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Annual Report 1998

Monopolies And Prices Commission

KENYA NATIONAL ASSEMBLY

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Annual Report

1998

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STATEMENT BY THE COMMISSIONER

It is with great pleasure that I take this opportunity to present the annual report on the activities and operations of the Monopolies and Prices Commission for the year ended 31st December 1998.

Kenya like other Developing Countries, is facing major challenges in reforming its economy to enhance national living standards and opportunities. There is the challenge of improving productivity, not only in producing more with less and deploying scarce assets wisely but also in becoming better at making and exploiting new discoveries, whether in technologies, resources, fashion or ideas. A possibly more difficult challenge is to develop in a way that creates new jobs and growth rather than see the economy shrinking to an efficient but diminishing core of activity.

The engine which drives efficiency in a liberalized economy is free, fair and effective competition. Competition is also a positive force that assists economic growth and job creation. And

indeed, the benefits of fostering more competitive markets are being increasingly recognized by countries around the world. More than seventy countries have adopted or are in the process of adopting competition policy and law as a way of enhancing the competitiveness of their national markets in the world market.

Competition Policy is not about the pursuit of competition per se. Rather, it seeks to facilitate the effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with important social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds.

Kenya adopted Competition Policy and Law on 1st February 1989 with the coming into force of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya (The Act). The object of the Act is to enhance the

welfare of Kenyans through the promotion of competition and fair trading and provision for consumer protection. However, it should be noted that while the Act has markedly increased the competitiveness of the internationally traded goods and services, there are still many important goods and services which are provided by public utilities, professions and some areas of Agriculture which remain sheltered from both domestic and international competition. The implication is that the Act remains limited in its application to these sectors of the Kenyan Economy with coverage depending on ownership or corporate form rather than considerations of community welfare.

A national competition policy presents opportunities to progress reforms more broadly and promote nationally consistent approaches which avoid conflicts and costs of establishing diverse industry / sector-specific and sub-national regulatory arrangements. National competition Policy would be able to set out principles and concepts for all participants operating or wishing to operate

anywhere in Kenya. These principles and concepts include:-

- (a) No participant in the market should be able to engage in anti-competitive conduct against the community interest.
- (b) As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership.
- (c) Conduct with anti-competitive potential said to be in public interest should be assessed by an appropriate transparent assessment process, with provision for review to demonstrate the nature and incidence of the public costs and benefits claimed.
- (d) Any changes in the coverage or nature of competition policy should be consistent with and support the general thrust of reforms:

(viii)

- (i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition;
- (ii) in recognition of the increasingly national operation of the markets, to reduce complexity and administrative duplication.

These principles and concepts are consistent with this Commission's belief that time has come to progress the country's regulatory reform more broadly, and to do so by ensuring that there should be no regulatory restriction on competition UNLESS clearly demonstrated to be in the public interest. We request Kenyans to be aware of the fact that those who have enjoyed economic benefits bestowed upon them by regulatory restrictions will not sit back and watch these benefits withdrawn by reformists without a struggle. Regulations which

confer benefits on particular groups soon build constituencies with interests in resisting change and avoiding rigorous and independent re-evaluations of whether the restrictions remain justified in the public interest.

Finally, the greatest challenge remains in the realm of international trade. Of late, there has been an influx of cheap imports into the market causing competition concern. More so, the increase in imports is posing a threat to many local companies which in one way or the other, are finding it difficult to compete, hence are either resorting to mergers or outrightly going out of business. However, through liaison with the concerned parties, the playing field may be made even to ensure that local firms are not edged out of the market unfairly.



J. J. B. KIJIRAH
COMMISSIONER

MONOPOLIES AND PRICES COMMISSION

Chapter One

1.0 MACRO-ECONOMIC ENVIRONMENT IN 1998

Competition Policy like any other policy operates within a spectra of other Government policies. These other policies must be effective for Competition Policy to produce the desired results. Competition Policy fits in the wider liberalization trend as a reaction to a challenge. The repeal of administrative and legal controls created a challenge as to the fate of consumers, producers and investors on what to expect of the new economic environment given the environment under which they had thrived. Under import substitution strategy of industrialization, Kenyan industries were monopolistic or oligopolistic in nature and very little competition existed amongst the firms.

Like in the preceding years, the Kenya Government continued to pursue economic policies meant to engineer growth, eradicate poverty and reduce unemployment which were the basic

economic challenges facing the nation. According to the policy framework paper on Economic Reforms for 1996 - 1998, the Kenyan economy was expected to grow on average by over 6% per year for several years for economic variables to achieve stability and be realized. Towards this goal, the Government continued with the tight fiscal and monetary policy. From the middle of 1993, this policy has been used and has proved viable in stabilizing and reviving economic growth. In this sphere, there has been tax reforms aimed at reducing tax rates and broadening of the tax base. Other measures have also been put in place to ensure reduction in Government expenditure and an attempt to achieve balanced budgets.

However, the effects of the 1997 aid freeze by both the bilateral and multilateral donors trickled into 1998 with adverse effects on the operations of the Public Sector, forcing drastic reductions on financial allocations to various arms of the Government. This was further exacerbated by the

calamities of 1998 such as the *el nino* rains that destroyed the country's infrastructure and the August 7th bomb blast. Despite the acute shortage of funds, the little that was available had to be re-routed to counter the adverse effects of these unforeseen occurrences. The inadequate resources allocated to the Commission in 1998 had a negative impact on the operations of the Commission throughout the year.

The conditions obtaining did not favour the activities of business entities and consequently, many firms suffered financial difficulties. These unfavourable economic conditions, forced firms either outrightly out of business or caused them to seek merging partners while many were put under receivership. Worst hit, were financial institutions, some of which were unable to survive and had either to be put under statutory management of the Central Bank of Kenya and in the case of the National Bank of Kenya (NBK), the government had to inject capital into it. Five banks were placed

under Statutory management by the end of November. A run on the NBK by the depositors forced the government to intervene and to repay some of the non-performing parastatal loans it had guaranteed and appointed an advisor to facilitate the recovery of the bank's non-performing loans.

The banking crisis was precipitated by imprudent banking practices including engaging in risky, reckless and at times fraudulent lending as well as heavy borrowing by insiders. The CBK had to put in place stringent minimum conditions to be met before banks placed under Statutory Management could be re-opened.

Amendments in the Banking Act were passed by parliament and were to be effective by 1st January, 1999. The Revised Banking Act was to have the effect of restoring discipline in the industry by empowering the Central Bank of Kenya to intervene promptly and penalize banks which contravene the provisions of the Act.

The key macro-economic objectives for the period 1996 - 1998 defined in the policy framework paper included:- (1) achieving higher real GDP growth rising from an estimated 5% in 1995 to nearly 6% in 1998; (2) limiting the annual rate of inflation to no more than 5% in 1996 and there after. (3) Strengthening the external current account position from a deficit of about 4.2% of GDP in 1995 to a deficit of about 1.4% of GDP in 1996 and to 0.8% by 1998.

However, the real GDP growth in 1998 was recorded at 1.6% compared to 2.3% in 1997. This was far below the target set in the Policy Framework Paper (1996 - 1998). The poor growth performance was mainly in cash crop production, trade, manufacturing, transport and tourism. The factors which contributed to the depressed economic performance included:

- (a) Dilapidated infrastructure, particularly roads, ports and telecommunications services.

- (b) Increased incidence of insecurity and labour unrest, especially in the past three years, which resulted in loss of local and foreign investor confidence.
- (c) Financing of the fiscal deficit that led to high domestic interest rates and discouraged private sector borrowing.

The overall inflation showed a downward trend during 1998. The average annual inflation rate declined to 6.6% in December, 1998. This was attributed to the significant improvements in the supply of basic foods, particularly over the fourth quarter of 1998. This figure was not far off from the target of 5% in the policy Framework Paper (1996 - 1998).

The current account deficit stood at 2.0% of GDP by end of 1998. The current account deficit was narrowed to US \$ 189 M by November 1998

from US \$ 335M in November, 1997. The improvement in the current account resulted from:-

- (a) The narrowing of trade deficit by US \$ 80M to US\$ 1,136M from US \$ 1,216M.
- (b) The increase by US \$ 67M in the services account from surplus of US \$ 881 M to a surplus of US \$ 948M. There was a reduction of both exports and imports which was a reflection of the general slowdown in the country's economic performance in 1998.

On Reforms, the government continued with the Civil Service Reform Program and privatization. The Civil Service Reform was initially aimed at increasing efficiency in the Civil Service and to improve public sector management capacity. Ministerial rationalization, reduction of staff levels continued to be undertaken during 1998. The completion of rationalization of some key ministries

like Finance, Lands and Settlements, Health, Public works and Housing, Land Reclamation, Regional and Water Development plus six additional ones was to be completed by December 1998. This was not realized by the end of the year.

Privatization of strategic state corporations was enhanced and this saw the giant Kenya Posts and Telecommunication Corporation being split into three, Telekom company, Postal Corporation and Communications Commission. The Kenya Power and Lighting Company was split into Kenya Power and Lighting Company, Kenya Power Generation Company Ltd (KenGen) and the Electricity Regulatory Board established. The completion of the commercialization of the National Cereals and Produce Board, NCPB, following the signing of Agency agreement between the government and NCPB was accomplished. The opening of these parastatals has competition concern as private investors are allowed to invest in these sectors.

Commission has six provincial offices in Mombasa, Embu, Nyeri, Nakuru, Kisumu and Kakamega.

Chapter Three

3.0 DEVELOPMENT OF THE COMPETITION POLICY AND LAW UP TO 1998, LAW ENFORCEMENT AND DISPUTES SETTLEMENT MECHANISMS

3.1 Development of Competition Policy and Law Up to 1998.

After independence in 1963, Kenya adopted an inward looking development strategy based on import substitution industrialization. This policy did well at the start but later on, proved unable to create an enabling environment for the harnessing of economic growth variables. After the oil shocks of the 1970s and the accompanying dismal export and balance of payment performance, it became quite imperative that the development strategy had

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to be changed. The economy could not generate enough foreign exchange, attract foreign direct investment (FDI) and at the same time it inhibited private sector growth. It perpetuated heavy Government participation at the behest of private sector role thereby inhibiting investment, creation of employment opportunities and consequently precipitating economic downturn.

To forestall a repeat of economic crisis of the 1970s, the Government formulated new policies for economic restructuring such as those contained in the *Report and Recommendations of the Working Party on Government Expenditure of 1982*, various Development Plans and the *Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth*. The Sessional Paper No. 1 of 1986 articulated the need for a market driven economy and a legislation to curb restrictive trade practices and abuse of dominance as opposed to Government intervention.

Thus in 1986, a regional seminar for English speaking sub-Saharan Africa on Restrictive Trade Practices sponsored by the United Nations Conference on Trade and Development (UNCTAD) was held in Nairobi. Officials from the then Price Control Department and other Government Ministries attended the seminar. In 1987 a draft bill was prepared and the final deliberation on it done and passed by Parliament in December 1988. The new Act, the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya came into force in February 1989.

The new Act was meant to curb the behaviour of the private enterprises that may inhibit the proliferation of competitive market structures, efficient allocation of resources and protection of the consumers in the absence of price controls. Competition policy in liberalized markets advocates for efficient resource allocation and the improved quantity and quality of goods and services.

To sustain the principles of competition, the Law provided the legal instrument that was necessary to deter firms from distorting market operations for selfish gains. The institutional set-up that emerged from this statute included the Monopolies and Prices Commission which was mandated to administer and enforce the Act under the supervision of the Minister for Finance. The Act also created an appellate court, The Restrictive Trade Practices Tribunal with linkage mechanisms for re-appealing to the High Court of Kenya leaving repeal and amendment functions of the law to the National Assembly whenever enforcement bottlenecks were discerned.

While the phasing out of controls has been done from 1989 gradually, it was never pursued simultaneous with the strengthening of the statute through desirable amendments and new legal provisions to address the emerging bottlenecks. This failure has in many instances impaired the implementation process as the intended integration

of this policy into the country's economic, investment and consumer welfare policies has taken too long to be incorporated in the macro-economic policy framework. Similarly, market distortions arising out of dumping of cheap imports into the domestic market have often generated negative effects that have impeded economic growth. It is, however, gratifying to note that Anti-Dumping issues gained momentum in 1992/93 and reached a peak in 1996 when it was decided that Kenya needed to enact the Anti-Dumping Legislation.

Throughout the period that the Act has been in operation, it has not been a flawless instrument of Competition Law. While it has not been adequate in addressing some restrictive business practices, it still has the section providing for price controls which are no longer useful. The last items under price control, petrol and petroleum products were decontrolled in October 1994. This has caused the need to refocus the Law to address

occurrences that are inimical to the operations of free, fair and competitive markets.

In this regard, the work to improve on the existing legislation to make it more responsive to the privatization process was started in 1996. These efforts were rewarded in 1998 when a comprehensive draft legislation was finalized and forwarded to the Attorney General's Chambers for further scrutiny. The drafting of the bill was done following a comprehensive evaluation of the current status of the competitiveness of the Kenyan enterprise using the experiences of the past ten years.

3.2 Law Enforcement and Disputes Settlement Mechanisms

In order to understand and appreciate the mechanisms of enforcement, compliance and disputes settlement, it is important to emphasize that the competition Policy legislation was formulated at a time of great public reluctance to abolish price

controls. There was a general fear of leaving the consumer unprotected from unscrupulous businessmen. The current legislation was the culmination of a lengthy process of compromise. It is therefore not a perfect instrument of Competition Policy as it stands today and the law needs urgent review to support policy initiatives of liberalization and de-regulation.

The Restrictive Trade Practices, Monopolies and Prices Control Act, Cap. 504 of the Laws of Kenya provides four institutions for the administration and settlement of disputes in relation to Competition Policy and Fair Trading. The Commission works under the general guidance of the Minister for the time being responsible for Finance. The Restrictive Trade Practices Tribunal operates independently as the Court of first appeal but falls administratively under the Minister for Finance. The High court of Kenya is the final court of appeal arising out of this legislation.

The specific areas in which the Commission enforces the Law under the general supervision of the Minister are:

- (a) Restrictive Trade Practices including Cartelization.
- (b) Evaluation of Mergers and Takeovers.
- (c) De-regulation of natural Monopolies by controlling concentration of Economic (Market) Power.
- (d) Price surveillance, monitoring and regulation.

The Role of the Commission is to advise and make recommendations to the Minister on what action to be taken on possible breaches of the Act. As the Act stood in 1998, the Commission's responsibilities extended to both Competition Policy and the administration of price controls (if any). While the Act gave the Commissioner extensive powers of investigations and price evaluation, he was allowed moral suasion and gentle coaxing as

the preferred instrument of policy enforcement. Where persuasion failed, the Commissioner prepared Ministerial Orders for the Minister to issue. In that form the Orders got the force of the law.

All Ministerial Orders on Competition Policy could be appealed against at the Restrictive Trade Practices Tribunal as the first court before they can be appealed against at the High Court of Kenya. However, all Orders on Price regulation and costs determination cannot be appealed against and if they must be annulled, then, Parliament had to be involved. This arrangement created many implementation bottlenecks. The Orders the Minister issues require the offenders to desist from the annulled practices and in very special circumstances, compensate the competitor for losses suffered by assisting in certain specified ways. The compensation is not intended to be necessarily monetary.

The Restrictive Trade Practices are enumerated in detail in Sections 6-12 of the Act. In case of mergers and takeovers in Kenya, these cannot be consummated without the prior approval of the Minister. To do so without reference and approval would be contravening the Law. With regard to mergers and takeovers, the Orders would simply approve, reject or approve with conditions the proposed mergers or takeovers. The criteria for determining whether mergers and takeovers are or are not prejudicial to the interests of Kenyans are set out in section 30 (a), (b) and (c). The criteria include increased productivity, Competitiveness and employment creation potential and or enhancement of capital intensiveness as opposed to labour intensive technology. The decision would be based on economic cost-benefit balancing of probabilities. In case of unwarranted concentration of market power, the Minister is empowered to discourage the dominance of the market by an enterprise through the issue of an Order to divest or dispose off certain

interests to counter vertical or horizontal control of economic activities. The factors which would render unwarranted concentrations of economic power prejudicial to the public interest are contained in section 23 (4) of the act. These factors include raising unreasonably product or service costs, product prices and company profits, reduction or limiting of Competition or deterioration in the quality of goods and services.

The Tribunal is established under section 64 of the Act. Appointment of Members is vested with the Minister for the time being in charge of Finance. The principal function of the Tribunal is to hear appeals against Orders made by the Minister in the areas of Restrictive Trade Practices, Mergers and Takeovers and on Unwarranted Concentration of Economic Power. The procedures of submitting an appeal are clearly defined in the Act.

The right to appeal against the Restrictive Trade Practices Tribunal decision is vested in the High Court of Kenya. The procedure for appealing

is also adequately covered in the Act. Both the Minister and the Appellant can appeal to the High Court against decisions of the Tribunal.

There is no provision in the Act for the High Court to handle cases arising from Ministerial Orders on Price Control, Price Regulation and Determination of Costs. There are only two remedies available in law, namely:

- (i) Section 35 (1) (f) provides that the Minister may from time to time by Order exclude anything from the operation of all or any of the provisions of the Act.
- (ii) Any orders, rules and regulations made by the Minister for Finance under the Act may be annulled by the Parliament.

3.3 Cases Handled in 1998

For the year ending December 1998, the Commission was able to evaluate twelve (12)

merger and takeover cases. Seven (7) of the cases were finalized and approved by the Minister of Finance. The remaining five (5) cases were still in progress at the end of 1998. Nine (9) of the cases emanated from the services sector and three (3) in the manufacturing sector.

Further, the Commission handled fifteen (15) Restrictive Trade Practices cases during the period under review. Eight (8) of the cases were old cases carried forward from the previous years and seven (7) were new cases. Nine (9) of the cases were finalized and the remaining six (6) were still under review at the end of the year.

Chapter Four

4.0 THE ANTI-COMPETITIVE CONDUCT, PRACTICES, AGREEMENTS AND MARKET ARRANGEMENTS

4.1 The need for Transparent Competitive Conduct Rules

Kenya has provided a set of rules intended to ensure the competitive process is not undermined by the anti-competitive conduct of firms. These rules prohibit agreements or arrangements that increase the market power of the firms and prohibit firms that possess substantial power in their own right from using such power in an anti-competitive way. These rules are contained in the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya.

4.2 General Classification of anti-Competitive Conduct and Practices

While there are no limits to the kinds of behaviour a firm might conceive as a means of subverting the competitive process, conduct involving agreements between firms can be distinguished from other forms of conduct. Agreements between two firms at the same level of business chain, such as between suppliers or between consumers, are referred to as "horizontal agreements". Agreements between firms at different levels of the business chain, such as between suppliers and consumers, are referred to as "vertical Agreements".

Other forms of anti-competitive conduct include abuse of market power, certain mergers and acquisitions, price discrimination, refusal to deal, hostile takeovers, price fixing and so on. Because of the wide range of competitive and efficiency consequences of different forms of business conduct, different types of rules are appropriate for

different types of conduct. For the sake of brevity and clarity, the rules are categorized into two classes; namely, per se prohibitions and flexible rules based on competition test.

4.2.1 Per se Prohibitions

The anti-competitive impact of some kinds of conduct may be so unambiguous that they are prohibited outright without having to demonstrate their impact in each particular case. Where this conduct can be defined with sufficient certainty, the Act has provided for per se prohibition. For instance, price fixing arrangements between competitors has been prohibited under the Act. Per se prohibitions under the Act remove the need to prove effects on competition; and thus provide savings in enforcement costs and greater certainty for firms seeking to comply with the law.

4.2.2 Flexible Competition Test

Some forms of behaviour, such as certain cooperative arrangements between firms, such as agreements to share costs and benefits of product research and development are more ambiguous in their impact on competition. In these circumstances, a per se prohibition would be inappropriate for it might prevent behaviour that is potentially useful to the community. Accordingly, conduct of this kind is prohibited if and only if it is demonstrated that it has a particular adverse effect on competition.

When assessing the effect of a given conduct of a competitor/firm on competition, this Commission must first determine the market affected by the particular conduct. A "market" is an area of close competition or rivalry in which one product or source of supply may be substituted for another in response to changing prices. Markets have product, geographic, temporal and functional dimensions. Appraisals of market limits have

important implications for levels of competition or market power. More narrowly defined markets are more likely to support findings of adverse or substantial lessening of competition.

4.3 Types of anti-Competitive Conduct and Trade Practices

Business managers, corporate lawyers, consultants and business advisors all over Kenya are advised to take note of the following anti-competitive behaviours and practices which are practised widely in Kenya notwithstanding the fact that the existing law on competition requires all operators to seek ministerial authorization in order that such behaviours or practices may have legal validity. Indeed, the law is categorical in regard to certain business arrangements such as certain types of mergers and acquisitions such that those who participate in these arrangements without prior approval by the Minister for Finance have no other remedy but are liable to imprisonment and

penalties. It is the intention of this Commission to improve its enforcement regime with effect from 1st July 1999. An Enforcement Committee has been established with effect from May 1999 and arrangements for the recruitment of a Counsel to the Commission are at an advanced stage.

4.3.1 Anti-Competitive Agreements

All agreements which restrict firms from competing are prohibited. For instance, any arrangement to the effect that contracting parties will not charge below an agreed price, boycott and other forms of horizontal arrangements are unacceptable.

4.3.2 Price Fixing Agreements

All types of price fixing agreements are outlawed under per se Prohibition of the law. Pricing decisions lie at the heart of the competitive process and arrangements between competitors

which fix, control or maintain prices are not only undesirable socially but also retard the rate of development of the nation. Price recommendations by manufacturers and suppliers fall within per se prohibition and all firms involved in this conduct should take note of the provisions of Cap.504 of the Laws of Kenya.

4.3.3 Boycotts

Boycotts are defined as agreements between competitors aimed at restricting the ability of a target firm to either buy or sell in a market. There are primary and secondary boycotts. A primary boycott occurs when a group of people agree not to deal with (either sell to or buy from) a target person or class of persons. A secondary boycott occurs when a group of people who may not themselves deal with a target person persuade an otherwise uninvolved party (such as a supplier) not to deal with a target person. Both types of boycotts are prohibited under the existing legislation.

4.3.4 Conduct of Trade Associations and Professional Bodies

Any conduct of a trade association or a professional body which has the effect of lessening competition in the market place is deemed prohibited UNLESS such conduct or arrangement has been provided and authorized under an existing legislation.

4.3.5 Refusal or Discrimination in Supply, Predatory Trade Practices, Collusive Tendering and Bidding

For the purpose of the existing law, any contract, arrangement or understanding whether formal or informal which results or proposes refusal or discrimination in supply, predatory trade practice, collusive tendering or bidding in an auction sale are deemed anti-competitive and therefore prohibited.

4.3.6 Non-Price Vertical Agreements

There is a wide range of vertical agreements under which firms at one level (stage) in the production or marketing process impose restrictions other than price restrictions, on the conduct of other firms at another stage. For example, a manufacturer may impose various restrictions on retailers of its products such as third-line forcing, full-line forcing, sale of only non-competing products, territorial restrictions, exclusive dealership and so on. These types of anti-competitive practices are referred to as vertical restraints to competition and their impact on competition can only be established after full economic evaluation of the arrangement on the specifically defined market. In this regard, this Commission applies flexible competition tests when dealing with any particular vertical arrangement.

4.3.7 Resale Price Maintenance

Resale Price Maintenance (RPM) is the practice whereby a supplier requires retailers to sell at or above a minimum price. This practice is outlawed and firms practising it are doing so at their own risks.

4.3.8 Misuse/Abuse of Market Power

Firms with substantial market power may be able to engage in anti-competitive conduct for the purpose of achieving one or all of the following outcomes:-

- (a) eliminating or substantially damaging a competitor.
- (b) preventing the entry of a competitor into a market.
- (c) deterring or preventing a competitor from engaging in competitive conduct in a market.

This is misuse of market power and it is prohibited under the Kenyan law.

4.3.9 Mergers and Acquisitions

Mergers and acquisitions are a means whereby the conduct of individual firms affects the structure of the market. Mergers between firms can be an effective way of developing competitive advantage, optimizing the benefits of complementary strength and taking advantage of economies of scale and scope. Mergers can also operate as an important discipline upon poorly performing management. Hence, merger and acquisition activity can improve efficiency to the benefit of consumers and the community at large.

The legal provision requires certain mergers and acquisitions to be approved and gazetted by the Minister for Finance. All participating parties are encouraged to seek ministerial authorization for any merger or acquisition activity so as to be sure that the statutory requirements of section 27 of the Act are not floated by their conduct.

Chapter Five

5.0 WHO IS SUBJECT TO THE COMPETITION POLICY AND LAW

The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya applies to all commercial activities in Kenya. It is charged with the responsibility of ensuring the development and sustenance of competition in the economy by prohibiting restrictive trade practices, controlling monopolies and concentrations of economic power. All business entities operating in Kenya, whether locally or foreign owned, are equal before the law and are all subject to this Act.

According to section 5 of the Act, 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 the authority conferred on it by an act of Parliament are not subject to the law. In this category are also,

organizations associated with the licensing of participants in certain trades or professions by agencies of the Government acting in accordance with the authority conferred on them by an Act of Parliament.

However, section 73 confers on the Commissioner powers to investigate and penalize those organizations in which Government own shares, whether as sole, majority, or minority share holding which contravene the Competition Law. This obtains except where a conduct, practice or activity is exempted by section 5 or any other written law.

As may be discerned, the law concerns itself with the production, distribution and supply of goods and services, procurement of inputs and the quality of goods and services. All actions by firms that may in one way or the other negate or hamper the functioning of the principles of market economy are declared to be inconsistent with this law and consequently punishable.

Chapter Six

6.0 THE ROLE AND BENEFITS OF COMPETITION POLICY AND LAW IN THE KENYAN ECONOMY

6.1 The Role of Competition Policy and Law.

The role and contributions of the Competition Policy and Law include:-

- (a) Maintaining structurally competitive markets. This entails promoting competition and efficiency in production and marketing of goods and services, control and regulation of restrictive business practices and preventing mergers and acquisitions which may reduce the intensity of competition among market players to the detriment of consumers. Mergers and acquisitions can facilitate firms to adjust to new market conditions. However, the existence of actual and potential competition in a relevant market strongly influences firms to be

efficient in their production and restrains their ability to exercise market power, hence leading to adoption of innovation and new improved technology, quantity and quality at lower costs. Therefore competition policy and law ensures that mergers and takeovers that are consummated do not compromise fair and free competition in the economy.

- (b) Preventing collusion between market operators with the goal of preventing competitors from subverting the competitive process through collusion e.g. in the tendering process. Efforts to maintain structurally competitive markets will be ineffective if those independent enterprises are able to act as one enterprise by jointly determining prices, output, territories or customers. Because cartel agreements are in the self interest of firms, enforcement of competition policy and law is required to ensure that the theoretical benefits of

Competition to economic development are realized in practice.

- (c) Preventing abuse of market power. A firm in a dominant position is one with market power, the ability of the firm to raise price significantly above cost without suffering a corresponding loss of market share to existing competitors or new entrants. Abusive conduct includes predatory pricing, discriminatory pricing (charging different prices in different markets or to different customers) tied sales (linking the availability of one product to the purchase of another), full line forcing (requiring a firm to buy a whole line of products), export bans (prohibiting the firm from selling in other markets) and refusal to deal.
- (d) Stimulation of innovation and technology. This Policy determines how much economic growth occurs due to the creation and spread of new technology. Competition Law

enforcement may also help in developing efficient strategies combat foreign licensors' anti-trust conduct thereby promoting both the transfer of new technologies and the diffusion of those technologies within the domestic economy. For example, the entry of Kuguru Food Complex has made Coca-cola Ltd to greatly improve its product quality, packaging, advertising, product brand, etc.

- (e) Promoting and protecting consumers' welfare particularly that of the vulnerable members of the society through improved quality of goods, strengthening and promoting the efficient production and distribution of goods and services in the domestic market and promoting the expansion of the base for local entrepreneurs.
- (f) Breaking up economically unjustified monopolies and oligopolies. Monopolies

and oligopolies can greatly retard growth and impose significant cumulative losses on society in terms of foregone potential income and welfare, above and beyond the static costs of inefficient resource allocation that can be expected to result from monopolistic behaviour. An example is the Kenya Power and Lighting company whose highly priced power supply to industries and households has for many years failed to meet actual demand. It is hoped that the liberalization of the sector and the entry of private firms will result in increasing efficiency and consumer benefits.

- (g) Promoting vigorous domestic competition as part of the foundation on which to build international competitiveness, hence promoting long term growth and development.

6.2 Benefits from Effective Competition

The benefits of competition policy and law to the community include the following:-

- (a) The control of restrictive business practices has substantial beneficial effects on the economy in general and through trickle downstream and upstream, deterrent effects on anti-competitive conduct and practices. It obliges firms to compete harder and thus create a Competition culture which in turn increases efficiency in the market thereby leading to qualitative and quantitative increase of goods and services.
- (b) Competition policy and law promotes economic liberalization and development of entrepreneurial initiative in the private sector. The interaction between Competition and other economic policies has led to improvement of business climate and entrepreneurial initiative in private sector especially through deregulation, removal or

curbing of government intervention and opening up of the national economy.

- (c) Competition policy and law ensures that the maximum scope for competitive behaviour exists by establishing whenever possible those structural conditions that do not inhibit the operations of the market forces or where monopoly elements are inherent in a particular sector, the incumbent dominant firm does not drive out new entrants or deter potential new entrants by predatory behaviour. Competition policy accommodates special social objectives through authorizations instead of direct controls and licensing.
- (d) Other benefits accruing from applying competition policy and law principles to economic development is attaining greater efficiency in Industry especially in areas of innovation and technology adoption through prohibition of restrictive trade practices,

protection of intellectual property rights (e.g. patent rights) and business secrets that are pro-competitive including prohibition of imitations. A competitive industrial sector requires a stable macro economic and political environment coupled with a policy that ensures that implementation strategies are applied uniformly, efficiently and fairly. The policy must reward for the devotedness, honesty, hard work and discipline now that Kenyan economy is fully liberalized leading to low prices, low production costs and distribution of services and goods in the economy and hence improved consumer welfare and creation of employment. It is also important to note that industrialization is not an end in itself but a means to accelerate the country's economic development which in turn provides the resources to support measures to alleviate poverty, protect vulnerable groups and

provide rising standards of living for Kenyans.

- (e) Competition policy and law provides a supportive and facilitative function for other policies governing Foreign Direct Investments (FDIs) and Trade. In recognition of the benefits of FDIs and the opening of markets to competition with resultant improved market efficiency as evidenced by lower prices of goods and services, improved quality and increase in consumer choice, the government has systematically removed numerous tariff and non tariff barriers affecting international trade in order to make Kenya an attractive investment destination and increase gross fixed capital formation. Competition policy ensures that markets are kept open to new entrants and that other firms do not frustrate this by engaging in anti-competitive practices, e.g. export and import cartels that

hurt domestic market. Measures of encouraging FDIs include the decontrol of foreign exchange rates and establishment of Export processing Zones.

- (f) Another benefit of competition policy and law to the economy is ensuring that Price liberalization benefits are realized in the sense that the flow causes of excess demand (budget deficits, involuntary expansion of enterprises credit, increase in tax) of enterprise are eliminated and that more effective instruments for macroeconomic control are put in place. These will ensure that Price deregulation will not lead to an open inflation, hence interest rates will be determined by forces of demand and supply. In the competitive financial markets, competition policy will ensure that mobilized savings are efficiently allocated and that competitive net work of commercial banks are created and encouraged.

- (g) Effective enforcement of competition policy and law will enhance the entry of new private firms and the transfer of public assets to the private sector including providing protection against arbitrary actions of governments. Government intervention can be prevented by distributing a great deal of resources to the winner of Competition (most efficient). Other benefits of Competition Policy and Law includes activation of a national economy, income differentials among people can be diminished and concentration of wealth in a few people can be prevented.
- (h) In the informal sector, vigorous competition leads to improvement in quality of goods through technological innovation and advancement as n the recent COMESA exhibition held in Nairobi demonstrated.

As the two preceding sections show, Competition Policy and Law encompasses the whole

economy. Further, it plays an important role in the economy and several benefits result from its enforcement. It is expedient therefore, to highlight in this report how this law relates with other commercial laws in Kenya.

Chapter Seven

7.0 RELATIONSHIP BETWEEN COMPETITION POLICY AND OTHER GOVERNMENT POLICIES.

7.1 Role of Government under Competition Policy.

In a market economy, Government role diminishes as that of the private sector grows. However, its regulatory role and the provision of public goods is indispensable. It must also protect its citizens from the adverse activities by the private businessmen such as exploitation, deprivation of basic welfare needs like health, environmental degradation etc. Competition policy provides an

avenue for the Government to intervene in the market to correct distortions and put in place guiding principles enabling adherence to fair trading. This would result in optimal resource allocation as markets would clear.

7.2 Competition policy and Consumer protection

The repeal of Price Control Act was not an easy task as it was felt that the consumer was being left at the mercy of the unscrupulous traders who would ultimately resort to unreasonably and persistently increasing prices of goods and services. Despite this misconception, consumer welfare is widely addressed in the Competition Policy. Consumer protection refers to the efforts made by the governments, public interest organizations, individuals and business to establish, protect and enforce the rights of the consumers. These efforts have both remedial and preventive approaches. Preventive approaches include measures that

regulate the supply and quality of goods and services while remedial aspects encompass all those measures that provide for those whose interests have been trampled on.

Inherent in the Competition Policy is the wider choice of variety of consumption goods and services. As goods can be obtained both locally and internationally, producers are keen at the quality and prices of goods and services they produce so as to retain and expand their market shares. Competitive market as a market of self annihilation, imposes upon traders the need to improve on quality and charge reasonable prices affordable by the consumers.

Under the former price control, commercial units used to create artificial shortages to lobby for price increases. Competition law protects consumers against such by allowing dealers to set their own prices according to the demand and supply and streamlining the production and distribution channels to ensure that goods reach the

final consumer without hindrances and unnecessary queuing. Since the coming into force of this Act, artificial shortages and long queues have become a thing of the past and empty shelves reflect a reality of the circumstances. It must be noted that with market economy, no trader can afford to lose the market by charging higher prices as opposed to the prices of his / her competitors. The final benefit of this principle is to the ultimate consumer.

In encouraging competition in the economy by prohibiting restrictive trade practices, controlling monopolies and concentrations of economic power, the consumers are saved from acts of discrimination, poor quality goods, and any other activity by traders that may be prejudicial to public interest. For example, a concerned consumer of petroleum products lodged a complaint with this Commission requesting investigations on the possible cartelization of the petroleum industry.

7.3 Competition Policy and Fair Trading.

Fair trading allows markets to reward good performance and punish poor performance. It therefore encourages entrepreneurial progression, market entry by new firms, and greater efficiency on the part of enterprises - leading to greater productivity of capital and labour, reduces the cost of production and improves the competitiveness of enterprises. Competition also ensures that cost savings are passed on to consumers who may benefit as well from greater product quantity, quality and variety (consumers include business users of intermediate inputs and ultimate consumers).

Fair trading enhances technological advancement and competitors select the best, something a monopoly would find hard to replicate and hence keeping the markets open to new entrants with novel ideas is an important condition for technological progress.

7.4 Competition Policy and Law in Research and Development and Intellectual Property Rights.

Research and Development (R&D) collaboration and joint exploitation of research results often lead to substantial efficiency gains but can also reduce inter-firm rivalry, deter new entry and have anti-competitive spill-over effects on production and marketing in downstream markets and hence, distorting the pace and direction of technological change. These distortions can be perfected by prudent enforcement of a strong and efficient competition law.

In order to allow innovation, Intellectual Property Rights (IPRs) provide a degree of protection for a given period -this may lead to "deadweight loss" through higher prices, reduction in diffusion of the innovation and stifling of follow-up innovation (if protection is too broad) and hence it should be set off against the growth and welfare benefits accruing from the introduction of new

products and processes which calls for the need for synchronizing the IPRs Law and the Competition law.

7.5 Competition policy and Transnational Corporations (TNCs).

While competition from TNCs may have helped in some cases to reduce market concentration, its impact is uneven and limited in scope. TNCs are present in areas of manufacturing characterized by high degree of product differentiation, technology intensity or skill intensity and profitability. This suggests that TNCs subsidiaries and local enterprises often concentrate upon different industry sectors or segments, focussing upon segments where more prosperous customers accept higher prices. Ample confirmation exists in the audit and consultancy market, where the TNCs service the large TNCs affiliates and the large local firms, while the local service firms compete intensely for smaller clients offering lower

prices/fees. The lesser competitiveness of local firms has increased the possibilities for TNCs to dominate such market segments, thus replacing the local firms by foreign oligopoly. But sometimes, the local firms can emulate the TNCs skills and compete effectively in the market if there are no predatory practices or any other barriers to entry. Hence the need for an effective legal framework and well-endowed Competition Authority to counter these eventualities.

7.6 Competition Policy and Law and International Trade.

The liberalization process which has been going on in the country has increased competition between domestic and imported goods in terms of availability, variety, prices and allocative efficiency.

The country has also experienced an upsurge in Foreign Direct Investments (FDIs). FDIs have generally been recognized as one of the ingredients of economic growth as they are credited with

increased capital formation, technological and managerial transfer and market development.

However, the current economic conditions have their dictates, we should not leave the assessment of imports and FDIs on the long term benefits that may accrue to the economy. The government should specify a threshold of Foreign investment and sectors where FDIs are welcome to protect the upcoming businesses. Foreigners may not do much good to the economy by flooding the economy with second hand clothes.

7.7 Competition Policy and Law and Industrialization.

The Government has abandoned the old paradigm which upheld the centrality of state planning and management of economic development through the allocation of development resources and producing goods and services for public and private consumption without consultation with the interested

parties. Specifically in industry, this has led to a shift away from an import substitution strategy with its paraphernalia of permits, licenses, and inappropriate tariff protectionism, towards a new paradigm which recognizes market mechanism and private enterprises as more efficient in generating the economic dynamism that leads to growth amid consultations with the private sector. Competition policy strengthens the private sector by providing a level playing field for all market operators and deepening of the industrial sector. This deepening is by creating core and linkage industries, as well as acquiring, improving and domesticating relevant technologies to enhance factor productivity. It includes broadening the base of participation in the industrial sector by constantly bringing in new entrants.

By removal of barriers to entry with the stringent enforcement of competition policy, the new entrants will bring about a new outward oriented strategy which is export geared, improve

entrepreneurship and building up of technical and managerial capacity of micro, small and medium scale industries that are innovative in producing new products and developing new markets. This industrial culture and export mentality will imply the need for efficiency in use of resources, competitiveness - right price, high quality and timeliness of delivery resulting in employment creation through utilization of labour intensive technology, fair income distribution, low production costs and prices and overall national economic development.

Effective competition policy will result in industries building capabilities to formulate and implement strategies and action programmes which will improve their competitiveness, efficiency and overall productivity. Further, it will result in building the Government's capability to formulate and manage an overall strategy for industrial development within the framework of an open economy.

7.8 Competition Policy and Public Utilities.

Monopoly conditions are prevalent in almost all public utilities, usually combining natural monopolistic activities e.g. transmission networks and potentially competitive activities such as provision of services over the network. The current position of competition policy and law in handling public utilities is subject to legislative restrictions provided under the respective Acts of parliament establishing the said institutions.

The Monopolies and Prices Commission strives to ensure that public utilities do not use the exclusive positions in the market to compromise competition in areas where efficiency gains can be realized. It is now imperative that Competition principles should be applied to all market operators irrespective of the ownership.

Kenya is among the developing countries in the world that are in the process of privatization of enterprises operating in public utility sectors to reduce the state budget deficit and as a response to

the increasing need for better quality and prices of the services offered by many state-owned public utilities. This privatization process will be beneficial to the economy if only the resultant privatized firms will be conducive to competition. Therefore the Competition Authority has a fundamental role to play in the privatization process so as to identify the potentially competitive activities of the public utilities to be privatized and ensuring there is ease of entry with minimum expectation of emergence of unwarranted concentrations of market power that may be prejudicial to public interest. The Competition Authority should oversee that privatization and demonopolization go hand in hand.

7.9 Trade and Competition Policies.

Competition policy in Kenya is a recent phenomenon as compared to trade policy. However, global economic changes have necessitated various orientations in trade policy as a result of the establishment of a competition policy. There are

certain salient features that the enforcement of competition policy faces which affect the trade policy. These include;-

(i) Monopolistic or Oligopolistic Nature of the Market.

The policy of import substitution which was a trade policy after independence encouraged the creation of protected industries which were either monopolies or oligopolies. These industries have not been very receptive to competition policy and are in the forefront of resisting it rather than ensuring harmonious interdependence. Trade and competition policies should be implemented concurrently for positive results.

(ii) Barriers to Entry.

Monopolies often have restrictive or exclusive agreements down chain from manufacturers to retailers which hinder entry by competitors into the market. Competition policy

does not encourage this and hence it destroys this supposedly norm. This requires concerted and coordinated efforts in the enforcement of both the trade and competition policies to develop competitive markets in Kenya.

(iii) The Informal Sector and Competition Policy.

In the early 1990's the Kenyan government recognized the need to promote the informal sector popularly known as the *Jua Kali* sector. The policy for this sector is clearly spelt out in the Sessional Paper No. 2 of 1992 on Small Enterprise and Jua Kali Development in Kenya. An example of this is the passenger transport sub-sector which has become so competitive to the extent that price and route setting cartels have emerged but the Competition Authority can not get the culprits due to the informal nature of this sector. The re-intervention in the market place through the enforcement of an effective competition policy by

removal of trade entry barriers will enhance the development of the said sector.

Chapter Eight

8.0 Regulatory Restrictions on Competition and Creation of Regulatory Framework for Access Regimes

8.1 Background Information

The competitive conduct rules contained in the existing law address restrictions on competition arising from the voluntary behaviour of firms. However, they do not address regulatory

restrictions on competition, whether contained in statutes or subordinate legislations. Regulatory restrictions pervade Kenya's economy - ranging from Government sanctioned monopolies to licensing regimes and various restrictions to particular competitive conduct.

In many areas, currently at least partially exempt from the reach of competitive conduct rules - government owned businesses, agricultural production and marketing arrangements and professions - need urgent attention to remove restrictions to competition.

Government regulation will continue to be an important feature of our society, and there is wide community support for government regulation to protect consumers from the negative effects of unfettered competition for profits in the short run. Public health, security, safety, environmental protection and other significant interests for future generations may be sufficient justification for continued Government intervention in the market

place. However, many of Kenya's existing laws were designed without explicit consideration of their impact on competition. Over the last decade or two, Kenyans have recognized that regulatory restrictions on competition impose substantial costs on consumers and society through either cross-subsidies or reduced incentives for firms to innovate or improve their efficiency.

While there have been important reforms since 1986, reform of existing regulatory restrictions on competition have occurred mainly in areas where political priorities have permitted. Beneficiaries of restrictions have resisted reform with those advocating competition bearing the burden of establishing what existing restrictions are not justified. It is now imperative that the culture of competition is adopted nationally so that no participant in the market place should be able to engage in anti-competitive conduct against the interests of the community (public interest). However, Competition from the world market must

be regulated so as to enhance public interest until such time that Kenya's competitiveness in particular industries can compete on equal footing in the world markets.

8.2 Access to Essential Facilities

Effective competition in certain sectors of the Kenyan Economy which exhibit natural monopoly characteristics and hence cannot be duplicated economically can only be attained through legislative access to these facilities by new entrants. These industries include electricity generation, telecommunications services, railway transportation etc. New entrants (competitors) will require access to transmission grids in regards to electricity generation and access to local telephone exchange networks in regard to telecommunications. Equally, it is not economical to construct a second railway line from Mombasa to Kisumu for a new investor who wishes to offer railway transport

services to Siaya residents. Facilities of this kind are referred to as essential facilities.

An "essential facility" is defined as a monopoly which permits the owner to reduce output and/or service and charge monopoly prices to the detriment of users and the economy as a whole. Where the owner of facility is also competing in markets that are dependent to access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets. Mechanism to guard against potential abuses of this kind play a vital role in pro-competitive reforms in essential facilities sectors such as electricity, telecommunications and rail transport.

8.3 Justification for Legislated Right of Access and Price Surveillance for Essential Facilities

It seems a very sensible thing for the nation to formulate a suitable policy for the Right of

Access to essential infrastructure where such infrastructural facilities may not be economically duplicated. At the outset, it appears that there are strong Competition and Consumer Protection arguments for this Commission to recommend that an independent and expert body should be set up to articulate the merits and demerits of such a Right of Access policy for legislative action.

As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this matter should be one of the government, rather than a court, tribunal or other unelected body. It should also be legislated against ministerial actions to advance private interests when declaring facilities as essential to the public interest and therefore qualifying for legislated Right of Access. Accordingly, ministerial discretion should be limited by four explicit legislative requirements -

- (a) Access to essential facility in question is essential to permit

effective and fair competition in a downstream or upstream activity.

- (b) The declaration of a facility by the Minister in charge of Competition Policy as an "essential facility", must have regard to (i) the significance of the facility to the national economy and (ii) the expected impact of effective competition in that industry on the national and international competitiveness of Kenya.
- (c) The legitimate interests of the incumbent owner of the facility set to be declared as an "essential facility" in public interest, must be protected through the imposition of a fair access fee and other terms and conditions that are fair and reasonable, including recognition of the owner's current and potential

future requirements for the capacity of the facility.

- (d) The declaration of the Right of Access must have been recommended by an independent and competent body of experts.

8.4 General Applicability of Legislated Access Regimes

As legislated Right of Access to essential facilities is grounded on community benefits considerations, it would appear that the proposed Access Regime would be potentially applicable to any sector of the economy. Many of the facilities potentially subject to an access regime regulation are currently owned by the public. This is particularly so in regard to key infrastructure assets such as electricity transmission grids, rail tracks, oil pipeline and telecommunications networks. As these assets are held and managed on behalf of the public, the benefits to the public of improving the

efficient use of these assets, and raising the competitiveness of the economy generally, will definitely be additional factors supporting the creation of an effective access regime.

Chapter Nine

9.0 REGIONAL AND INTERNATIONAL CO-OPERATION

As many developing countries adopt Competition Policy and Law, the need for constant interactions to shape the destiny and ensure entrenchment of this law has been increasing. For the year 1998, Kenya participated in the following international functions relating to the implementation and enforcement of the Competition Policy and Law.

- (a) The United Nations Conference on Trade and Development (UNCTAD) and the Kenya Government co-sponsored a course on Competition Policy and Law in Nairobi at the Kenya Institute of Administration

(K.I.A) for three weeks from 18th January to 8th February, 1998. It drew participants from Zambia, Malawi, Zimbabwe and this Commission. The course was recognized by UNCTAD as a regional event for English speaking African countries of Eastern and Southern Africa.

- (b) Zimbabwe's Ministry of Trade which has been struggling to establish a competition body requested this Commission to provide them with information on job descriptions and terms of reference for Competition officials in February 1998. The Kenyan Competition authority complied and the information provided was used in the recruitment of personnel for the Industry and Trade Competition Commission (ITCC) of Zimbabwe which is the Competition body - established by the Zimbabwe Competition Act of 1996 which became operational in July, 1998. The Director of the new

Competition body thanked this Commission for its contribution and pledged for continued cooperation in future.

- (c) The Commission was invited and participated in a National Symposium organized to discuss the Malawian Competition Bill between March 5th and 7th, 1998. UNDP sponsored this event and one official represented the Commission as a panellist.
- (d) Another regional event for Africa in which the Commission participated was the Cairo Regional Seminar on Competition Policy and Law. Two officials represented Kenya in this event held between 21st and 23rd of April 1998 as delegates. UNCTAD and the Egyptian Government organized and sponsored the seminar.
- (e) The Office of Fair Trading and the Monopolies and Mergers Commission of UK. hosted one official from the

Commission for a two weeks internship program. This program took place in June 1998 and was sponsored by the Kenya government.

- (f) The annual Intergovernmental Group of Experts (IGE) meeting on Competition Policy and Law organized by UNCTAD was held between July 27th and 29th. 1998 and the Commission was represented by one official as a delegate. The IGE was preceded by a symposium on Trade and Competition Policies which was organized by UNCTAD, WTO and The World Bank on 25th of July, 1999. The WTO working Group on the Interaction between Competition and Trade Policies was held from 30th to 31st July, 1998 immediately after the IGE and the Kenyan delegate attended all the three meetings.
- (g) From August 31st to September 27th 1998, one official attended the anti-Monopoly Act

and Competition Policy Group Training course at the Japanese Federal Trade commission (JFTC) in Tokyo, Japan. The course was organized by JFTC and sponsored by JICA. This was Africa's first participation as this course had in the past been attended by Asian participants only and it widened the Commission's horizons in international cooperation.

- (h) In September, 1998, one official was invited personally as a panellist in the Secretary General of UNCTAD'S Adhock Experts Meeting to develop a contribution to the Third WTO Ministerial conference scheduled for Mid - 1999 to prepare a built in agenda of the Uruguay Round Multilateral agreements (MTAs).
- (i) In another international cooperation activity, the Commission provided consultancy services to the Zambia Competition Commission on a Beer sector case at the

request of Zambia. Exchange of information within the region was one of the resolutions of the K.I.A Seminar mentioned earlier. This interaction took place in December, 1998.

- (j) During 1998, Kenya's proposed Competition and Fair Trade Bill was sent to UNCTAD for comments. The European Union and Italy submitted their comments on the Bill. This was also a good gesture of cooperation between Kenya and these organizations.
- (k) In another international cooperation event, the U.S.A Federal Trade Commission and Department of Justice hosted two Kenyan officials for a two weeks attachment program sponsored by UNCTAD.

Chapter Ten

10.0 CONSTRAINTS, CHALLENGES AND THE WAY FORWARD.

For almost a decade that this Commission has been operational, several constraints and challenges have been encountered. Briefly, in this section, we discuss some of these and the way forward for this Commission.

There are many developmental and regulatory challenges that have to be addressed in enhancing growth and well functioning of the market. The Commission will continue to address these challenges appropriately in its endeavour to encourage competition and economic growth. The continued support and participation of all market players, the public and private sectors and all Kenyans in general will be needed in order to achieve the goal of creating well functioning and effectively competitive markets. In this regard, it is absolutely critical to streamline production and distribution channels to foster the movement of

goods and services and to facilitate efficient allocation of resources to areas that bring the most value and prosperity to the Kenyan economy. Building of investor confidence depends on the application of investor friendly market conduct rules which can only be engendered through implementation of a system of prudent regulation that seeks to ensure market fairness to all the participants and transparency. To achieve this goal, the following constraints must be addressed as soon as possible:

(a) Publicity and Awareness

Public awareness of the existence and purpose of Restrictive Trade Practices, Monopolies and Price Control Act and the Commission charged with its administration and enforcement is not widespread. The general public, Government agencies, business enterprises and their management countrywide should take note of this legislation so as to safeguard against trade practices and conduct

in contravention of competition conduct rules. In addition, it is expected that corporate lawyers, consultants and business advisors will familiarise themselves with the provisions of this Act to be able to advise their clients on the essence of the Law to their businesses and to the economy at large.

(b) Competition Policy and Other Government Policies

Issues infringing on competition policy may not be fully resolved when other policies of the Government have to be considered. Other Government Laws and policies which are intended to promote other social objectives like employment, exports, labour intensive production and indeed other developmental goals in some cases conflict with the provisions of the Competition Law. Such laws include the Trade Licensing Act and Companies Act amongst others which were enacted without explicit consideration of Competition requirements. There is therefore, an urgent need

for a legislative action to harmonize them to avoid conflicts and overlaps.

(C) Human Resource and Capacity Building

Due to inadequacy of resources especially human, financial and office equipment, the Commission has found it very difficult to cope with the cases and the changes taking place in the business world. Kenya badly needs a strong and effective Competition Office. To this end, this +Commission should be provided with top-notch Economists and Lawyers.

10.1 Challenges.

10.1.1 Monopolistic and Oligopolistic Nature of the Industries

The strategy of import substitution encouraged the creation of protected industries which are either monopolies or oligopolies in nature. These industries are not very receptive to competition and are in the forefront of fighting it;

making the work of the Commission very difficult. All firms must realize that competition is the dynamic game for today's and tomorrow's market operators.

10.1.2 Barriers to Entry

Most of the well established monopolies have had in existence restrictive agreements between themselves. For example, distributors and farmers may be contracted to the manufacturers. The commission has had to deal with these agreements which always contain anti-competitive clauses and this has not been very well received by the business community.

10.1.3 Competition Process Vs Competitors

In the process of implementing competition policy, the Commission had to deal with cases of inefficient companies wanting to be protected against their competitors. Of course before the

Commission realizes this, resources will have been wasted in the investigation. It must be understood by all market operators that the role of the Commission is not to protect competitors but competition process.

10.1.4 Autonomy and Independence

The Commission is established as a department of the Ministry of Finance. The business community is used to the same office as a price control office and it has been very difficult to explain the change of roles especially in the provinces. Due to lack of independence, administrative decision making compromises the strict application of the law.

10.1.5 Restrictive Trade Practices Tribunal - The Referral Body

The referral quasi-judicial extension of the competition authority, the Restrictive Trade Practices Tribunal has not been able to assert its independence from the Finance Ministry. It has all along depended on the Ministry for its budgetary and other requirements. The market operators have in the past referred cases to the High Court instead of the Tribunal. The Tribunal should operate independently of the Minister and the Commissioner as provided under the law.

10.1.6 Free Entry - Free Exit Phenomenon

It has been a very big challenge for Monopolies and Prices Commission to explain to the business community that its job is not to prevent exit. Just like the commission has to see that there is free entry without creation of barriers to entry, barriers to exit should also be removed. Inefficient businesses should be allowed to exit to pave way for efficient ones which can compete effectively.

10.1.7 The Informal Sector and Competition Policy

In the 1990s the Kenya Government recognized the need to promote the informal sector, popularly known as Jua Kali. This sector has been growing very rapidly. Just to cite an example, the transport sector has become so competitive to the extent that cartels have emerged for setting prices and also creating barriers to entry. This has recently been a big challenge to the competition authority due to the informal setting of the sub-sector. The question arises of how a competition authority can deal with groups that it can not lay hands on? Systems of control and management of issues in the sub-sector are informal and therefore not clear. Conduct rules for the sector must be formulated because the sector is not above the law.

10.1.8 Parastatal Reform and Competition Policy

The Kenyan Competition Authority is also faced with the new challenge of ensuring that public monopolies are not transformed into private monopolies by the reform process of strategic parastatals. There is the issue of the contracts that the government had with private sector participants which now dictates the privatization process and also the pattern of acquisition of the enterprises. The question is whether the privatization process is going to yield competitive enterprises or not. Could the exercise be resulting in private monopolies and oligopolies? How does the regulatory agency ensure that the privatised parastatals are competitive and efficient?

10.1.9 Management of Change

Competition policy in Kenya came at a time when so many other changes in policy were taking place. In many quarters among the business

community, the management of change has not been understood and accepted. The big question that remains in the minds of businessmen is why should the Government intervene in the market place after liberalization. Public interest considerations justify permanent Government presence in the marketplace through regulatory agencies.

The competition agency, despite its major role in the process of liberalization, needs to ensure that markets are kept as open as possible to new entrants, and that other firms do not frustrate this by engaging in anti-competitive practices. The vigorous enforcement of competition law can thus provide reassurance that monopoly power will not leave the community powerless against anti-competitive conduct by enterprises and market failures.

10.2 The Way Forward in the Commission.

The role of the Commission in the development of the country cannot be over

emphasized. The present trend in liberalization, deregulation, privatization and market orientation will only achieve the intended benefits of efficiency and consumer satisfaction if there is fair and effective competition. The reduced role of the state as an economic agent should be counter balanced by its more active role in ensuring a supportive and effective regulatory framework for the promotion of free, fair and effective competition throughout the country.

A paramount consideration is the co-ordination of competition policy with other economic development policies, particularly where there is potential conflict, e.g., between the strict application of the competition policy and other social objectives such as employment policy. Competition Authority will continue to consult and co-ordinate with authorities responsible for general economic and social development policies such as, technology, consumer protection, industry, privatization and foreign investment and trade, with

a view to ensuring that competition policy is fully taken into account during the design and implementation of other policies. Competition policy should constitute a key element of other policies and be implemented by all regulators in consultation with the Minister in charge of national Competition Policy.

There is also need to minimize distortion of business decisions, ensure consistency and neutrality in the application of competition law towards different types of businesses such as monopolies, green field investments, mergers, interlocking directorates and share-holding taking into account differences in their impact on the competitive process. Nonetheless, considering our national goals, flexibility in the application of competition policy and law is particularly necessary in order to safeguard efficiency, growth and development.

The Commission as the competition authority will continue to contribute in the

formulation and implementation of commercial related policies by;

- (a) expressing views relating to policies and/or measures that promote competition in industry.
- (b) advising on how legitimate industrial goals may be attained through less competition restricting measures.
- (c) ensuring effective enforcement of competition rules against restrictive trade practices with an economically realistic approach to industrialization, market concentration and socially needed authorisations / exemptions.
- (d) enhancing viable competition among local producers through strict adherence to anti-monopoly laws and hence preparing them for external competition in the world market.
- (e) ensuring high quality of locally manufactured products whether for export or

domestic market through continuous review and upgrading of standards to promote competitiveness through exposure first in the domestic market and gradually in the international market. Kenyan products must conform to international standards of quality, design, packaging, etc. so as to penetrate into the world market.

A stable macro-economic environment coupled with confidence in the Government not to back-track in implementing the relevant economic policies are essential for the market economy to reward participants handsomely. Such gains are further bolstered by the Governments constant review of the Competition policy to ensure that it meets the economic challenges in the global village.

Despite the constraints and challenges facing the Commission, no effort will be spared in ensuring that no participant suffer adversely due to market manipulations. Research and Law enforcement will be strengthened to ensure that

market signals are upheld and that market mechanisms are enhanced in scale and scope.

ANNEX II

FIGURE 1: ORGANISATIONAL STRUCTURE OF THE MONOPOLIES & PRICES COMMISSION



