matters affecting trade, production and prices."

The WPGE principal objective in its recommendations for a competition policy, legislation and establishment of suitable institutions for the administration and enforcement of the Policy and Law, was to provide Kenya with an instrument for influencing resource allocation in constructive directions while helping to curb the abuses associated with unbridled private enterprise.

The WPGE recommendations of 1982 gave the advocates of a liberalized economy both in Government and private sector food for thought and studies were undertaken between 1983 and 1985. Towards the end of 1985, a comprehensive Cabinet memorandum was prepared and submitted to the Cabinet proposing the enactment of a law prohibiting Restrictive Trade Practices and the establishment of a Monopolies and Prices Commission in Kenya. The Cabinet approved the proposal and mandated the then Ministry of Finance and Economic Planning to consult widely with other relevant Government Ministries and Departments so as to be able to draft a suitable bill for debate and enactment by Parliament.

Kenya's momentum for change from a controlled economy to a free economy was amplified by Sessional Paper No.1 of 1986 on "Economic Management for Renewed Growth," which noted on page 24 paragraph 2.53 that the "Government will establish the market-based incentives and regulatory structures that will channel private activity into areas of greatest benefit for all Kenyans. In doing so, Government will rely less on instruments of direct control and increasingly on competitive elements in the economy." At paragraph 6.31, page 100, the Sessional Paper also noted that, "At present, Kenya has no comprehensive legislation making restrictive practices illegal and no administrative or legal mechanism to prevent them". Therefore "Government will propose legislation prohibiting restrictive trade practices and establishing an administrative mechanism to enforce it." This commitment by the Government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya in 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988 after receiving the Presidential Assent on 19th December 1988. Thereafter, the then Minister for Finance signed the necessary Legal Notice on 30th December 1988 appointing 1st February 1989 as the day on which the Act came into operation. The provisions of the Competition Law have engendered the regulation of Mergers, Unwarranted Concentrations of Economic Power and Restrictive Trade Practices. It has, however, rather atavistically in this age of liberalization, contained virtually all the price control provisions contained in the replaced Act.

As seen above, Sessional Paper number 1 of 1986 articulated unequivocally the path Kenya was destined to follow in the realm of competition. It said,

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

1. A department of Price and Monopoly Control (DPMC) will be created in the Ministry of Finance, under new legislation to be prepared, to monitor actions in restraint of trade and to enforce rules prohibiting unfair practices;

2. Administration of price controls will be streamlined and applications for adjustments acted upon within 90 days, in the absence of which price adjustments will be automatically permitted;
3. The Determination of Costs Order will be revised to include costs that are not currently a basis for price adjustments and will permit the introduction (on an experimental basis at first) of importality formulae on which to base adjustments; and
4. Items that are not produced by monopolies and are not essentials for low-income families will be considered for decontrol on a gradual basis.³

It is clear from the sessional paper that Cap. 504 was intended to be a transitional piece of legislation to enable Kenya move from a price control regime to a true Market (Competition) Regime. In the 1988 Budget Speech which announced the publication of the draft bill which eventually dovetailed to Cap 504, the then Vice President and Minister for Finance, Professor George Saitoti, declared that Kenya was committed to a market driven competition regime.⁴ This was evidence that Kenya was not only committed to a transitional promotion of competition arrangement; it was willing to eventually liberalize the market and fully embrace competition. This settled the matter internally: Kenya was poised to adopt a fully liberalized market regime to be regulated by a Macro Competition regulator, the present day MPC.

In the East African scene, Kenya is a member of the East African Community. Article 78(1) of the draft Treaty of the East African Community which addressed competition Provided that:

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

In the final East African Community Treaty document which was signed by the Heads of State of the three East African countries on 30th November, 1999, this unequivocal position regarding competition is subsumed by Article 75. If one needs evidence of an unambiguous position that the Kenyan government policy articulates untrammelled competition in the market place, this is it. Explicitly, the government has committed itself to prohibit any practice that adversely affects the objectives of free and liberalized trade. Further, the Kenya government, as a member of COMESA, has through Article 55 of the COMESA treaty agreed to the prohibition of any practice which negates the objective of free and liberalized trade.

³ Republic of Kenya: Sessional Paper No 1 of 1986 On Economic Management for Renewed Growth. Government Printer, Nairobi.

⁴ Republic of Kenya: Budget Speech, 1988, Government Printer, Nairobi.

To further buttress its commitment to local and international competition, the Kenya Government has stated that facilitation of both local and international trade will be two of its most important industrialization strategies. In a forward to Sessional Paper No 2 of 1996 on Industrial Transformation to the Year 2020, the then Minister for Commerce and Industry, Hon. Joshua Angatia, with regard to international trade, said: "... As a country, we must look outward to our neighbours and the world both to seek opportunities for our enterprises and to invite others to participate in building our economy. We cannot create a future if we can turn our backs on the challenges of international trade and commerce"⁵.

The sessional paper further reiterated the need to assure promotion of competition among local traders" through strict enforcement of anti-monopoly and anti-trust laws"⁶. The sessional paper also definitively stated:

"The multilateral trade negotiations of the Uruguay round culminated in the establishment of the World Trade Organization (WTO). It set out an ambitious agenda which included reducing trade barriers further. Kenya is a signatory to this Agreement and must work within its trade regulations and recognize that international trade will become more competitive. However, new trade opportunities will emerge as a result of the new multilateral arrangements that will encourage international trade provided Kenya can establish export oriented industries. "⁷

The above positions demonstrate that the government of Kenya is committed to the promotion of Competition. Sessional Paper No.1 of 1986 and the Budget Speech of 1988 committed Kenya to the promotion of competition internally.⁸ Sessional Paper No 2 of 1996 committed the government to promotion of competition through the path of comparative advantage and hence, internationally.⁹ The paper also committed Kenya to the World Trade Organization (WTO) agreement which arose from the Uruguay Round and stressed that Kenya would abide by WTO trade agreements which promoted international trade .¹⁰

2.0 THE MAIN FEATURES OF KENYA'S COMPETITION LAW

Kenya's Competition law applies to all sectors including state enterprises. Section 73 of the Kenyan Competition law states:

"Except insofar as exempted from the application of the provisions of this Act by section 5 or any other written law, every body corporate in which the Government holds one or more shares, whether as sole, majority or minority shareholders, and which is carrying on any trade is a person to whom this Act applies and who may be investigated by the Commissioner..." Section 5, however, has exemptions relating to trade practices which

⁵ Republic of Kenya:Sessional Paper No. 6 on Industrial transformation to the Year 2020,Forward.

⁶ Ibid.pg.66.

⁷ Ibid.pg.66.

⁸ Sessional Paper No. 1 o 1986(op.cit)pg.116.

⁹ Sessional Paper No. 2 of 1996 (op.cit) pg.18.

¹⁰ Ibid.pg.18.

are allowed by another Act of parliament and trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by government agencies in accordance with authority conferred by an Act of Parliament. In all matters affecting Competition, Kenya's Competition Law applies to all regulated sectors.

The main areas covered by the Competition Law are:

2.1 Restrictive Trade Practices

The Kenya law on restrictive trade practices is intended to cover a very wide area. It covers acts intended to reduce or eliminate the participation of legal and natural persons in economic activities. It embraces trade agreements, trade associations, refusal and discrimination in supply, predatory trade practices, collusive tendering and collusive bidding at auction sales.

Offended persons can complain to the Commission or the Commission may initiate an investigation *ex proprio motu*. The Commission has wide powers including powers to require the offending persons to cease and desist. This is done through Consent Agreements which the Commissioner is required to Gazette. Where there are no Consent Agreements, a hearing is held after which the Minister makes requisite orders. The orders to desist may require the offender to take positive steps to assist existing or potential suppliers, competitors or customers, in order to compensate for the past effects of the offending practices.

A person against whom a Ministerial Order is made has a right to appeal to the Restrictive Trade Practices Tribunal and eventually to the High Court.

The Kenya experience has been that most people against whom complaints are made tend to reach some sort of an agreement with the complainants. At that point most complainants just vanish into thin air. They thus make the investigation process very difficult. We should however not be surprised. Businesses by nature are selfish and will see no point in wasting more money and time when the desired result has been achieved. To the extent that the suspected offenders desist from continuing to break the law, we can opine that the mere existence of a competition Authority, to which complaints are made, is beneficial to the economy. Even without completing investigations, the Competition Authority, through fortuitous defaults brought about by recalcitrant Complainants, has been performing an important role in prohibiting Restrictive Trade Practices.

Regarding investigations initiated *ex proprio motu* by the Commission, the Kenyan experience is that even where the suspected offenders deny wrong-doing, the offensive practices cease. The surveillance function of the Competition Authority is, thus, beneficial to the national economy.

It may be important to point out that developing and least developed countries have substantial informal sectors. This has the effect that the capture of restrictive trade practices is made very difficult.

2.2 Mergers and Takeovers

Mergers and takeovers between two or more independent enterprises are prohibited *per se* unless they are authorized in accordance with the law. This compulsory notification and authorization procedure has, of necessity, ensured that the Commission is quite active in the Mergers/takeovers area.

The Commission is of the view that some sort of a threshold should be introduced. Otherwise the Commission is quite effective in this area.

It should be pointed out that when the merger or takeover is being approved, a condition may be imposed that certain steps be taken to reduce the negative effects of the merger or takeover on competition. An example of a conditional approval is the takeover of Agip Kenya Limited by Kenya Shell Limited and BP Kenya Limited towards the end of the year 2000. The takeover was approved on condition that Kenya Shell and BP Kenya would, as soon as possible and at any rate, not later than twelve (12) months following the consummation of the takeover, dispose of the Nairobi and Mombasa Terminal depots, including LPG facilities therein, wholly owned and operated by Agip Kenya Limited prior to acquisition by Kenya Shell Limited and BP Kenya Limited.

2.3 Control of unwarranted concentrations of economic power

The competition law requires the Minister to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy outweighs the efficiency advantages, if any, of integration in production and distribution.

The Competition Authority undertakes sectoral studies in a bid to consummate this legal mandate. Where necessary the Minister may make an order directing any person whom he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or the supply of services as the exigency of the situation may deem necessary to remove the unwarranted concentration.

The writer deems Orders to dispose of interests extremely intrusive and veritably unnecessary. Other methods to contain abuses of dominant positions should be considered. Fortunately, we have not found it necessary to resort to this route.

In developing and least developed countries, cognizance should be taken of the reality that there is a general dearth of investable capital due to a general lack of capacity to make adequate savings. This means that enterprises against which divestiture orders are made may be unable to find investors willing or able to purchase their holdings. With

such eventualities, Competition Authorities will find it difficult to enforce the law. A situation in which the law cannot be enforced is no better than a situation in which there is no law at all and should be avoided at all costs.

It is also possible for enterprises being subjected to divestiture orders to collude with potential investors so that subject properties are not bought at all. Divestiture Orders, also, have the possibilities of being subjected to constitutional challenges in counts of law as they pose dangers to the sanctity of private property vis-a vis administrative and legal convenience.

2.4 Control and Display of Prices

The existence of this part is veritably superfluous. Kenya has abolished price controls since October, 1994. It is hoped that the whole part will be repealed soon. A new law is being drafted which will accord Kenya's Competition Authority requisite autonomy.

3.0 INSTITUTIONAL FRAMEWORK

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

3.1 Legislature (Parliament)

Parliament is the principal custodian of public interest in Kenya and it creates both the institutional and legislative frameworks for the promotion and protection of public interest. In the competition area, Parliament enacted the current legal instrument, i.e. the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya. And because the market is dynamic, the Law that regulates the functioning of the market must be reviewed from time to time so as to align it with the dynamic changes in the market place. My submission here is that Parliament has a functional responsibility of ensuring the updating of the country's Competition Law so that the Law is able to support and promote effective competition so as to further the economic interests of the public and the efficiency of business.

3.2 Office of the Minister for Finance

The overall responsibility for competition Policy in Kenya is in the hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act Cap.504 of the Laws of Kenya subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices, who, with a team of economists, financial analysis, lawyers and other necessary market

analysts is the principal custodian of Kenya's Competition policy. The Commissioner, whose appointment is mandated under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations are carried out by the Commissioner's staff in the Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out informal research into markets where competition problems are thought or alleged to be present.

3.3 The Office of the Commissioner for Monopolies and Prices

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

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

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes with traders. However, he may be able to suggest who would be in the best position to help.

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

3.4 The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to Section 64(1) of the Restrictive Trade Practices, Monopolies & Price Control Act, Cap.504 of the Laws of Kenya, a quasi-judicial authority, that is the RTPT, is appointed every other five years since 8th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya of not less than seven

years standing and four members. The members of the RTPT have a five years secure term of office and may be appointed for other terms of office at the expiry of the five years.

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

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

3.5 The High Court of Kenya

All appellants to the RTPT in pursuant to the provisions of Sections 20(1), 251 and 31(1) in respect to ministerial orders made in pursuant to the provisions of Sections 18(1), 24(1) and 31(1) respectively who are dissatisfied with the decision of the RTPT may appeal to the High Court of Kenya against that decision within thirty days after the date on which a notice of that decision was served on him and the decision of the High Court should be final.

4.0 CASES HANDLED BY THE COMMISSION

Cases Considered by the Monopolies and Prices Commission (1989-2001)

<u>Year</u>	Restrictive Trade Practices Cases	Merger and Takeover Cases
1989	7	6
1990	6	9
1991	6	10
1992	7	9
1993	7	7
1994	13	9
1995	15	14
1996	15	11

1997	10	11
1998	15	12
1999	8	24
2000	18	37
2001	18	23
2002	15	35
2003	19	20
<hr/>		
Total	179	237
<hr/>		

SOURCE: MONOPOLIES AND PRICES COMMISSION

5.0 SELECTED CASES

Three cases have been selected in the areas of Mergers and Takeovers, Prevention of Possible abuse of dominance and Collusion. All things being equal, the Monopolies and Prices Commission aims to complete all investigations within three months. Again, all things being equal, the Commission aims to complete Sectoral Studies within six months.

5.1 CASE ONE- MERGERS AND TAKEOVERS

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

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

Introduction

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

COMPANY PROFILES

Premier Foods Limited

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

Trufoods Limited

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

Kabazi Cannery Limited

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

Rationale for the Takeovers

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

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

resultant economies of scale will allow the acquiring entity to contract farmers directly and thereby improve the farmers income.

Research and Investigations

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

- (a) There existed inter-locking directorships and shareholdings between Trufoods Ltd and Kabazi Cannery. The directors and shareholders were the same for both firms. Fifty percent (50%) of the two firms were owned by Someg Investments Limited-a Swiss firm. Someg Investments Limited did not have engagements in any other business activity hence dispelling any fear of occurrence of concentration of economic power. Twenty percent (20%) of the shares were held by one person while the rest of the shares were held by 16 individuals with none of them owning more than two percent (2%). The shareholders were all engaged in business activities which were substantially not similar to what Trufoods and Kabazi were involved in.
- (b) The specific products that Premier, Trufoods and Kabazi manufacture/process and sold could be divided into four broad categories, namely; spices and condiments, beverages, spreads, and canned products. Spices and condiments include Tomato Sauce and Tomato Ketchup; Beverages are juices, fruit drinks and concentrates; Spreads comprise jam and marmalade; and Canned products include corn, beans, peas and other vegetables.
- (c) Premier sold its products both in the local market - 4104 metric tonnes (Kshs 168 million) and export market - 218 metric tonnes (Kshs 12 million) in Tanzania, Zanzibar, Somalia, UK and Uganda. Trufoods sold a value of Kshs 179,126,749 in the local market while Kshs 8 million was sold in the foreign markets (EAC). Kabazi's export sales were negligible while its local sales were estimated to be about Kshs 120 million. The negligible exports, alluded to herein, went to the EAC market.
- (d) The three firms had a very wide distribution network which involved over 200 distributors spread across the country. The companies also had numerous competitors in the same market. Notable among these were Cirio Delmonte Kenya Ltd, Bestfoods, Kenya Orchards Ltd, Excel Chemicals, East African Breweries Ltd, Kuguru Food Complex, Unilever, Nestle Kenya Ltd. More competition was posed by importers such as Heinz Ltd, Ceres Ltd, Robertson etc. Numerous Jua Kali sector [MSE's] players were also involved in this business.
- (e) The proposed new entity would lead to an increase in employment. At the time the takeover application was considered, Premier employed 223 people (90 casual and 133 permanent), Trufoods had 192 (113 casual/contract, 86 permanent), Kabazi 159 with 69 being permanent. The services of the staff of the two target

firms, it was agreed, would be transferred to Premier Foods Limited. The 3 firms had human resource development programmes which included training on quality management, computers, ISO, HACCP, lean manufacturing, supervisory skills, waste management, First Aid and personal health care and plant hygiene etc.

- (f) Premier Foods Ltd expected to increase the utilization of its plants to 90% after the take-over. Due to efficient purchase, manufacturing and distribution, the company expected to adopt competitive pricing mechanisms for its products which would eventually lead to increased exports.
- (g) The turnover levels for the three companies for 2001 were Kshs187,126,751 for Trufoods, Kshs 179,994,596 for Premier and Kshs 126,631,367 for Kabazi.

Analysis

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

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

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

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

The two target firms were experiencing difficult times due to their ancient technology which was on the verge of becoming irrelevant and this meant that they faced the danger

of closing down. The takeover looked likely to salvage this situation and thus ensure that those persons already in employment would retain their jobs. Further, the expected expansion would in the medium to long-term create more employment opportunities in this sector for Kenyans.

Employment

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

Recommendation

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

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

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

1. Trufoods Limited and Kabazi Cannery Limited would pay all their pre-takeover employees their full employment benefits in accordance with the

contractual arrangements governing their employment.

2. Premier Food Industries Limited would enter into new employment contracts with those of the said employees who would wish to become its employees.
3. Employment levels, post-acquisition, would remain at least at the same level as that subsisting at the time of the application for the intended takeover.

6.0 CASE TWO: PREVENTION OF FUTURE POSSIBLE ABUSE OF DOMINANCE

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

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

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

6.2 Introduction

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

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

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

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

6.3 CEMENT MANUFACTURING AND MARKETING IN KENYA

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

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

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

6.4 BAMBURI CEMENT LIMITED (BCL)

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

The company has 13 directors as follows:

NAME	STATUS	NATIONALITY
Didier Tresarrieu	Managing Director	French
Alan Y. Lemeur (alt.Max Vogeli)	Director	French/Swiss
David Masika	Director	Kenyan
James M. Shiganga	Director	Kenyan
Geoffrey c.D. Groom	Director	Kenyan
Jean C. Hillenmeyer	Director	Kenyan
Solomon Karanja	Director	Kenyan
Joshua C. Kulei (alt. William Sambu)	Director	Kenyan
Mbuvi Ngunze	Director	Kenyan
Raphael M.Thyaka	Director	Kenyan
Richard Kemoli	Director	Kenyan

Toney Hadley	Director	British
Ronald Roy	Director	Canadian

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

No.	NAME OF SHAREHOLDER	No. OF SHARES	% SHARE ISSUED
1.	Bamcem Holdings Ltd.	265,907,994	73.3.
2.	National Social Security Fund	57,314,178	15.8
3.	Balooobhai Chotabhai Patel	8,249,741	2.3
4.	Barclay Trust Investment Patel	5,583,981	1.5
5.	Insurance Co. of East Africa	2,272,088	0.6
6.	Kenya Reinsurance Corporation	2,735,748	0.8
7.	Old Mutual Insurance Co.	2,347,740	0.6
8.	Others	18,537,255	5.10
9.	Total	362,942,725	100

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

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

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

It should be noted that the leading world cement producer namely Blue Circle of United Kingdom and LaFarge of France have an indirect shareholding in BCL making BCL more of a foreign company. It trades its products under a brand name Boabob Cement and its market includes the Coast, Rift Valley, Western and Nyanza provinces. For its export market it relies on Uganda, Indian Ocean Islands of Mauritius, Comoros, and Madagascar. In order to capture the Nairobi Market, BCL has set up a grinding plant at Athi River and this plant was commissioned in 1999.

Recently, BCL has invested Kshs.189 million in ARML through a one year convertible bond. This will result in BCL having a shareholding of 19.4% in ARML. In order to supply the Ugandan Market better, and also capture the Democratic Republic of Congo market, it has acquired Hima Cement Ltd in Uganda.

6.5 EAST AFRICAN PORTLAND CEMENT LTD. (EAPC)

This is the second largest factory in the country with a production capacity of 800,000 million tonnes annually contributing approximately 500,000 million tonnes to the domestic consumption. It is a limited local public company quoted in the Nairobi Stock Exchange. Its factory is located in Athi River and was commissioned in 1958.

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

No	NAME OF SHAREHOLDERS	NO. OF SHARES	% OF ISSUED SHARE CAPITAL
1.	NSSF Board of Trustees	24,300,000	27
2.	P/S to the Treasury	22,799,505	25.33
3.	Cementia Holding AG	13,180,442	14.64
4.	Associated International Cement Ltd	13,144,442	14.60
5.	Bamburi Cement Ltd. (Nairobi Norminees Ltd)	10,016,068	11.13
6.	Public Thro' N.S.E.	6,559,543	07.29
	Total	90,000,000	100.00

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

No.	NAME OF DIRECTOR	STATUS	NATIONALITY
1.	A.M. Lulu	Chairman	Kenyan
2.	T.K. Barmazai	Managing Director	Kenyan
3.	T.K. Ibui	Director	Kenyan
4.	M. Chemengich	Director	Kenyan
5.	T. Hadley	Director	Kenyan
6.	M.L. Oduor-Otieno (Alt. G.M. Mitine)	Director	Kenyan
7.	G.C. Groom	Director	Kenyan
8.	D.W. Masika	Director	Kenyan

In 1986, the management of EAPC realized that there is need to replace its plant, as it was old (38 years). Plans were made to rehabilitate the plant and various financing agents were approached. Among those approached include Blue Circle and Cementia and they were not willing to fund the project. In 1994 the government opted to seek a loan from Japan, under Overseas Economic Corporation Fund (OECF) worth K£2,254,435 (U.S. Dollars 65 Million). This loan is fully guaranteed by the Government for seven years. The new factory was completed on December, 26, 1997 and commissioned in early 1998.

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

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

6.6 ATHI RIVER MINING LTD. (ARML)

This is one of the smallest cement manufacturing plants in the country and started producing cement in 1985. However, the company started its operation in 1973 and it has been producing chemicals and minerals. It has two factories, one located in Athi River in Machakos District and the other is based in Bondora, Kilifi District.

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

Its Directors and Shareholders are as follows:

NAME OF DIRECTOR	NATIONALITY	STATUS	% SHAREHOLDING
Brian Rogers	Kenyan	Chairman	Nil
Harjivandas J. Paunrana	Kenyan	Vice-Chairman	28.256
Pradeep H. Paunrana	Kenyan	Managing Director	25.619
Sudhir A. Tanna	British	Director	0.270
Wilfred Murungi	Kenyan	Director	1.112
Palle J. Rune	Kenyan	Director	0.453
The Acacia Fund Ltd.	Kenyan Corporate	Director	8.162
Total			63.872

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

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

6.7 APPLICATION OF COMPETITION POLICY AND LAW

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

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

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

An unwarranted concentration of Economic power is prejudicial to public interest if having regard to the existing economic conditions in the country and all other factors which are relevant in the particular circumstances, the effect thereof is or would be:

- a) To increase unreasonably the cost relating to the production, supply or distribution of goods or the provision of any service.
- b) To increase unreasonably the price at which goods are sold and profits derived from the production, supply or distribution of goods from the performance of any service.
- c) To reduce or limit competition in the relevant market.
- d) To result in the deterioration in quality of goods or in the performance of any service.

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

6.8 CONTROL

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

6.9 EAPC

No.	NAME OF SHAREHOLDER	CURRENT % ISSUED SHARE CAPITAL	% SHAREHOLDING AFTER PROPOSAL IS EXECUTED
1.	NSSF Board of Trustees	27	16.67
2.	P/S to the Treasury	25.33	25.33
3.	Cementia Holding AG	14.64	14.64
4.	Associated Internaional Cement Ltd. (AIC)	14.6	24.93
5.	Nairobi Nominees Ltd. (Bamburi C. L.)	11.14	11.14
6.	Public thro' NSE	07.29	07.29
	Total	100	100

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

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

6.10 BAMBURI CEMENT LTD.

No.	NAME OF SHAREHOLDER	CURRENT % ISSUED SHARE CAPITAL	% SHAREHOLDING AFTER PROPOSAL IS EXECUTED
1.	Bamcem Holding Limited	73.3	71.89
2.	National Social Security Fund	15.8	17.25
3.	Balobhai Chotabhai Patel	2.3	2.3
4.	Barclay Trust Investment	1.5	1.5
5.	Insurance Co. of East Africa Ltd.	0.6	0.6
6.	Kenya Re-insurance Corporation	0.8	0.8
7.	Old Mutual Insurance Co.	0.6	0.6
8.	Others	5.10	5.10
	Total	100	100

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

No.		Current % Shareholding	After Implementation of Proposal
1.	Cementia	29.32	29.32
2.	Associated International	29.32	27.87
3.	Coastal	14.66	14.66
	Total	73.3	71.85

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

In terms of shareholding, it can be concluded that the two leading cement manufacturing plants in the country will be owned by foreign investors who already control BCL, the

leading cement manufacturer. Again, Blue Circle will be the leading shareholder in EAPC while LaFarge will be leaders in Bamburi.

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

6.11 MARKET SHARE

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

ESTIMATED MARKET SHARES

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

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

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

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

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

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

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

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

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

The cost differential between EAPC and Bamburi in 1999 was estimated at about Kshs. 2,500 per tonne. The implication of this is that the BCL products should be cheaper than EAPC. The obvious deduction is that BCL Cement is priced unreasonably high.

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

2.0 Profit before tax for Kenya Cement Industries

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

3.0 Profits in Kshs. x 1000

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

As mentioned earlier, Bamburi has bought convertible bonds in ARML. One of the conditions given to ARML was that they should buy clinker from Bamburi. This resulted

in ARML closing down its clinker plant . This resulted in reduction of competition in the production of clinker as for now only EAPC and Bamburi are producing clinker. Clinker is an essential raw material in production of cement.

6.12 THE WAY FORWARD

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

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

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

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

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

February, 2001.

6.13 POST SCRIPT

1. The Government accepted the advice of the Monopolies and Prices Commission and NSSF was denied authority to sell its shares in EAPC as per its original proposal.
2. Around July, 2001 LaFarge acquired Blue Circle worldwide to create the world's biggest cement group. The acquisition agreement had been reached during the first week of January, 2001.¹¹ Automatically LaFarge took control of BCL. Through this acquisition LaFarge took charge of 41.7 per cent shareholding in EAPC, BCL's competitor. Through the same deal LaFarge acquired 19 per cent in the shareholding

¹¹ See Financial Times, 9th January, 2001.

of BCL's third, albeit small, competitor. This had the effect of allowing representatives of LaFarge to sit in the Boards of all the three cement manufacturing companies in Kenya. Had the proposal to sell NSSF shares as originally planned been approved, the control of the cement industry by LaFarge would have been tighter.

7.0 CASE THREE-COLLUSION/PRICE FIXING

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

1. This case addresses the problem created by a powerful Cartel in the Insurance Industry in Kenya.
2. The case also addresses the problem posed where there is a sector regulator in the particular industry being investigated by the Competition Authority.

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

The repression of competition in the insurance industry in Kenya caused uproar. Insurance brokers and players in the transport industry protested. At one time, all Matatus (minibuses used in an estimated over 90% of public passenger transportation in Kenya) threatened to remove their vehicles from the Kenyan roads. The Association of Kenya Insurers called a truce and started negotiating with the Matatu Welfare Association quietly regarding reduction of the fixed prices. At this point, the Monopolies and Prices Commission made a breakthrough and obtained a copy of the AKI Motor Rating Schedule dated 4th June, 2002 which set rates, terms and benefits to apply to all motor policies issued after 1st July, 2002. The Commission also obtained a copy of AKI Resolution 07/2002 wherein it was resolved and agreed that other supplementary rates would apply with effect from 1st January, 2003.

7.1 The Commission wrote the following letter to AKI:

7th February, 2003

RESTRICTIVE TRADE PRACTICES

In accordance with Section 15 of the Restrictive Trade Practices, Monopolies and Price control Act, Cap 504 of the Laws of Kenya, I wish to inform you that allegations have been made that you have been engaging yourselves in Restrictive Trade Practices and

specific evidence has been presented to substantiate those allegations. The allegations are:

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

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

COMMISSIONER
MONOPOLIES AND PRICES COMMISSION

7.2 AKI replied as follows:

19th February, 2003.

RESTRICTIVE TRADE PRACTICES

We refer to your letter dated 7th February, 2003 regarding allegations made against this body concerning alleged restrictive trade practices. We observe that your letter does not disclose the identity of the complainant or the nature of the evidence presented to you, as required by law. In any event, we now wish to address you as follows:

1. The Association of Kenya Insurers

- 1.1 The Association of Kenya Insurers (“AKI”) is a Society registered under the Societies Rules (1968) and under Certificate of Exemption for Registration number 2166 of 5th January 1988. Its objects include:

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

2. The Insurance Act

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

- (1) *Subject to this Act, the duties of the Commissioner shall include:*
- a) *the formulation and enforcement of standards in the conduct of the business of insurance with which a member of the insurance industry must comply;*
 - b) *directing insurers and reinsurers on the standardization to contracts of compulsory insurance;*
 - c) *directing an insurer or reinsurer, where he is satisfied that the wording of a particular contract of insurance issued by the insurer or reinsurer is obscure or contains ambiguous terms or terms and conditions which are unfair or oppressive to the policy-holders, to clarify, simplify, amend or delete the wording, terms or conditions, as the case may be, in respect of further contracts;*
 - d) *the approval of tariffs and rates of insurance in respect of any class or classes of insurance;*
 - e) *such other duties as the Minister may assign to him.*
- (1a) *The Commissioner may, with the approval of the Minister make regulations for the purpose of giving effect to the provisions of this Part.*
- (2) *The Commissioner shall, as soon as reasonably practicable after each year ending on 31st December, furnish to the Minister a report on the working of the Act during that year together with summaries of returns and documents deposited with him under Part VI during that year; and the minister shall lay the report before the National Assembly as soon as reasonably practicable thereafter.”*

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

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

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

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

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

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

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

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

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

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

“(1) For the purposes of this act, “restrictive trade practice” refers to an act performed by one or more persons engaged in production or distribution of goods or services which:

- (a) *in respect of other persons offering the skill, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate;*
or
- (b) *in respect of other persons able and willing to pay fair market prices for goods or services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.*

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

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

3.2 It is doubtful that the provision of insurance business as defined in Section 2 of the Insurance Act, falls within the ambit of Section 4 of the Restrictive Trade Practices, Monopolies and Price Control Act.

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

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

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

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

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

4. **Conclusion**

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

Yours sincerely,

WILFRED R. NJERU
G. EXECUTIVE DIRECTOR

Copy to:

Commissioner of Insurance
Ministry of Finance

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

7.3 The said letter is reproduced below:

20th August, 2001

PREMIUMS RATES

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

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

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

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

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

SAMMY M. MAKOVE
COMMISSIONER OF INSURANCE

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

5th March, 2003

RESTRICTIVE TRADE PRACTICES

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

Please note that our letter of 7th February, 2003 made reference to two specific allegations made against you which principally related to the AKI Motor Rating Schedule effective from 1st July, 2002. The said schedule is in your possession as you authored it, vide your letter AKI CIRCULAR NO. 86/2002/MNW of 4th June, 2002. Among the complainants are the Kenya Transport Association and the Federation of Kenya Employers.

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

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

COMMISSIONER
MONOPOLIES AND PRICES COMMISSION

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

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

In accordance with Section 15(3) of the Restrictive Trade Practices, Monopolies and Price Control Act, the Monopolies and Prices Commissioner and the Association of Kenya Insurers have this 23rd day of April, 2003 negotiated a Consent Agreement stipulating as follows:-

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

For the last thirteen months there has been peace amongst the players in this industry, i.e. the Insurance Companies, the Insurance Brokers, the transport industry and the public. This must have spawned immense benefits for the Kenyan economy as eventually it is the consumers (the public) who eventually suffer the consequences of repressed and/or distorted competition.

8.0 OTHER APPOSITE ISSUES IN THE ENFORCEMENT OF COMPETITION LAW AND POLICY

(i) Lack of a competition culture

Enforcement of Competition Law in the developing world is a very lonely profession, especially for decision makers. Competition is a fairly new phenomenon. As long as there are competing manufacturers, wholesalers, retailers etc., many people will think that there is adequate competition. As a new phenomenon Competition has not been understood well. For example, when the Kenyan Law was being debated in parliament some members of parliament thought that competition law and policy should be applied to curtail the prepondance in business by a certain group of Kenyans vis-a-vis those deemed to be indigenous¹². Yet another member of parliament felt that competition law should be applied to prohibit the practice of requiring new entrepreneurs to pay goodwill¹³.

If law makers did not understand the law they were promulgating, then the common citizenry is obviously less informed.

(ii) Lack of support by the policy makers, public and the Business Community
Policy makers do not accord Competition Authorities required support. This may be because competition is a new phenomenon. Recently, in Kenya, two members of parliament wanted to reintroduce price controls in the areas of Banking and Petroleum. The amount of support they got from parliament, the public and the unaffected sectors of the business community was phenomenal.

At a recent meeting¹⁴ of Competition Practitioners, it was decried that although Competition was one of the new issues being discussed in Doha in November, 2002, most of the Competition Authorities were excluded from government delegations. This cogently demonstrates that full acceptance of Competition by national authorities is yet to be attained.

Businesses only support the idea of competition when they are affected negatively. In the developing and less developed countries, policy makers are often the owners of key businesses. This reality poses veritable challenges to the enforcement of competition policy and law.

¹² Kenya National Assembly, 3rd November, 1988.

¹³ Ibid.

¹⁴ Statement by Mr. George Lipimile, Chief Executive, Zambia Competition Authority. The meeting was held in Pretoria, South Africa, to launch the Southern and Eastern Africa Competition Forum on 16th November, 2002. During the Cancun WTO meeting in September, 2003, the Competition Authorities of Zambia, South Africa and Kenya were represented.

Quite often the law makers promulgating competition law own the businesses which may require regulation. Possibilities of conflicts of interests are legion.

(iii) The Judiciary

In Kenya very few competition cases have been handled by the judiciary. The Restrictive Trade Practices Tribunal has not handled many cases. No appeal has ever gone to the High Court from the Tribunal. As a result there is no jurisprudence and there are no precedents.

It is necessary that the judiciary is brought on board through requisite education and advocacy programmes. That way, the business community and the public may be more willing to face tribunals and courts.

(iv) Lack of Adequate Financial Resources

In developing and less developed countries such as Kenya, Competition Authorities are not accorded adequate financial resources. This may be understood when we juxtaposition the requirements of Competition Authorities with more mundane needs such as clean water, health, roads, education etc. Even these supposedly more immediate needs do not receive adequate funds as the funds are not there in the first place.

(v) Lack of adequate human resources

Almost all Competition authorities in the developing and less developed countries lack adequate human power. To many people in poor countries, it does not make sense to train one highly qualified competition expert abroad when the same resources could be expended in training a number of health nurses. There is need to sensitize policy makers on the need to have qualified practitioners.

The private sector has contributed a lot to lack of qualified personnel. In many instances, the private sector has poached from the competition authorities employees who have been highly trained. This is because the private sector offers better salaries.

(vi) Lack of Legal and Financial Ability to Delve into the Areas of Education and Advocacy

For Kenya, although the Commission has an independent legal mandate to police competition issues, in other areas it is merely a department of the Treasury. As a result, education and advocacy issues have to be handled by another Treasury unit. Since competition matters are a fairly new phenomenon, there is need for the law to be reviewed so that the

competition authority gets autonomy. This will allow the authority to handle education and advocacy matters.

Regarding inadequacy of financial resources, it is hoped that effective advocacy will facilitate the increase of the competition authority's budget. Autonomy will also have a positive effect in this area as the competition authority can impose fees to cover costs of its services in areas such as mergers and takeovers.

(vii) Exemptions

Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act exempts from the provisions of the law the following:

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

These exemptions have the ability to lessen competition in the economy. The exemptions will cover some statutory authorities and also embrace the licensing of members of professional societies such as the Law Society, Medical Doctors, Engineers, Architects, Accountants etc. These exemptions contrast glaringly with the American situation where professional societies are fully captured by the competition law in trading matters since the case of Bates & O'Steen versus Arizona State Bar¹⁵.

The phenomenon of exemptions is, however, not confined to Kenya. Under Section 3 of Zambia's Competition and Fair Trading Act, activities of professional associations designated to develop or enforce professional standards reasonably necessary for the protection of the public are exempted from the application of the competition law. The section also exempts such business or activity as the Minister may, by Statutory Instrument, specify.

¹⁵ (1977) S.C 76-346.

(viii) Sector Regulators

Sector Regulators in Kenya are created by separate pieces of legislation. Quite often, the law creating a sector regulator contains a portion dealing with competition in the sector. There should be deliberate harmonization of sectoral laws with the competition law. If found desirable, the competition authority should have concurrent jurisdiction with sector regulators in all matters spawning competition issues.

Recent experience has shown that sector regulators are increasingly consulting with Kenya's competition Authority. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the Monopolies and Prices Commission. The Civil Aviation Board has been liaising with us in the area of Restrictive Trade Practices. The Communications Commission of Kenya has also been cooperating with the Competition Authority in the investigation of Restrictive Trade Practices and in the area of mergers and takeovers. The Capital Markets Authority cooperates with the Competition Authority in matters concerning listed companies.

(ix) Prosecution of offenders

The Restrictive Trade Practices, Monopolies and Price Control Act has provided for offences and penalties under Sections 21 (Restrictive Trade Practices) and 26 (control of monopolies and concentrations of economic power). The prosecution of the offenders is, however, not done by the competition authority. This has to be executed by the national police force and/or the Attorney General's office. Requisite autonomy will improve the Competition Authority's role in this area.

Cognizance must be taken of the fact that in some jurisdictions, prosecution of offenders by the government is vested constitutionally in the Attorney General's office (by whatever name called).

(x) Difficult economic realities

In the area of mergers and takeovers, developing and less developed countries sometimes find themselves between the rock and the hard place. For example, a company will be placed under receivership. Eventually a proposal will be forwarded to the competition authority for its takeover by a competitor. The Competition Authority may find that no other competitor was interested in the failed firm.

Considering the dearth of investable Capital in these economies, in order to save employment and to guard against expensive equipment going to waste, the Competition authority is forced by circumstances to approve a

merger or takeover which in other circumstances it would not have approved. This will also apply in the takeover of businesses and assets of foreign companies divesting from developing and less developed countries.

(xi) Access to Redress by members of the Public

Section 66 of the Restrictive Trade Practices, Monopolies and Price Control Act restricts the right of appeal to the Competition Tribunal, and hence to the High Court, to those parties involved in the dispute right from the beginning. This disqualifies other legal and natural persons from accessing legal redress. This is an area which may require improvement.

(xii) Kenya's Approach to WTO Issues

Kenya has a National Committee on WTO issues. On Competition issues, the Monopolies and Prices Commission chairs the Working Group on the interaction Between Trade and Competition. This Working Group prepared the paper that contained Kenya's Doha position on competition. It has also postulated at different times the position of the country vis-à-vis EAC, COMESA and Cancun.

**The Monopolies and Prices Commission,
Anniversary Towers, 12th Floor,
University Way,
P.O BOX 30007,
Nairobi,
KENYA**

Tel: 254-20-343834

Fax: 254-20-217275

E-mail:mpc@treasury.go.ke