

Towards EAC Competitions Law and Policy

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East African Community is taking steps to operationalise the East African Community Competition Act, 2006. However, operationalising the Act will require EAC Partner States to have in place National Competition Laws and institutions.

Currently, only Kenya and Tanzania have fully functioning National Competitions Laws and institutions. Burundi recently enacted a Competitions Act and is in the process of establishing the requisite institution while Uganda and Rwanda are also at different stages of enacting their own competition laws.

This paper, therefore, gives a background of EAC Competition Law, outlines provisions of the EAC Competition Act, 2006, while discussing policy perspectives of competition law and policy in context of East African Community integration.

East African Community is currently integrating at a pace faster than any other regional community in Africa, today. On July 1, 2010, EAC became the first Regional Economic Community in Africa to begin the process of implementing a Common Market and is on course to become a Monetary Union in 2012.

This pace of regional integration has brought with it increased economic activity which has seen firms expand their businesses beyond national borders. Many companies now have operations in more than three if not all the five East African Countries.

The region has also witnessed a series of mergers and acquisitions as firms seek to break into new markets. However, all these activities are taking place in absence of a functional law regulating competition.

Experts define Competition Law as laws that promote or maintain market competition by regulating anti-competitive conduct. Basically monopolies or firms with very large market share can easily abuse their market dominance

by engaging such activities as price fixing, sharing of markets, reducing quality of product, among others, to the detriment of consumers.

Such firms can also easily suffocate their competitors out of the market through predatory pricing, where a firm fixes product prices below the cost price with the aim of driving small competitors out of the market. Competitions laws and regulations therefore seek to regulate firms' activities that are believed to be anti-competition while protecting consumer welfare.

In 2004, the East African Community Council of Ministers adopted East African Competitions Policy subsequently the East African Legislative Assembly enacted the East African Competitions Act in 2006.

The Act seeks among others to promote fair trade and ensure consumer welfare and to establish the East African Community Competition Authority. Once established the East African Competitions Authority will have powers to

Powers of EAC Competition Authority as per EAC Competitions Act, 2006

- Gather information;
- Investigate and compel evidence, including search and seizure of documents;
- Hold hearings;
- Issue legally binding decisions;
- Impose sanctions and remedies;
- Refer matters to the Court for adjudication;
- Develop appropriate procedures for public sensitization;
- Formulate by-laws and collect data;
- Undertake studies.

scrutinize before approving mergers and acquisitions with cross-border effects and deal with any other matters relating to competition.

Although the EAC Competition Act was enacted in 2006, it has not been operational. However, the coming into force of EAC Common Market has revealed a legal gap regarding regulating firms with cross-border investments. National competition laws and regulations have a jurisdiction limited to national borders which leaves a question on how to regulate companies whose activities have cross-border effects. It is for this reason that EAC Secretariat is now looking to operationalise the East African Competitions Act, 2006.

However, operationalisation of the Act will require EAC Partner States to have in place National Competition laws and institutions. Currently, only Kenya and Tanzania have fully functioning National competitions laws and institutions. Burundi recently enacted a Competitions Act and is in the process of establishing the responsible institution while Uganda and Rwanda are also at different stages of enacting their own competition laws.

National competition laws are necessary in sense that National competitions commissions are expected to enforce some of the provisions within the EAC Competitions Act.

The EAC competitions Act, 2006: The Act contains provisions on the following provisions:

Powers of the Authority:

The Act provides for the establishment of an East African Competitions Authority to coordinate enforcement of the EAC Counterfeit and other Intellectual Property Rights Violations Act.

According to the Act, the Authority shall consist of five Commissioners, one commissioner from each Partner State and it shall have powers to:

- Gather information;
- Investigate and compel evidence, including search and seizure of documents;
- Hold hearings;
- Issue legally binding decisions;
- Impose sanctions and remedies;
- Refer matters to the Court for adjudication;
- Develop appropriate procedures for public sen-

sitization;

- Formulate by-laws and collect data;
- Undertake studies.

Any person, individual, company, firm, association, statutory corporation, government company, body corporate, legal authority, etc can lodge a complaint with the Authority.

Restraints by enterprises:

It contains definitions on prohibited practices which attract punitive measures and these include:

- Agreements, including cartels, which fix or determine prices;
- Limit or control production, supply, technical development, etc;
- Customer allocation;
- Barring competitors from access to the market;
- Bid rigging or collusive bidding.

Abuse of Market dominance:

Dominance as per the Act is determined by several factors such as market share, share of competitors, entry barriers, size and resource of enterprise /competitors, among others. While dominance in itself is not an illegality, it is the firms abuse of its dominant position that will attract penalties. Examples of abuse of market dominance include:

- Predatory pricing;
- Denying market access;
- Use of dominance in one market to enter other relevant market;
- Exploitative discriminatory price/condition;
- Refusal to deal;
- Restricting movement of goods or services between different geographical areas

Mergers and acquisitions:

Businesses intending to execute a merger or an acquisition will be required to notify the EAC Competitions Authority of such merger or acquisition. The main reason is to prevent mergers that enhance market dominance.

For this reason, the Act stipulates that:

- Merger or acquisition shall not come into effect before its notification to the Authority and Authority has given its approval;
- If Authority doesn't notify the person within 45 days parties may proceed with the merger;
- Council of Ministers may override the Authority's objection to a merger or acqui-

tion if the Council is satisfied that the merger is to fulfill an overriding public interest.

Partner States Subsidies:

The Act limits the powers of EAC Partner States to unilaterally impose subsidies that are likely to tilt the trade balance in favour of a particular country. The Act therefore stipulates that:

- Partner States shall before granting any subsidy notify the Authority;
- Where the Authority considers that the subsidy threatens or distorts competition it shall communicate its decision to Partner State;
- Partner States dissatisfied with the decision of the Authority may refer the matter to Court; Decision of the Court is binding.

Remedies and punitive measures:

The Act prescribes punitive measures for violating provisions within the Act. Some punitive measures include: Penalty of not more than \$10,000 or imprisonment for a period of not more than 2 years or both; Cease and desist order; Compensation (damages); Nullification of agreement; In case of Mergers and acquisitions, can be approved, approved with modification, or refused approval.

Please Note that the Act will soon be reviewed and some of the provisions are likely to change especially regarding the appeal process.

The proposal is to amend the Act to change the appellate body from the Council of Ministers to the East African Court of Justice to avoid political interference.

On the provision on punitive measures, it has been noted that the \$10,000 penalty is too low and should be instead tied to a percentage of a company's annual turnover to ensure that violators of the law receive impactful penalties.

Policy Perspectives:

Generally, competition law is contentious and has been debated on for decades. Its history is convoluted with arguments for and against competition law. Some critics believe that competition law is not necessary in a free market economy while others argue that competition law is necessary to ensure

a leveled playing field one that will afford even the small players a share of the market. It is believed that once left unregulated the big players are likely to suffocate the small players out of the market.

While critics of Competition Law argue that it should not apply in a free market, competition laws are applied even in the more advanced capitalist states such as the United States. In the US, for instance, the Competitions Law known as the Anti-trust Law is used to promote competition in the market by regulating anti-competitive conduct.

The European Union as well as other regions have enacted competition laws that regulate firm's activities that have Cross Border effects. The last decade has seen an increase in the number of enacted Competition Laws as more countries embrace competition laws as way for the future.

However, EAC is still lagging behind with only Kenya and Tanzania with functioning competition laws in place while the rest of EAC partner States are at different stages of enacting the laws. Absence of competition laws in other EAC Partner States appears to have curtailed efforts by EAC Secretariat to operationalise the EAC Competitions Act, 2006.

The central importance of Competition Law is that it lays down rules for fair competition where small and big firms co-exist in a market controlled by market forces. It gives consumers an opportunity to choose goods and services in an open market at a price and quality that fit the consumer's needs and fosters opportunity for business by ensuring a level playing field.

In absence of competition law, big firms can easily drive small firms out of the market through abuse of dominance such as predatory pricing, while exploiting consumers through price fixing as a result of cartels. It is therefore important that EAC Partner States support operationalisation of EAC Competition ACT, 2006 and that Uganda, Rwanda, and Burundi expedite the establishment of national competition authorities to supplement the workings of the regional authority.