



ANTITRUST IN EMERGING AND DEVELOPING ECONOMIES: AFRICA, BRAZIL, CHINA, INDIA, MEXICO...

Interview with Francis W. Kariuki

This conference will be held in New York University School of Law on October 23, 2015. **Francis W. Kariuki** (Competition Authority of Kenya) was interviewed by **Eleanor M. Fox** (New York University School of Law). They will participate in the panel "Setting the Stage: State Involvement in a Market Economy", along with **Simon Roberts**(University of Johannesburg), **Jonathan Orszag** (Compass Lexecon), and **Susa Ning**(King & Wood Mallesons).

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Eleanor Fox: Francis, you are the Director-General of the Kenya Competition Authority, which is a young agency, having become operational in 2013. By all accounts, you have carried your agency very far in those few years, amidst all of the challenges that face a competition authority in a developing country with a huge portion of people living below the poverty line and the largest source of livelihood in the agriculture sector. Can you tell us: What do you regard as the biggest challenges competition policy enforcement poses to Kenya, and how are you meeting them?

Francis Kariuki: The biggest challenge has been to entrench the Authority in an environment where a competition culture has not deeply permeated. This is exhibited by the lack of appreciation of the workings and benefits of competition law by the business community and also presence of some government regulations which act as obstacles to effective competition. These regulations are as a result of a historical anachronism; from the era of government controls which accorded SOEs a lot of space and latitude in the

management of most of the sectors of the economy. The Authority needs to establish its visibility and credibility in this scenario which demands judicious use of the ever scarce resources, in terms of human and capital.

The other challenge, towards entrenching ourselves, is dealing with the perceptions of some international law firms and their clients. This is in reference to what I may refer to as commonality view or single entity perception in regard to the level of development of Competition Agencies in Africa. My personal view is that they believe that all competition laws in the Continent are not modern; analytical skills are missing and internal procedures of managing clients' information/records are non-existence.

It is with this background that the Authority, in its formative stages, prioritized advocacy initiatives targeting the Government and also the business community. This was through awareness creation workshops and also advisory opinions. Enforcement has also focused on key sectors of the economy' in terms of their impact to the poor and also their contribution to the investments in the economy. This has not only created visibility for the Authority but it has also endeared the Authority with The National Treasury and hence an increase of its budget by 700% within the 3 years and an increase in human capital by 150%.

The Authority has also prioritized building of regulatory capacity through development of guidelines, informed by ICN guidelines, to support the substantive law, and in terms of arriving at optimal decisions, efforts have been made to interact with universities and research institutions, locally and outside the country, to deepen staff skills.

Eleanor Fox: The United Nations is formulating the Sustainable Development Goals, which will continue the efforts under the Millennium Development Goals of 2000-2015. The United Nations and World Bank have called upon every nation and discipline to do what they can to work towards these goals, and both have specifically included competition policy in the effort. The goals include significantly reducing severe poverty, significantly reducing the skewed inequality in wealth, power and opportunity, and creating sustainable inclusive development. Are these goals related to what competition authorities do or should do? If we work towards equity, are we undermining efficiency? Are you taking the goals on board in competition enforcement and policy in Kenya, and if so, how are you doing this?

Francis Kariuki: My view is that Government Agencies' activities or policies should be aimed at addressing the biggest challenge facing the Government or the population at that

particular time. As you have indicated in the previous question, we live in a country with a huge portion of population living below the poverty line. Therefore, the Authority should, and it has, taken cognizance of this fact and prioritized its enforcement activities towards reducing the levels of poverty. This, of course, has ensured sustained resources from the Exchequer.

Having said this, I am not indicating that all the Agencies in the World should focus on poverty reduction. However, it is advisable that Agencies should focus on the key challenges facing the citizenry in the countries. In other words, just like an aircraft, Agencies should fly at the altitude and speed, depending on the turbulence of the airspace space they are overflying; otherwise, they will stall.

My view regarding equity is that firms should get value for their commensurate effort. I believe this is one of the fundamental functions of the competition policy, namely, the distributive function. However, this does not mean that the distributive function should choke the progressive function, since R&D ensures sustained availability of the resources to be distributed, as a result of innovation, and continued improvement of the citizenry welfare. It is a balancing act; to ensure efficiency is encouraged through innovation but innovation should not be a bottleneck to effective competition through deterring entry and hence sustaining unreasonable profits, to the detriment of the consumer.

This balancing act is CAK's day to day reality, especially in the mobile money platforms where we have determined that innovation should be protected while ensuring recoupment. However, the innovators should not foreclose new entrants unreasonably. The Authority's position has led to revision of mobile money transfer rates by about 67% downwards.

Also, the Authority has rolled out a Special Compliance Process (SCP) targeting the trade associations under the agriculture and financial sectors. This is because agriculture contributes 25% of the country's GDP and also mostly employs the poor of the society. On the other hand, prioritization towards the financial sector is aimed at deepening financial inclusion and also to facilitate investment.

In general, the SCP has the objective of according the associations a window of opportunity so as to review and align their rules with the Competition Act.

Eleanor Fox: What advice or observations do you have for competition lawyers (and their clients) who are doing business or hoping to do business in Kenya?

Francis Kariuki: Kenya has a modern Competition Law, and has been fully functional for the last 3 years. Our priority has been to create a culture of competition through advocacy targeting the Government and the Corporates. In the last one year, we have increased our focus in restrictive trade practices enforcement especially in the financial sector, advertising and cement.

Our focus has also been to minimize the number of days we take to determine merger applications from the statutory 60 days to 45 days. This is because we view mergers as a mode of investments in Kenya. Also, this has been supported by publication of various guidelines and rules to create transparency and predictability regarding our decisions.

In the coming year, we expect increased cartel enforcement and deepened advocacy activities directed towards regulations having implications on markets, developed by sector regulators.