Interview with Francis Kariuki, Director General, Competition Authority of Kenya

*Editor’s Note:* Francis Kariuki has served as the Director General of the Competition Authority of Kenya since January 2013, and held a similar position with its predecessor agency. He is a founding member of the African Competition Forum. He holds a Master of Science in Economic Regulation and Competition from City University, London; a BA in Economics & Business Studies (Kenyatta University); and various Certificates in Strategic Leadership and Corporate Governance. He was interviewed for The Antitrust Source on March 27, 2019, by Russell Damtoft.

**THE ANTITRUST SOURCE:** Thank you so much for agreeing to an interview. You’ve been with the Competition Authority of Kenya for a long time. I think a rich experience has been developed. Can you tell us a little bit about the history and the organization of the Competition Authority?

**FRANCIS KARIUKI:** Yes, as you have indicated, the Competition Authority of Kenya was created eight years ago. The law which created the organization came into operation in August 2011. Competition regulation in Kenya before then was under the mandate of a department within the National Treasury.

However, as part of the Economic Recovery Strategy, the government voted to review the status and institutional dispensation of the then competition regulator and make it more competent and at the same time accord it more resources, both in terms of the budget and human resources. This was facilitated through, among others, modernization of the law, including expanding the regulatory framework and creating an independent institutional dispensation.

Since 2011, we have witnessed progressive support by the government in terms of resources to the tune of the budget allocation growing by over 300 percent. At the start in 2011, we had a staff establishment of 12. The Authority’s establishment currently is at 72 and expected to grow to 92 at the end of the calendar year.

In terms of the approach to regulation, we started by regulating mergers because we had to build adequate capacity. And now we have expanded to enforcement of cartels and also the other mandate of consumer protection. The government has also expanded the mandate of the Authority to deal with abuse of superior bargaining power, including late payments to suppliers. And I’m happy that one of the topics which was being discussed within this year’s ABA Antitrust Section Conference was the abuse of superior bargaining position.

**ANTITRUST SOURCE:** Turning to yourself, I know you were with the predecessor organization as well. What brought you into this field? What was your own pathway that led you to the position you have now?

**FRANCIS KARIUKI:** Let me begin by saying that I grew up in a rural village in Kenya. My parents were quite possessive of me to do economics, because the Minister for Finance then was one of their classmates when they grew up. And therefore they were always saying, like read hard, you’ll
become like—then he was called honorable Kibaki, later he became the President of Kenya. So from the time I was young it is that, “I want you to be an economist and work in the National Treasury.” My parents really nudged me towards this.

The other passion when I was growing up and through my experience, I realized that you can come from a humble background, and when given opportunity you can become whoever you aspire—I came from a humble background. And what has driven me is that even small businesses, if they are given opportunities, the start-ups, they can be able to grow and become big.

So as a human being my past experiences guides me. Then, in the government, I have received support since when I was engaged in the service. I worked for a few years and then I was nominated for a course in one of the leading schools in London, which specialized in competition regulation.

After that, still I was given the opportunity to lead in the review and the revision of the then competition law. And I wish to thank all the people who were in the National Treasury then for the support they gave me. So generally, I can say it is through nurture and nature that I have been able to progress to where I am.

But the other thing that I’d like to state is that leadership cannot be taken as a starting point. I’d like to be evaluated after I leave the Authority. What is the legacy? What is the impact of my legacy to the Kenyan citizenry?

**ANTITRUST SOURCE:** And what is it you would like people to say when they’re looking back and evaluating your time at the controls?

**FRANCIS KARIUKI:** He came, he made an organization, which has been quite credible in all spheres of its mandate and grounded in a formidable foundation.

**ANTITRUST SOURCE:** Every country is unique and has different economic and social problems that need to be solved. And what do you see as the problems which competition law—and then I’m going to get into consumer law as well—needs to solve for Kenya?

**FRANCIS KARIUKI:** We are in an economic situation where we have trade associations. Not long ago, the fixing of prices, territorial allocation, sharing of sensitive information was the norm of the day. And we have not had a serious generational change in regard to the leadership of those associations.

During the time of price controls, they used to agree and go to the National Treasury for price-fixing purposes during the National Budget. And now there’s a new sheriff in town who is telling them that sharing of this information is against the law. So that has been quite a challenge in terms of trade associations. Their history is not conducive to the way they should be behaving. And now we are telling them to head off by 180 degrees. It’s quite challenging.

The other area is in terms of the promulgation of regulations by government entities, which create obstacles to competition in the market. For example, in the agriculture sector, you realize there was a lot of protection, especially in the tea industry, where the incumbents were protected from competition.

The other issue was in regard to the competition culture, let me call it interface between the policymakers and the incumbents. It was a challenge that after many years of protection, incumbents are faced with the threats of new entrants hence reducing their space and profits in the relevant markets.
The other challenge is in regard to the new economy. The issue of data and the issue of platforms, which relate to both competition and consumer protection.

This issue is not only in Europe but it’s happening in Europe and affecting Africa. We have a challenge in terms of evaluating it. We’re using the traditional methods to enforce consumer protection and competition provisions in these areas. The question is, are they adequate?

**ANTITRUST SOURCE:** One thing that very much impressed me about Kenya is how quickly Kenya has adapted to a tech wave, such as MPESA and other emerging technologies that have really made themselves felt even deep into the countryside in Kenya. Kenyans could buy services on their devices from an early date. How is the Competition Authority been able to ride the tech wave and to stay on top of the developments in that area?

**FRANCIS KARIUKI:** Let me say that our approach has always been if it’s good for the consumer, let the consumer enjoy. If, at the end of the day, it’s reducing that last mile from the consumer’s house to the bank, and the consumer is not walking or riding a car to go there for a service, they are saving time for other purposes. The Authority has always said, let’s accord the innovation space—more of a regulatory sandbox.

Secondly, is that we are sure, and we are aware that these kind of platforms, whether they are being developed using innovation, are using a lot of money. There’s, obviously, for sustainability of innovation and the market themselves, a need to give firms the chance to recoup.

The biggest challenge is, what level of investments have firms deployed? I want to share one challenge we experienced in the area of mobile money payment, where the dominant firm had some exclusive agreement with the mobile money agents. After a complaint, we found exclusivity clauses under the contracts between the dominant firm and its agents. However, the dominant firm defended itself by saying that it had made a lot of investments. So we evaluated what kind of investments they had supposedly made. We found out that they used to go to the rural areas, get the biggest shopkeeper, like a grocery owner, paint the shop with their logo, and then they would say that was their investment! We found the investment not to be proprietary and we forced them to open up the network.

From this experience I can comfortably say that technology will support the consumer, but also it can be used to block new entrants into the market. Also, the other angle I would want to bring out is that it’s also good to work with sector regulators. They have a lot of data. They have a lot of information regarding the sectors that they are regulating.

But in terms of looking at wide economic policy, I am of the opinion that the competition agencies sit in a vantage position to advance new markets, more than the sector regulators. Therefore there is this need to build the interface between competition agencies and sector regulators. That is why we have corporation frameworks with various sector regulators such as the Communication Authority of Kenya, the Central Bank of Kenya, and the Insurance Regulatory Agency.

**ANTITRUST SOURCE:** That’s really interesting, because in any of these sectors, there are aspects where regulation is necessary. The instinct of regulators is sometimes that all problems can be solved with regulation, but that also has the potential to dampen incentives to invest. So how have you been able to hit the balance between the right level of regulatory oversight without dampening the innovative urges in the market?

**FRANCIS KARIUKI:** That’s a good question. To address the challenge, we have developed what we call a Regulatory Impact Assessment Framework for competition. We have shared the framework
with sector regulators, and generally the framework focuses on ensuring that any regulation does not dampen competition. Also, it provides for mechanisms to evaluate if the regulation dampens competition: can its objectives be met through other means or alternatives? This ensures that the objectives of the regulation and the interests of innovation are well-balanced for the sake of consumers.

**ANTITRUST SOURCE:** So it sounds like your approach is more one of building alliances with the regulators instead of trying to come in with a heavy hand and say you’re doing it all wrong.

**FRANCIS KARIUKI:** Yes. It is what we may term as collaborative regulation through building of alliances. A competition agency has to regulate all the sectors but it does not have the technical in-depth knowledge of what is happening within those sectors. Therefore, it’s advisable to work with the sector regulators to arrive at optimal decisions.

**ANTITRUST SOURCE:** I want to move back to some of the traditional areas of enforcement. Today you’re about ten years into merger control in Kenya. And last year you set up some thresholds for merger notification. Can you tell us how that was done and whether you’re satisfied with the way it’s working out. Are you seeing the cases that you want to be seeing?

**FRANCIS KARIUKI:** Yes. The Kenyan law of the ’80s was very intrusive in terms of the merger regime. For example a transaction involving two grocery shops would legalistically require the regulators’ approval.

But is that the proper use of resources? Is it supporting investments in the country and in the region? We are competing with our neighbors in terms of attracting foreign direct investment. If we go to those more nuances, how are we going to compete in a global market?

And yet, when we look at the historical figures, of the mergers we have analyzed, about 96 percent are approved without conditions. So, why focus so much on something where you already know the answer? So, we decided to come up with thresholds. However, the transaction is fast tracked.

But the other angle is that we have to be aligned to another fact as well. We have been looking at market shares and therefore market power in regard to market turnover. However, small companies, small start-ups maybe, have critical data, critical software which may create market power. These are emerging issues which we need to take into consideration as we continually improve the threshold regime. And that’s why I was really excited with the FTC hearings in regard to where we are moving in regards to the data.

The other challenge in terms of the thresholds—I know there has been the issue of a national thresholds in COMESA, the COMESA Competition Commission. There has been discussion regarding merger thresholds as to the national and the regional economic community competition agencies. There has been a problem of dual notification.

But let me put it very, very clearly that the challenge we have been having, it’s not a personal one or a lack of appreciation of the importance of our regional economic community authority. It’s an issue of how best can we donate powers we have been given by our Parliament to another outside entity within proper legal mechanisms. Towards this, the Competition Act of Kenya has been amended to provide for exclusion of some transactions.

Pursuant to this, we have drafted, with COMESA, some draft regulations in regard to how we are going to donate some merger transactions powers.
ANTITRUST SOURCE: You have another addition to the mix now with the East African Community. How will your work intersect with the EAC’s Authority?

FRANCIS KARIUKI: It’s another matter we have to deal with. Luckily, I’m also a commissioner with the East African Community Competition Authority. But I can see there could be some challenges in terms of forum shopping, if it’s not addressed between COMESA and the East African Community. At East African Community we have discussed how we can come up with a framework to avoid that double notification. I’m happy that Kenya has been able to deal with COMESA, and these are processes we can inform the East African community. The challenge is that there’s one member that is not a COMESA member. Obviously that’s an issue of negotiations in terms of moving forward.

ANTITRUST SOURCE: One debate about merger control that we often hear about in many countries is the balance between the traditional consumer welfare standard and the interest in protecting other social goals—employment, things of that nature. How do you approach that debate in Kenya?

FRANCIS KARIUKI: Our law has two criteria; substantial lessening of competition and public interest regarding mergers. How do we balance them? The Authority’s approach is that when there’s a merger, obviously there are some jobs which have to be lost. But we have to sit down with the companies. And they explain to us why they are losing jobs.

If there are two positions of marketing manager, you cannot force a company to employ two marketing managers. What I mean is that you cannot view the criteria under public interest from an ivory tower and impose them. They have to be negotiated solutions, and that is what the Authority’s approach has been.

ANTITRUST SOURCE: You take the long view?

FRANCIS KARIUKI: Yes.

ANTITRUST SOURCE: I have read about a big merger that is going on right now, between two mobile operators—Telecom and Airtel—which, as I understand is a merger between the number two and the number three? How do you approach mergers which reduce the number of competitors but which don’t change the dominance in the market? And does the fact that the Kenyan government has an ownership interest in Telecom affect the way you think about things?

FRANCIS KARIUKI: Yes, I’ve seen the proposed merger reports in the press. Otherwise, informally, there have been some meetings in regard to the merger, but I cannot speak authoritatively about the transaction.

But from a helicopter view, we have number two and number three, coming together and we have a dominant firm. I have not arrived at a position. However, if a merger can make someone become a more credible competitor, to manage a dominant competitor, the Authority may be inclined to approve that merger.

ANTITRUST SOURCE: Moving on to cartels, can you tell us what are the big challenges that you see in Kenya?
FRANCIS KARIUKI: We had a different approach when we started enforcing cartels. We started with a Special Compliance Program, where we gave general amnesty in some of the sectors which we thought cartel-like behavior to be prevalent, and also in the sectors which are very key in terms of supporting the growth of competition and the growth of economic development in a country. Those were the financial and the agriculture sectors.

After that, we have now started hard enforcement. We have conducted two dawn raids. The last one was in December last year. We are still analyzing the information we got. The indications are that there was very clear coordination of activities.

But the challenge is in regard to collection of evidentiary information during the dawn raid. I literally closed our offices, because when you’re conducting a dawn raid at four offices in four locations, I need support from the whole Authority staff. So, generally, the challenge is in terms of the numbers and collection of evidentiary information. Then the other challenge we are seeing is that when you go to the site, the information and the data are not on that site. It’s somewhere in the Alps or somewhere in Silicon Valley.

How do you progress from there? Whom do you serve? Whom do you subpoena to give you the information? That’s another challenge we are seeing.

Then the other challenge which we are seeing is futuristic. It’s when in the very near future cartels will be done by machines, some algorithm in whatever form they’ll be. How do we progress towards that?

As a younger competition agency, we are aware of these challenges. And that’s why we are seeking greater cooperation between agencies. And even more, where we can use even diplomatic missions in terms of how we cooperate in terms of some of the sectors.

ANTITRUST SOURCE: I want to turn to consumer protection for a minute. The consumer protection portfolio is a recent addition to the Authority’s work. What led to that?

FRANCIS KARIUKI: The previous law was being enforced by a department that did not have consumer protection. The new law now has consumer protection.

The thinking of the government and also the drafters of the law is that there is an obvious nexus between competition regulation and consumer protection. As one of the advisors of the government I advised that the competition enforcement ensures that the goods and services are produced at prices which are signaled by the forces of supply and demand.

And when these goods are produced, then we have the link—how do you take them to the consumer? How do you ensure that they are of good quality? How do you ensure that they are not misrepresented? So, there’s that nexus between production and distribution to the table.

The Government took the idea, because also it had the minimalist approach to creation of institutions.

ANTITRUST SOURCE: Most consumer protection regulators—I started out my career in that field—find that the number of complaints that you receive relative to the amount of resources you have is huge. The metaphor we sometimes use is that it’s like drinking out of a fire hose. What are your priorities? Where do you try to focus your resources in the consumer area?

FRANCIS KARIUKI: You’ve hit the nail on the head. In fact, we were discussing this two months ago in the Authority. We realized we are attending to small complaints/issues. Some of these complaints can be resolved using consumer lobby groups. How can we work with consumer lobby
groups? If they are unable to resolve, they can escalate the issues to the Authority. These are some of the issues we are grappling with.

So, the Manager of the Consumer Department—and I’m happy he’s here with me today—has started focusing on sector-wide problems. We are focusing on misrepresentation, especially in the edible oil market.

Also, I can share an example we resolved in the mobile money and payments sector. There was no pricing transparency in the mobile payments and money transfers. The Authority investigated the whole sector, 47 service providers, and ordered that there had to be transparency prior to a consumer engaging them to make payment. This has changed the face of mobile payments and mobile money transfers in Kenya.

So, we are moving from this more nitty-gritty, resource engaging, but minimal impact, to big substantial cases with same resources but the impact is bigger.

**ANTITRUST SOURCE:** On another topic, one issue that is prevalent in all countries, but maybe more so in developing countries, is the existence of corruption in society.

**FRANCIS KARIUKI:** Yes.

**ANTITRUST SOURCE:** Is that something that you see, and do you see a relationship between competition law and policy and reducing the amount of corruption in society?

**FRANCIS KARIUKI:** Yes. Sure. You shouldn’t worry asking such a question because corruption affects all countries. I think it’s just the levels of corruption that vary.

And, do I see how competition policy enforcement can help in this? Sure, I do. You realize that most of the corruption issues are in public procurement. And as a competition agency, there’s much we can do with the Public Procurement Regulatory Authority. To support our country in the fight against corruption, we have developed a cooperation framework with the Public Procurement Regulatory Authority. We have a work plan for the next two years, in regard to how we are going to increase transparency and openness in public procurement.

In addition, we have an inter-agency Committee, which is spearheading the activities. These include creating more transparency in public procurement, digitalizing the process, among others.

**ANTITRUST SOURCE:** This is fascinating. I could go on at great length. I want to ask one question, and it’s about technical assistance.

The Competition Authority of Kenya is one of the more experienced in Africa. Are you finding yourself in the position of providing technical assistance to some of the newer agencies in your community that are coming online with competition systems?

**FRANCIS KARIUKI:** Yes, totally. And it’s not just the new organizations. This is an area where we have to harness knowledge and agree on where we have—if I may use this term—competitive advantage and see how we can join hands as organizations. For example, in Kenya, we have been approached in terms of how we managed the mobile platforms, how we manage Uber entering to Kenya, how we manage the mobile payments markets.

**ANTITRUST SOURCE:** This has been very instructive. I wish we had another hour to talk. Thank you
all and congratulations for all that you’ve achieved, and I appreciate your taking the time to talk with us today.

FRANCIS KARIUKI: Thank you, and I can say I wish to thank the ABA for inviting us. The papers, the handouts, they are quite informative, and we feel that the Authority can be able to learn a lot and be able to advance its enforcement.