

## Why Firms See the Fair Competition Regulations Differently

Some commentators have maintained that there is insufficient competition in Kenya's communications industry owing to the supposed dominance of a single service provider all across. Support for this narrative is by the allusion to Safaricom Limited's revenues, market share, profits, customer reach and leadership in range of services. This assumption is fine for people who cursorily examine the industry but it is shortsighted and wrongheaded to use these assumptions as foundations for industry regulations and execution of policy for the following reasons.

That received wisdom appears to have guided a substantial portion of the provisions in the Fair Competition and Equality of Treatment Regulations published in the Gazette in March 2010. Reading through the regulations, it is clear that the effect of the rules would be demonstrably discriminatory to a single firm given the market structure that obtains. The thinking seems to be that Safaricom has such an unassailable lead in the market that its competitors may require a hand through specifically designed regulations.

Secondly, provisions of the regulations take for granted that size or market success referred to as a dominant position correlates highly with abuse of that dominance. It is true that Safaricom is large relative to its competitors but that alone is not an economic problem especially considering that it registered the fastest growth rates while competing against a second entrant in Kenya's market. Clearly this fast growth did happen despite the existence of a competitor.

Regulation 7 (2) of these establishes a test for determining dominance including access to "superior technology" and ability of a license holder to earn "super normal profits". Such criteria confirm that the regulations are neither prudent nor attuned to cutting-edge thinking on economic regulation. One feature of the communications industry is the primacy of technology to deliver value because it is essentially anchored on technology. Why should regulations be designed to handicap any institution that wishes to be on the technological edge? On the other hand, any honest consumer who has studied price theory would be left wondering what "super-normal profits" mentioned in regulation 7 (2) (d) means. Common reference to the term in Kenya has had clear political and prejudicial connotations. Therefore, it is imprudent to incorporate into regulatory policy a populist phrase that has no meaning in business or economics but which serves as an adverse tag for corporations that pursue profits while providing services that consumers demand.

Thirdly, the regulations propose to establish a procedure for reaching a decision on dominance by a firm in the form of declarative reports. Dominant market power reports specified in regulation 8 (4) may reinforce the view that they are heavily tilted towards isolating a successful firm. In addition to the criteria stated in regulation 7 (2) that determine market dominance, this section adds that dominance may be presumed where a firm's gross revenues exceed 25% of the revenues of its competitors. Indeed, a situation such as this would suggest that one firm is probably dominant but that does not take into consideration that its investments are probably disproportionately larger too. In essence, this clause gives the indirect injunction that a firm may pursue successful but not run too far ahead of its competitors. In other words, only moderate investment success is envisaged.

Taking aside the self-interested claims that some competing firms made in the press, it is worth asking whether such a fundamental issue touching on market competition in one of Kenya's successful industries should be introduced through subsidiary legislation. Going further, the definition of market test for dominance is not a trivial matter and is often the subject of legal interpretation that should be contained in a statute for competition.

A dispassionate view of the provisions of the Fair Competition and Equality of Treatment Regulations 2010 makes it difficult to assign high grades for infusing competition because it is uncharacteristically focused on dominance to the exclusion of other concerns for competition. Notwithstanding the fact that it was made available for public comments, its overriding approach seems to be addressing the concerns of firms that have not compared well in market size to the leaders. The empirical studies show that attempts to pre-determine the outcome of competition often harms consumers as benefits of a tilted field in this case will go to the firms that have already struggled to compete well enough.

Finally, the combined effects of the new regulations do not support consumer choice and benefits but will instead result in renewed opportunities to firms that have thus far not competed vigorously enough to deny market share and revenues to Safaricom. There is nothing worse than assuring firms of any size that they need not innovate and compete but that rules will be adjusted to ensure their ability to stay in the market. Regulatory policy should focus on protection of consumers by ensuring that all firms face pressure of competition and not to ensure survival of competitors. For that reason it is disconcerting when regulatory policy asks successful firms to slow growth and technological adoption for fear of reaching the threshold of economic dominance. Punishing successful firms may benefit their competitors but cannot be in the broad public interest. That is the impression one gets from reading the Fair Competition and Equality of Treatment Regulations.

Kwame Owino is a Programme Officer in the Economic Regulation Programme in the Institute of Economic Affairs. The views expressed in this piece are extracted from the regulatory policy work of the IEA-Kenya but do not necessarily reflect the corporate views of the IEA-Kenya or its membership.