

COMPETITION AUTHORITY OF KENYA

KNOWLEDGE HUB

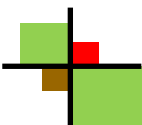
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EXIT INTERVIEW

In this eighth issue of the Knowledge Hub, we get to hear from Mr. Boniface Makongo. He shares on his experiences in the field of competition Regulation, lessons learnt, challenges and the way forward in Competition regulation.

Mr. Makongo has served in the Authority for over 10 years beginning in the capacity of Manager Legal and finally as the Director Competition and Consumer Protection.



Boniface Makongo

Briefly tell us about your journey in competition regulation and what motivated you to join CAK?

Concerning the motivation to join CAK, you might be aware that antitrust as it's known in the US, or competition policy, enforcement as it's known in EU and European jurisdictions was a relatively new field around 2011. I came in basically after the Authority was established. Generally, I was keen on it because I had done a project in my fourth year on the regulation of competition in Kenya, which was still a new concept. It was a department in the National Treasury. So, after I cleared campus and worked for several years this opportunity came up as the Manager Legal. I applied and I was fortunate enough to be considered. So that demonstrated that I've always had an interest in the issue of anti-trust from then.

While at the Authority, I think I've done several things. Initially, as the Manager Legal the key task that I embarked on then was amendments to the law in terms of improving on the legislation as it was to enable us to investigate, penalize, and sanction cartels and abuse of dominant cases. But at that time dominance was purely criminal so you had to go to the DPP and that was very complicated. We also had a lot of clamor around dominance and its abuse. So that is one of the amendments that I spearheaded. The other amendment was on professional associations. We had a challenge because professional associations were still setting fees and we needed a stricter law. Initially, we

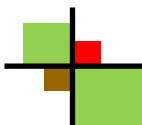
criminal penalty for officials of the professional association in case they set fees.

As Legal Manager, there was the issue of penalizing consumer cases initially. Also, just like abuse of dominance cases, consumer cases were criminal cases. So when the parties failed to agree, you had to prepare a case file and send it to the DPP for prosecution, and that is not something that the DPP finds to be a priority. So that was a challenge, as we were not very equipped to sanction consumer contraventions. So, the amendment then allowed us to investigate and sanction consumer complaints, including the application of penalties. The other amendment that I brought forth was concerning mergers. Initially, we had a challenge around mergers that were consummated irrespective of the thresholds and amounts involved, needed to come to the Authority. That was a challenge since you'd be wasting a lot of time looking at transactions with benign effects on competition, which had nothing to do with and had no impact on the market structure of any particular segment of the economy. So, the amendment there allowed us to categorize certain transactions that did require notification. Based on that we've done two things, one, we have excluded the transactions below KES 500 million so they don't have to be notified to the Authority. And equally, we have taken care of the bilateral obligation which was a challenge previously because we had double notifications. So, people would notify COMESA and also the Authority. That amendment enabled us to address the issue of double notification, so that the thresholds are so clear that if a matter is notified to COMESA, it doesn't have to come to us. I'm expecting that as we go along, as the EACCA becomes operational, based on the same amendments, it will have clarity in threshold so that you either notify COMESA or EACCA or the national agency in the context of Kenya, the CAK.

The other amendments that I have spearheaded would be the

There was a lot of collapse of retailers because of the kind of conduct they've engaged in. Now we have a fairly robust mechanism of monitoring instances of abuse of buyer power. The other thing that I like to mention is with regard to leniency. In most jurisdictions which have cartel conduct, when the cartel conduct is investigated and sanctioned, there is normally a provision for leniency. A leniency applicant is a member of the cartel enabled to submit information that will support the Authority to then investigate and sanction cartel conduct. So, you have one of the members falling out and coming and giving us, information and we guarantee their confidentiality that the other members won't know who gave us the information. The information that we get helps us to investigate and address the conduct. Unfortunately, that provision has not been effected because we've not received any leniency applicants and the ones we've received have not qualified. We also have guidelines based on the same provision of the amendment of section 89 A that we brought in. So those are some of the amendments in terms of looking at provisions of the Act and how to make it robust in aiding us in the realization of our mandate.

The other things that I've done include coming up with guidelines over the period, as the Manager Legal and Director Competition and Consumer Protection. Additionally, I want to mention that I've also spearheaded development of the Competition (General) Rules 2019, and also development of the Competition Tribunal Rules.



What challenges did you experience in the roles you served in and how were you able to guide the Authority navigate them?

There was failure to appreciate the amendment of the law. It was easy to sell it to Treasury but when it came to selling it to the respective parliamentary committees, there were challenges. For instance, the amendments that we did, we intended to take them up immediately but we couldn't because the members of Parliament, couldn't understand why we would want to penalize somebody for a consumer contravention. The proposal we had around the Suo mottu investigation of consumer complaints has failed to sail through Parliament. But how we handled it is that we submitted amendments initially in 2016 and the one on abuse of dominance was taken up. The one on consumer contraventions was not taken up. The one on professional bodies was taken up. The ones that were rejected at that stage were resubmitted in 2018. Unfortunately, on the issue of Suo mottu investigation of complaints, did not sail through even the second time.

How would you advise us in terms of sensitizing the Parliamentarians so that when it comes to such a need, we have an easy time with them?

My advice would be geared to the National Treasury and other stakeholders in government. My view would be having forums, inviting them to our assignments and ensuring that whenever we have activities they're part of it. That works wonders in terms of the Authority being relevant to them, and them also appreciating what we do, so that when we have proposals, say for amendments, they are positive and supportive of what we do. There is need for continuous stakeholder sensitization

and engagements.

With the National Treasury and sector regulators and other players including the Ministry of Trade, going forward, we need to work very closely with the Ministry of Trade so that they're aware of what we do. We've also had engagements in relation to professional bodies. The challenges we have is that there are many professional bodies and price fixing by professional bodies is based on some statutes. We realized that as much as we have this provision in our Act speaking to the Authority's primacy in issues of competition and consumer protection, it was proving to be difficult because we are just having statutes. To address that unique challenge, we engaged the Parliamentary Committee on the Implementation of the Constitution. We tried to invoke section 27 of the constitution, which provides for the government to procure goods competitively. We had actually done a benchmarking as an Authority, in Romania, Singapore and Italy where they had deregulated professional services and they had done away with price fixing. We thereafter came up with amendments that, the Parliamentary Committee would adopt. Unfortunately, the term of that Parliament ended, and we've not managed to resuscitate that discussion. So that is something that we should carry on with to address challenges and amend statutes that are outside the ambit of the Authority.

You were part of that team that developed the first Strategic Plan. So briefly, could you tell us, how you determined the priorities and lessons picked from the development of this first Strategic Plan?

I think I came in when it was already being implemented. But you'll appreciate that, that first strategic plan

was basically about setting up the institution. The Authority was still manned by the National Treasury, so at that time it was setting in place departments and recruitment of staff. The key lesson I remember from that time was dynamism, and being open to new ideas. I want to acknowledge the role of the then DG, who was very proactive, always being available and always, willing to engage new entities. That is how we ended up with the MOUs we have with the Chinese, JFTC and South Africa. We also ended up working closely with a number of agencies such as COMESA and became members of the ICN.

There was also a lot of engagement with other parties and that is how we ended up with all the tools and guidelines we have from the regional and global engagements. Still work in progress is the whole issue of publicity, at that time, our focus of publicity was basically the televisions and the radios, social media was not very key. It was initially easy to set up the merger regime, and then subsequently, we went into the issues of enforcement. At that time, we didn't enforce much but that was when we set in place the mechanism that enabled us to carry out enforcement in the, in the second Strategic Plan.

We had our first penalty of around 6 million, after that we developed the confidence to do the raids we did on fertilizer and others. It did not result in any penalty, but the enforcement work we did in cement, significantly lowered prices and also enabled entry of new players. We later investigated the paints sector where we imposed penalties of 70 million shillings and recently the steel industry cases. I'm hoping that going forward, the enforcement department especially, will be a key driver in the Authority. First in, ensuring that markets are



We are also in the process of acquiring our forensic laboratory, so we will have in-house ability to analyze the data that we collect. Previously you're aware that, for instance, when we were doing the steel investigation, the forensics took almost three to four months, since we were relying on people out there who you cannot force to expedite work for you. But if you're having it done internally, then you should do it quickly. And I'm thinking that since more people are aware of the Authority, we should take advantage of that awareness to collect more information, including surveillance that will enable us engage in enforcement.

We have an Informant Reward Scheme, which enables us to collect information which will aid an investigation or inform us about a contravention that is going on. My thinking is that going forward, we have what it takes to do more. In terms of making markets competitive, we have seen a rapid increase in consumer complaints. So, the Authority should look for way to increase the number of staff to handle these complaints because we have limited staff currently. But I think there are many positions in the establishment especially in consumer and enforcement departments. I'm expecting that going forward, the Authority will look for mechanisms of filling those positions because we actually need more staff.

What needs to be considered when developing competition regulations and guidelines, and possibly where do you involve stakeholders during that process?

We have many guidelines in mergers on market definition, general consolidated guidelines, guidelines on RTPs, and now we have merged our filing and settlement into one guideline for the entire technical departments, including buyer power. We also have guidelines on consumer bodies and consumer protection and all that.

So, the important thing is to note is that guidelines basically are very useful in a competition kind of environment because they guide the stakeholders in knowing how to ask on various issues. Guidelines are very important in guiding stakeholders, but also stakeholders are very important in ensuring adherence. So going forward, the issue is to review and to always keep in touch with the issues raised by stakeholders, and ensure that amendment or development of new guidelines solve stakeholder issues. What I'm emphasizing is, there's need for involvement and to always ensure that you are alive to stakeholder concerns when develop guidelines.

Which challenges you have noted in competition regulation in Kenya, and what mitigative measures can we adopt?

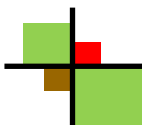
Challenges will be many, but the key challenge I've noted, of course, is lack of knowledge. Competition regulation is not very old, so you have practices that have been going on for decades that contravene our act, but people do them because they don't know. So, the best way to mitigate that is sensitization. In our PC, we have a provision for sensitization, so going forward, you sensitize the players in the various sectors. We tend to sensitize the ones who are prominent like Kenya Association of Manufacturers and all that. Even then, I don't think we've sensitized everybody, so there's need to be a bit more granular. Also ensure that you do sensitization frequently as people tend to forget. As part of that sensitization, ensure that if a stakeholder has been sensitized and then after three, four years, we find that they have contravened the Act, the penalty should be deterrent enough.

We need to cast our net wider as we are based in Nairobi, but there may be a lot of interventions or even other issues going on in other parts of Kenya. As the Authority we can reach out to a wider pool of citizens. There's need to continue in that in terms of investing more, using

most cost-effective methods of reaching out to Kenyans so that they know what we do. Whenever we have a penalty imposed, we communicate to the public so that they know. I would like to emphasize on the importance of sensitization, so that people are aware and the need to simultaneously undertake enforcement action.

In your opinion, what do you think is the future of competition regulation?

My thinking is that it's extremely bright, because I've been here for over 10 years, and I've seen the Authority grow. I know that we now are at a stage where, I would say, we have all the competencies that we need. We might have staff shortages here and there, but that's not a big deal. So, my view is that the future of the Authority is very bright. But of course, the leadership then has to be there to ensure that we become more ambitious than we have been in the past, you know, in terms of taking on more cases and being felt across the country. The Authority also needs to appreciate the fact that if you have skilled and competent staff there are other market players looking for the same skills. It is therefore, important to work on retention of staff. Because people come here from the university, you've trained them, they have skills including how to collect and analyze evidence, then after some time they realize that you don't seem to be in a position to match up the kind of packages offered out there. That is going to be a challenge for the Authority going forward. How do you ensure that you retain the staff you are training? That is an area that really needs to be looked at because it is common knowledge that our staff members are fairly constrained in matters of remuneration. So going forward there's an urgency to restart the process of reviewing the current pay packages offered and see whether there's room for adjustment, among other strategies to retain staff.



What advice would you have for the incoming successor?

I've never attended a training since I joined other than the common ones, like the ones by KSG, and another one by NIS. I've not attended any other training. The only thing I can say in that regard is that we are working in a resource-constrained environment. Whoever takes over or generally as an Authority going forward, there will be need to focus on training that delivers the maximum impact or reaches the greatest number of people at the cheapest cost. So, go for good training so that we equip more people at the least expense. Then the other aspect is all these people who have gone for all these trainings and all these workshops we've presided over, or participated in, there is a mechanism to ensure that the information is shared. I know we've been having plenaries and all that but how do we enhance that going forward so that knowledge percolates to everyone without them needing to go for that particular training because somebody else has done the same training previously? There is need to pair, to give the people who've been in the Authority an opportunity to speak, to handhold, whoever joins, because I see there are a lot of skills. In my directorate, for instance, I've noticed that the quality of reports these days, compared to the reports three, four years ago, is totally different. So, people have really grown, but that growing, there has to be a mechanism that enables them to share with whoever, joins the Authority, going forward.

What kind of information resources would you recommend, especially for research work?

Concurrence is very useful in terms of recent knowledge

in what happens in other jurisdictions. The other resource is Competition Policy International which normally brings out the emerging cases across the globe and very many countries. Another area one can look at is the Global Review on Competition. The South Africans have also done some work, it's important to look at what kind of cases are in the South African Tribunal and apprise oneself. Also look at the EU, what are their latest cases, if you hear there is a prominent case make an effort to read and find out more about it.

What were your most memorable moments during your period at the Authority?

My most memorable moment is when I suggested some amendments, came up with what I thought the draft should be, and I saw it being adopted by Parliament word for word, that was very exciting for me. Initially when I joined the Authority, I had done amendments, but none had been in that form, we had made proposals, but these were now the real amendments, appearing in the Act the same way as the draft, so that was very memorable for me.

The other is the first time we had our first penalty which I participated in negotiating. The others have been the subsequent penalties we've had such as the paints matter where we had imposed a penalty and we went to the Tribunal and I managed to persuade the Lawyers, and eventually all the matters were withdrawn from the Tribunal. There're also cases like the tea sector that went to the Tribunal but the ruling was not what we expected. It's not necessarily negative since it was the first case of the Tribunal. Those are things that definitely I will take with me where I'm going.

One key leadership lesson that you're taking

away with you from the Authority.

There is a lot of value when you challenge people and you give them an opportunity to prove their worth. I've seen a lot of people who joined looking a bit unsure of themselves but I've seen them grow. You give them challenges and you notice that this person has so much ability, so much capacity. What they were lacking was just being allowed to flourish.

*****THE END*****

