REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL

AT NAIROBI

CASE NO CT/001 OF 2017

EAST AFRICAN TEA TRADE ASSOCIATION.....APPELLANT

BETWEEN

COMPETITION AUTHORITY OF KENYA........RESPONDENT

(Being An Appeal From The Decision Of The Competition Authority Of Kenya Delivered On 29th August 2017)

JUDGEMENT

A. BACKGROUND

1. The Appellant is Company limited by guarantee incorporated under the laws of Kenya and having its registered office in Kenya. It is an umbrella body representing interests of tea trade, across Africa but mostly in Eastern Africa. It hosts and coordinates the Mombasa Tea Auction (The Auction). It comprises 200 members drawn from 10 countries across Africa. The membership includes producer members who grow and supply tea to the Auction; buyer members who buy tea at the Auction; broker members who link the producer and buyer members and sell tea on behalf of the farmers at the Auction; warehouse members who store tea to be sold or purchased at the Auction; and the packer members who mostly blend and pack tea.

2. The Respondent is a State Corporation established under the Competition Act No 12 (The Act) of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to regulate market conduct by investigating agreements, decisions or concerted practices including price fixing, territorial allocation of markets and abuse of dominance (foreclosure through exclusive agreements, predatory pricing, among others) which are likely to prevent, distort or lessen competition in the Kenyan economy.

3. The genesis of this appeal was a Special Compliance Process (SCP). The SCP was initiated by the Respondent pursuant to Sections 9 (1) (g) and 18 (1) of the Act. By Kenya gazette Notices No. 4608 and 4609 Vol CXVII – No 67 dated 26th of June 2015, the Respondent notified trade associations in the Financial Services Sector and in the Agriculture and Agro Processing Sector, in Kenya, that the Respondent intended to undertake an inquiry to determine compliance levels within the provisions of Section 21 and 22 of the Act.

4. According to the gazette notices, the SCP was to be guided by a number of principles. Of relevance to this appeal the said notice stated:

"It [SCP] shall address arrangements between actual or potential competitors being parties in a horizontal relationship, who are members of a Trade Association, where such arrangements relate to the rules, practices and procedures of the Trade

Association and are likely to contravene the Act".

5. Further, the SCP sought to remedy certain types of anti-competitive conduct, and of relevance to the matter before us, the notice targeted:

"**entering into agreements or any associations or any arrangements with fellow members on restrictive trade practices, including but not limited to agreements on minimum prices, prices formulae, and components thereof, margins, discount structures, rebates, terms of sale, transport and delivery costs, sales and production volumes".**

6. According to the gazette notice, any Trade Association which voluntarily submitted itself to the SCP, was to provide certain critical information and documents to the Respondent in the format of a pre-determined Template. Further, the Respondent would extend amnesty from prosecution to any association which complied with the audit and which rectified in full all contraventions highlighted by the Respondent pursuant to the SCP.

7. The Appellant in line with the above submitted itself to the SCP. As a consequence, thereof, the Respondent highlighted a number of practices within the Appellant's operations which the Respondent considered to be in contravention of Sections 21 and 22 of the Act. Subsequently, the parties entered into negotiations and discussions. The Appellant rectified, modified and distinguished some practices to the satisfaction of the Respondent.

8. The Parties did not agree on a way forward with regard to some practices of the Appellant. In particular, the Respondent was disconcerted by the Appellant's practice of fixing Brokerage fees and the proposed practice of fixing warehouse prices. The Respondent was of the view that this violated the provisions of Section 22(1) (b) of the Act. The same provides:

22. Application to practices of trade associations

(1) The following practices conducted by or on behalf of a trade association are declared to be restrictive trade practices—

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the prices or to the pricing formula used in the calculation of those prices;

or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

9. On 31st March 2016 the Appellant applied for exemption by the Respondent on this issue amongst others pursuant to section 25 of the Act. The Appellant made a presentation to the Respondent on 20th June 2016 and further filed written submissions dated 9th September 2016 before the Respondent.

10. The Respondent considered the application and rendered its decision on 29th August 2017. In its decision the Respondent allowed a number of applications under section 26 of the Act but disallowed the applications for exemptions with respect to the following:

a. Setting of Broker fee and commissions as fixed percentage of the of the sales volume being 0.75% payable by the Producer and 0.5% payable by the Buyer.

b. The proposed fixing of warehouse charges by members

11. Aggrieved by this decision the Appellant filed this appeal through a memorandum of appeal dated 11th October 2017.

B. DOCUMENTS AND EVIDENCE

12. The Appellant filed the following documents before the Tribunal for consideration by the Tribunal in deciding this appeal.

a. Record of Appeal dated 11th October 2017 and filed on 31st October 2017

b. Further affidavit sworn by Edward Mudibo on 14th March 2018 and filed on 16th March 2018.

c. Appellant's Submissions dated 7th August 2018 and filed on 10th August 2018.

13. The Respondent filed the following documents:

a. Notice of address for service dated 31st October 2017 and filed on 31st October 2017.

b. Replying affidavit sworn by Wang'ombe Kariuki on 31st October 2017 and filed on 31st October 2017.

c. Supplementary affidavit sworn by Wang'ombe Kariuki on 26th March 2018 and filed on 27th March 2018.

d. Respondent's Submissions dated 11th September 2018 and filed on 12 September 2018.

14. In addition, the Appellant's Advocate, the Respondent's Advocates and the Tribunal Members formed a joint team with a view of collecting the views and opinions of a cross section of stakeholders in the tea industry in Kenya.

15. Between 16th September and 20th September 2019, the joint team met and interviewed the Management Team of the Appellant, the Tea Warehouse Association, the Tea Buyer's Association, the Appellant's Legal Committee and the Appellant's Automation Team. The joint team also toured and interviewed Ufanisi Warehouse Limited, Combrok Tea Brokers Limited, Chai Trading Company Limited (Miritini) and Global Tea and Commodities Limited.

16. Between 7th October and 11th October the joint team met and interviewed the Tea Directorate under AFA, Eastern Produce Limited, Management Team of the Kenya Tea Development Agency (KTDA) Nairobi, Ngorongo Tea Factory Kiambu, Karirana Tea Factory, Kenya Tea Growers Association, James Finlays Kericho Limited, Tegat Tea Factory Kericho, Kenya Tea Packers Kericho (KETEPA), the Tea Research Institute and Kaisugu Tea Factory.

17. At the end of the exercise, the views were collated into a document titled, "Record of views of and input from Stakeholders in the Tea Industry in Kenya". The said document is part of the record of the Tribunal for purposes of this appeal.

C. THE APPELLANT'S CASE

18. The Appellant argues that presetting the Brokers' commission is critical for the following reasons:

a. The auction serves a number of players both within the Kenyan economy and other countries in Africa. It was important that the trade operates seamlessly. This ensures efficiency of the trade process and helps promote and maintain the quality of tea sold at the Auction. If the commissions are not preset, the Brokers have to agree with the Producers and the Buyers on the commission charged on a transactional basis. This will waste a lot of time and undermine efficiencies.

b. The Appellant is in the process of launching an automated auction system. The system is aimed at revolutionizing the operations of the Auction and the operations of the tea trade as a whole. The true efficiencies of the automated system cannot be achieved outside of preset brokers' and Warehouse commissions and charges respectively.

c. The fixed broker's Commission and warehouse charges ensure predictability in the trade. Unpredictability leads to loss of revenue for both buyers and producers as the commissions would be unregulated. This would in turn put into question Kenya's position as the ideal location of the regional tea trade auction. The fall of the Mombasa auction, would in turn lead to loss of revenue and jobs in the country.

d. Tea requires special storage facilities to preserve its delicate quality. The said facilities must be maintained at certain standards. Further, the tea warehouse cannot be used for other commodities as tea should be handled in isolation to avoid contamination and the attendant decline in quality.

e. Fixing brokerage fees would discourage the "briefcase" broker mentality. Those trading simply for profit and not for overall good of the industry. The industry thrives on orderly profitability and pursuit of quality services. If the determination of brokerage fees, is left to individual brokers this would lead to undercutting, a decline of professionalism and quality service currently rendered by the Brokers. The eventual result is a decline in tea trade, a decline of quality tea offered at the Auction, and a decline of quality tea production in Kenya.

19. The Appellant argues that it qualified for and deserved an exemption under section 25 and 26 of the Act on the following grounds:

a. Under section 21(1) of the Act, a trade practice is prohibited "**if it is done with the intention of preventing, distorting or lessening of competition".** The Appellant argues that the rules and regulations it had put in place, were not aimed at distorting competition but were aimed at enhancing trade for the benefit of the all the members and in the national interest. The Appellant argues that the fixing of the charges and commission was justifiable in the circumstances.

b. The predictability of the brokerage and warehouse charges will enhance smooth operations and efficiency. This will promote exports in the Country which is a key consideration when allowing exemptions under section 26 of the Act.

c. Also, that the price fixing would ensure efficiency and consequently, the viability of the Auction. This would in turn improve or prevent decline in the production or distribution of goods or provision of services in the tea industry. This is a key consideration under the provisions of section 26 of the Act.

d. The automated tea auction is designed to efficiently operate within an environment where brokerage and warehouse charges are fixed. An automated auction **"promotes technical or economic progress or stability in the industry"**. Also another key consideration under section 26 of the Act.

e. The tea trade at the Auction injects a significant amount of money into the Kenyan economy. All payments at the Auction are effected through Kenyan Banks, being associate members of the Appellant. In 2017, alone, a total of Kshs 112,855,911,260.00 was paid into Kenyan Banks by virtue of tea trade at the Auction. Consequently, a practice which promotes the tea trade should be exempted under section 26 of the Act. The tea trade at Mombasa obtains a benefit for the Kenyan public which outweighs or would outweigh the lessening in competition that would result or would likely result from the agreement, decision, or concerted practice or the category of agreements, decisions or concerted practices.

D. THE RESPONDENT'S CASE

20. The Respondent in rejecting the application for exemption argued and continues to argue that price fixing is a hardcore contravention of the Act under Sections 21 and 22. Further, the Appellant has not shown any benefit to the public that would outweigh the lessening of the competition.

21. The Respondent argues that the ultimate casualty in any price fixing arrangement is the consumer. The outcome of the price fixing amongst the Brokers and the Warehouses is to extinguish competition amongst themselves to the detriment of the consumer, who in this case is the tea farmer or Producer Member.

22. The Respondent states that it gazetted the application for exemption in accordance with section 25 (3) of the Act via Gazette

Notice No 8601 volume CXVIII – No 29 dated 21st October 2016. It received feedback pursuant to this Notice from the Tea Directorate under AFA and it took into account this feedback before declining the exemption sought by the Appellant.

23. The feedback from the Tea Directorate provides:

a. In conformity with the Agriculture and Food Authority and Crops Act, the AFA-Tea Directorate is required to vet the rules and regulations of the Appellant. An independent body is therefore involved in vetting the rules and fees payable to ensure fair play for all parties.

b. That the main purpose of setting the Brokerage fees is to ensure there is business certainty and stability in the tea sector considering a large portion of Kenya's tea is sold through the Auction.

c. The downside of setting fees is that it does not allow individual members to negotiate based on specific services and volumes of tea handled

d. The Brokerage fees charged remained unchanged over the past several years and there has been agitation that these fees should be reviewed downwards.

e. The AFA-Tea Directorate was currently looking into the fees and charges across the tea value chain and make recommendations on optimal charges and fees.

f. The tea rates charged by Sri Lanka and India Tea brokers were lower than those charged by Kenyan Tea Brokers but the Kenyan Brokers justified this by stating that they provided more services to the consumers of their services.

g. The fixing of brokerage commission worked in favour of the vulnerable farmer

h. To ensure competition between Brokers and protect the farmers, fixing of a definite commission should be replaced with capping of the commission.

24. The Respondent quotes Adam Smith and Richard Whish on the detriments of horizontal price fixing and the same being regarded as the most blatant and undesirable restrictive trade practice.

25. The Respondent also quoted persuasive decisions from South Africa, the United States and the European Union. All condemning price fixing by competitors.

26. The Respondent also argues that all members of the Appellant are competitors as against non- members. Consequently, if the members collectively agree on a price they have the effect of eliminating competition in the market as a whole. Consequently, a farmer has nothing to compare or choose from in terms of services offered by various brokers and warehouses.

27. The Respondent argues that no evidence was submitted by the Appellant to illustrate that the non-Kenyan Appellant members could not operate without a fixed brokerage commission or warehouse commission and would effectively abandon the Auction if this was not in place.

28. The Appellant has not demonstrated any financial loss suffered by members or any prejudice that would be suffered if producers were allowed to negotiate the prices for brokers and warehouses competitively.

29. Allowing fixing of brokers' and warehouse fees will undermine the innovation and improvement of value preposition to the over 560,000 Kenyan Tea Farmers since brokers and warehouses will be assured the minimum or fixed fees set. This will encourage inefficiencies and therefore negate the objectives and benefits of competition policy and law in this economy.

E. ANALYSIS

30. The issue for determination before this Tribunal is by no means novel. The question of price-fixing within the tea industry was earlier raised before a three Judge Bench (Hon. Justices D.S. Majanja, H.I. Ongudi and H. Chemitei) sitting at the Kericho High Court in the **Petition No. 18 of 2014** i.e. ***Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte KTDA Management Services Limited* [2016] eKLR**

31. The Court more particularly stated that at paragraph 33 of the Ruling that:-

"The price fixing allegations are at paragraphs 136 to 162 of the petition. The petitioner alleges that the Mombasa Auction, which is run by the 27th respondent (EATTA), in which KTDA is a shareholder, has been hijacked and monopolized by local cartels of big estate owners (emphasis added) and brokers. The petitioner set various complaints about how the organisation is run to the detriment of small scale farmers. The petitioner seeks declarations of violation of Articles 10 and 46 of the Constitution, general damages from 1st to 27th respondents and principally an order directing the Competition Authority of Kenya and the AFFA to investigate the price fixing and manipulation at the Mombasa Tea Auction."

32. The High Court, however, at paragraph 34 and 35 observed that such mandate was a preserve of the Competition Authority of Kenya and therefore not properly before it. Consequently, the Court made no judicial pronouncement on the issue.

33. The matter seems to have resurfaced in the circumstances leading to the Appeal herein when the Respondent in exercise of powers conferred upon it under the Act took the Appellant through the SCP and the subsequent application for exemption and denial leading to the impugned decision, the subject of this appeal.

34. The objects and functions of the Respondent are not in dispute. The Appellant is not challenging the Respondent's mandate but rather its decision. Indeed, if the Appellant was challenging the mandate of the Respondent, this matter would not be before us. The same would have been filed at the Judicial Review division of the High Court.

35. The objects of the Act and the Respondent are clearly outlined in the preamble, section 3 and 9 of the Act. Such objectives are in line with the generally accepted objective of Competition and Anti-Trust Law. **(See, Michal S Gal and Eran Fish, 'Antitrust pluralism and justice –comment on Al- Ameen' in Daniel Zimmer (Ed), *The Goals of Competition Law* (Edward Elgar, 2012) p. 284). i.e.**

"Competition law is potentially driven by, and can promote, a multitude of goals. Often these goals go in the same direction, so that furthering one furthers all. For example, prohibiting hard- core cartels furthers consumer welfare, total welfare, efficiency, and fairness."

36. Of particular importance here, is the issue of hard-core restriction of price fixing and in this case of a horizontal nature i.e. whether setting of brokerage and warehouse fees constitutes a hard core horizontal restriction. **(See, Robert Mudida et al, 'Kenya's New Competition Policy Regim*e*' (2015) 38/3 *World Competition Law and Economics Review* 437, 451 462.) i.e.**

"Not only can it be challenging to prove object or effect to the criminal law standard, it can be expensive in terms of enforcers' time and money. This said, it is entirely possible that Kenyan courts will come to the view that they can infer 'object' when they see an agreement that is nothing more than a cartel arrangement – in which case Kenya would have essentially a per se rule for such cases. It may help that section 21(3) lists many of the types of hard-core cartel activity – for example, price-fixing and market allocation – and indicates that the section applies to them."

37. Across jurisdictions, price fixing and market allocations are seen as the most contemptible anti-trust/cartel practices. This position was epitomised in the Constitutional Court of South Africa in the case of ***Competition Commission Of South Africa v Standard Bank Of South Africa Limited* [2020] ZACC 2** at paragraph 88, the Court observed in part that:-

"The attitude in other jurisdictions towards hard core cartels or conduct of the type contemplated in [section 4(1)(b)(i) and (ii) of the Competition Act] has been one of utmost repugnance. Cartels are viewed as the most abhorrent anti-trust practices and have been described as a cancer to competition and harmful to consumers and economic development" (Emphasis ours)

38. A reading of the *South African Competition Act* at **section 4(1)(b)(i)** provides for the prohibition of Restrictive Trade Practices and specifically conduct on "**directly or indirectly fixing a purchase or selling price or any other trading condition**"

Section 21 (3) (a) of the Kenyan Act provides that **"directly or indirectly fixes purchase or selling prices or any other trading conditions".** The wording is indeed similar and therefore the South African Context offers great guidance.

39. Further, **Article 81 (1) (a)** of the treaty establishing the **European Community** which provides for the prohibition of agreements whose object or effect is the prevention, restriction or distortion of competition within the common market, and in particular those which: "**directly or indirectly fix purchase or selling prices or any other trading condition.**"

40. All the above i.e. the South African and the European Union model are similar in the provisions to the Kenyan Competition Act.

41. However, considering that the Appellant has pleaded that it draws its membership prom the East African Community and the larger Common Market for Eastern and Southern Africa (COMESA) it is important to look and appreciate the tenor of the Competition laws applying to the countries as contemplated by the *COMESA Competition Regulations*, 2004 and the *East African Community Competition Act*, 2006 (Came into force in the year, 2014).

42. The *East African Community Competition Act*, 2006 at Part II on restraint by enterprises provide at Section 5 that a person shall not in "**collusion with competitors fix prices**."

43. Section 6 of the *East African Community Competition Act*, 2006 provides for exemption under the circumstances stated therein.

44. On the other hand, the COMESA Competition Regulations, 2004 at Article 19 (3) provides for the prohibition of

"agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services"

45. Article 20 (1) of the COMESA Competition Regulations, 2004 provides for exemption/authorisation similar to the Kenya Act "**if the Commission determines that there are public benefits outweighing the anti- competitive detriment of the contract, arrangement or understanding**."

46. All these legal principles point to the fact that there is a consensus within the member state of COMESA and the East African Community as contemplated above. This covers all the member states enumerated by the Appellant under paragraph 5 of its Further Affidavit dated 14th March, 2018 save for **Mozambique** i.e. **Rwanda, Uganda, Burundi, Democratic Republic of the Congo, Malawi, Ethiopia, Kenya and Madagascar.**

47. An argument was posited whether the Appellant was in fact engaging in a hardcore horizontal price fixing practice" The practice of the Appellant was to have ALL the categories of membership (namely Producers, Brokers, Buyers, Warehouses and Packers) represented directly or indirectly through representatives at the price setting discussions.

48. That the pricing agreement is reached in consultation with ALL the players in the industry. These players being the suppliers and the consumers of the brokerage and warehouse fees. The fixing is not undertaken by one side but by all sides.

49. The above typification of the Appellant, may raise the question whether its members i.e. producers, brokers, packers, warehouses and buyers are in a horizontal or vertical relationship.

50. The Tribunal in this regard finds guidance in the case of ***Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) (2 February 2015)** where the South African Competition Appeal Court followed the European Commission in its Guidelines to Technology Transfers Agreements (2004) which states that:-

'In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.'

51. The characterisation principle above if applied to the Appellant shows that the nature of the agreement as exhibited in the Appellants rulebook i.e. brokers members be the only ones to offer tea for sale at an auction and producer members barred from acting as brokers shows that in absence of the agreements, brokers can compete with the producers.

52. Applying the characterisation principle established in the case of ***Competition Commission v South African Breweries Limited and Others*** *(Supra)* leads us to the conclusion that the members of the Appellant are in a horizontal relationship. Consequently, any price fixing within the auspices of the Appellant can be termed as a horizontal restriction.

53. From the Pleadings filed by the Appellant and the Respondent herein, there is no doubt that the exemption sought by the Appellant to fix brokerage commissions and warehousing prices is a form of price fixing. Had it not been so, the Appellant would not have sought such an exemption under Section 25 of the Act.

54. By dint of the Appellant making an application for exemption under Section 25 of the Act (as gazetted), is in itself an admission that it concurs with the findings of the Respondent that setting of warehouse prices and commission brokerage is a restrictive trade practice prohibited under the Act.

55. Consequently, the Appellant by conduct, is estopped from denying or disputing that its rules on brokerage fees and warehouse charges are restrictive trade practices within the meaning of the Act. And further, that the same constitute a hard-core restriction.

56. Looking at the characterisation of price fixing as hard core restriction, shows a distinction between Part A and B on one hand and Part C on the other under the Act. The exemptions contemplated under section 25 can only be sought for prohibited conduct under part A and B.

57. Sections 22 (3) (a) and 22 (1) (b) of the Act is not a blanket policy because of the existence of exceptions under section 25. An exemption may be granted but only when there are exceptional and compelling reasons of public policy.

58. With respect to the argument by the Appellant that fixing of Broker's fees would waste time as the broker and the farmer would have to agree on the same for each transaction. The Tribunal finds that the argument is not valid as it pre supposes that the Act prohibits a setting of a price between a broker and the Farmer for the long-term. In fact, during the field visits most producers intimated that they had long term contracts with their brokers. Nothing stops individual brokers and farmers from agreeing on a price to apply for as long as they both desire.

59. The Appellant argues that automation of the Auction would only work where there's a preset commission and charge for brokers and warehouses. We find this theory to be faulty. It is based on a misconception that the prices would have to be fixed on a transactional basis which is not the case. During the meeting with the Appellant's automation committee it was revealed that the system is bespoke. Which means it is capable of being built to meet the special needs of the Appellant including a scenario where brokers and warehouses do not all charge the same fee.

60. With regard to predictability, we find that there is nothing to stop the farmer or a buyer on the one hand and the Broker or warehouse on the other from entering into a long term contract with a view achieving predictability as between them.

61. We agree with the Respondent that horizontal price fixing is a hardcore violation of competition law and a practice that should be frowned upon. In the words of Richard Whish "horizontal (undertakings trading in competition with each other) price fixing would be regarded by most people as the most blatant and undesirable restrictive trade practice".

62. The Respondent argues that this practice denies the farmer choice and makes the brokers and warehouses complacent thereby hurting service delivery to the farmer. We agree with the Respondent that price fixing has the outcome of diminishing competition

amongst the service providers to the detriment of the Consumer. But the question before us is whether this practice hurts the Kenyan farmer"

63. We agree with the Respondent that any decision made by the Appellant, the Respondent and this Tribunal ultimately must be for the benefit of the tea farmer and the Kenyan economy as a whole.

64. Upon interviewing the producers, there was a resounding affirmation that the farmers preferred to negotiate the brokers fee under the auspices of the Appellant body. Farmers felt that their numbers and collective muscle, as the Producer's Association within the Appellant, enabled them negotiate favourable rates as opposed to when they did it as individuals.

65. We have perused and appreciate the input of the Agriculture and Food Authority, Tea Directorate to the Respondent through the letter dated 5th July, 2017. We note its concern that fixing of the warehouse charges and brokerage commissions did not allow individual members to negotiate based on the specific services offered and volumes of tea handled.

66. The said letter also intimates that brokerage the fees have remained the same over the past several years despite the rise in tea production. The feeling is that this should justify a corresponding reduction in rates applied to brokerage commissions.

67. The same letter also affirms that the current price fixing was in fact for the benefit of the farmer. This is important feedback from the tea industry regulator which must be considered.

68. The Respondent argues that the Appellant body as a whole is collectively engaging in anti-competitive conduct which harms competition outside of the Auction. We note that 95% of the tea produced in Kenya is sold through the Auction. The remaining 5% is either consumed locally or exported through direct sales outside the auspices of the Auction.

69. The upshot of this scenario is that almost all, if not all, farmers are members of Appellant either directly or indirectly (through factories to which they supply their green leaf). Consequently, there is no tea trade, within Kenya, competing with the Auction in Mombasa.

70. In the course of the joint interviews process, it emerged that out of the 11 brokers, only 3 Brokers handled about 70% of the tea sold through the Auction. This is a very critical fact on two fronts.

i. For one it shows that even with a fixed price, there is still something that these 3 Brokers do that sets them apart from the other 8. Which means that producers are able to elect a broker on some other basis other than price and competition is not altogether extinguished.

ii. The other issue is less positive. In the course of our discussions one of the brokers intimated that if the brokerage fees were liberalized, his company would in fact lower its prices as they can afford to do that. The import of this is that the 3 dominant brokers can in fact, engage in predatory pricing thereby driving the other 8 out of business. This would in effect create an oligopoly to the detriment of the farmer whom the Respondent sought to protect in the first place. The fact that the other 8 Brokers have been unable to penetrate the market share of the 3 is an issue that should concern the Respondent. Indeed, the interview with the Appellant's legal committee revealed that most of the brokers were struggling and if the fixed brokerage fee were to be scrapped the larger firms would run them out of business.

71. A comparison has also been alluded between Kenya, India and Sri Lanka on the brokerage commission and industry practices. We have looked at the laws in these jurisdictions and note some differences with the Kenyan scenario.

72. The *Sri Lanka Tea Board Law*, Cap. 253 (Law No. 14 of 1975) which is a law to provide for the establishment of the Sri Lanka Tea Board and for matters connected therewith or incidental thereto. This Act establishes the Sri Lanka Tea Board with the power to regulate activities in the tea industry including the conduct of tea auctions.

73. Under Section 25 of the *Sri Lanka Tea Board Law* (Revised 2018), the Board has the power to set a scheme to regulate the sale of tea, including the conduct of tea auctions. This clearly is not the case with Kenya under the *Crops Act* No. 16 of 2013 (Revised

2016) and the *Agriculture and Food Authority Act* No. 13 of 2013 (Revised 2019).

74. In India, the legislation governing tea auctions is the *Tea Act*, 1953 (No. 29 of 1953) – Revised 2015 which establishes the *Tea Board of India* with powers to regulate activities in the tea sector including the sale/auction of tea (See Section 10 (2) (f) of the Act) and registering and licencing tea brokers among other professionals (See, Section 10 (2) (i) of the Act).

75. All the above jurisdictions i.e. India and Sri Lanka point to regulation of auctions and the tea industry in general by an independent government agency. These agencies regulate the industry by setting rules and standards including price setting.

76. Kenya lacks the equivalent powerful regulator. This lacuna has been filled by the Appellant as a body and its constituent members.

77. The field visit by the Tribunal earlier alluded was an eye opener with regard to the operations and conduct of the Appellant. In relation to brokerage, the ***Black's Law Dictionary*** **(8th Edition)** defines a **broker** as **"An agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. • A broker differs from a factor because the broker usually does not have possession of the property."**

78. As per our findings during the field visits by the tribunal, the role of the broker in the context of the tea sector may be deciphered as follows:-

a. Confirming that the teas received by the producer's warehouse retain their integrity so as not to compromise their sustainability.

b. Receiving instructions from producers on teas to sell in specific sales, and whose full details are displayed in the brokers' catalogues.

c. Collaborating with the warehouse responsible for the producer's teas in order to collate the specific details of each tea offered for sale, and publishing these details in the brokers' sale catalogues.

d. Receiving representative samples of each tea on offer from the producer, ensuring that all buyers are provide with a small portion of that sample for the purpose of tasting and evaluation.

e. Electronically distributing sale catalogues for use in pre-auction, auction and post-auction processes by members.

f. Conducting the live outcry auction in a conducive and disciplined manner.

g. Generating the various relevant post-auction financial, statistical and informational reports for consumption by stakeholders.

h. Monitoring the timely payment of sales proceeds by buyers and remittance of the same to producers.

79. It was apparent that the broker plays a pivotal role in the tea industry in this country. The Broker drives market research and feedback to the producers on how to best improve their tea. The broker collates the orders of the buyers according to each buyer's preference and transmits the same to the Producers. The broker acts for the benefit of both the producer and the buyer.

80. In essence the broker is the consultant in the tea industry. This broker is sometimes confused for the unscrupulous "broker" who runs the infamous "soko huru". This unscrupulous trader buys green leaf off the farm at throw away prices only for him to benefit from the good price at the Auction.

81. We have also considered the brokerage fee within the entire tea value chain. It emerged from various discussions with the stakeholders that 70% of the value chain accrued to the Producer and the brokerage fee accounted for 0.4% of the tea value chain in Kenya.

82. It is interesting that with respect to the warehouses the majority of the stakeholders were of the opinion that the warehouse charges should not be fixed. They preferred to negotiate with the warehouses directly. The farmers are not as apprehensive when dealing with the warehouses individually as opposed to when they are dealing with the Brokers

83. From the analysis above, the only contention before this Tribunal is whether the Respondent was justified in denying the exemption sought by the Appellant to set warehouse prices and brokerage fees/commissions.

F. DETERMINATION

84. Kenya is the world's leading exporter of tea. Tea is also Kenya's number one foreign exchange earner. Tea accounts for 25% of Kenya's foreign exchange earnings. About 95 % of the tea produced in Kenya is sold through the Auction. The Auction is the only international auction and serves 10 African countries mostly within Eastern Africa. In 2017, the Auction handled just under 400 Million Kilograms of tea worth Kshs 112,855,911,261.00.

85. It is against this background that the Tribunal found it necessary to attend the Auction and understand its operations. Further, to meet and collect the views of a cross section of players in the industry with respect to the matter before the tribunal.

86. It is incumbent on the tribunal to understand the potential impact of the decision it makes with respect to the mechanics of the tea industry and on the national economy as whole if any.

87. From the analysis above, the only contention before this Tribunal is whether the Authority was justified in denying the exemption sought by the Appellant to set warehouse prices and brokerage fees/commissions.

88. Further, from the pleadings of the parties before the Tribunal, there is no doubt that the setting of warehousing and brokerage fee/commissions constitutes a trade restriction under section 21 and 22 of the Act and on those grounds, the Appellant made an application for exemption.

89. Effectively, the challenge is therefore the Respondent's exercise of its statutory mandate in relation to section 25 of the Act.

90. The Appellant argues that the provision on restrictive trade practices under Section 21 (1) of the Act must be qualified by the Respondent's demonstration that it has been done with the sole intention of preventing, distorting or lessening of competition.

91. Our reading of the provisions of section 21 (1) of the Act however reveals otherwise. For convenience we reproduce section 21 (1) as follows:-

Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as <u>their object or effect the prevention, distortion or lessening of competition in trade in any goods or services</u> in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part. (Emphasis/underlining ours)

92. The above provision shows that the restriction can either have the <u>object or the effect</u>. The Appellant's contention that it must have a <u>sole intention</u> is therefore for all intents and purposes misleading.

93. To further buttress the above, Courts have time and again rendered themselves on the definition and the interpretation of <u>object and effect</u> especially in constitutional interpretations. A case in point is the case of **<u>R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295</u> wherein the principle of interpretation was** enunciated by the Supreme Court of Canada to the effect that:-

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This <u>object is realized through impact produced by the operation</u> and application of the legislation. <u>Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact</u>, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

94. This principle has been restated and elaborated in numerous decisions and we have no doubt as to its import on the interpretation of Section 21 (1) of the Act. To elaborate the meaning and effect of the words object and effect with reference to a rule enactment and in this case, the Appellant's rule book on prices and warehouse fees, the Tribunal also considered ***Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others*** **Nairobi Petition No. 3 of 2011 [2011] eKLR,** ***Institute of Social Accountability & Another vs National Assembly & 4 Others*** **High Court Petition No. 71 of 2014 [2015] eKLR,** ***Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another*** **[2017] eKLR).**

95. To further address the issue, reference is made to the European Court of Justice interpretation of the object of an agreement and the applicability of **Article 81 (1) (a)** of the **treaty establishing the European Community** in the case of ***Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats (C- 209/07***), (***Irish Beef Case***) European Court of Justice. Where the court found that price fixing agreements and agreements with restrictive clauses is a hard core cartel practice that offends **Article 81 (1) (a)** of the **treaty establishing the European Community** which provides, as earlier alluded above, for the prohibition of agreements whose object or effect is the prevention, restriction or distortion of competition within the common market, and in particular those which: "**directly or indirectly fix purchase or selling prices or any other trading condition.**"

96. During the visits the Tribunal took judicial notice that in compliance with the decision of the Respondent dated 29th August, 2017, the Appellant had amended its rule book to remove the clauses which provided for the fixing of warehouse prices and brokerage commissions.

97. However, the said fees and commissions remained the same as revealed by the Tribunal's visit to some of the stakeholders e.g. Ngorongo Tea Factory, Ufanisi freighters, Karirana Tea (Factory) Estates Ltd, Tea Growers Association and the Appellants Auction at Mombasa which shows the brokerage commission at a constant of 1.25% (broken down into 0.75% for the producer and 0.50% for the buyer).

98. The above figures bear an uncanny resemblance to the figures submitted by the parties in their pleadings before this Tribunal.

99. About three years after the said mandate was stripped away from the Appellant, the figures still remain the same. Considering the power and influence that the Appellant wields in the tea sector, the stagnated figures are not strange, it points to a much deeper control by a section of the Appellant.

100. This conclusion from the figures above is not farfetched. As the Competition Tribunal of South Africa accurately noted, such conduct of price fixing is rife in hard-core cartel practices and thus in the case of ***Competition Commission v Pioneer Foods (Pty)* Ltd (Supra)** at paragraph 33 and 34 noted that:-

"While fighting cartels is viewed as one of the most important areas of activity for competition agencies globally, the ability of agencies to effectively do so is often hampered by the difficulties pertaining to the gathering of direct evidence. This is not surprising given the nature of cartel activity. Competitors engaging in co-ordination rather than competition tend to conduct themselves in secretive and stealthy ways; meeting behind closed doors, ensuring that there is no paper trail, agreeing on signals which they can send to each other and at times cloaking their activities in the guise of normal commercial practices thereby seeking to mislead and divert anti-trust agencies… This is why agencies globally have found creative ways by which to secure evidence of cartel activity, the Competition Commission's leniency programme being a case in point."

101. An issue of concern for us is that currently only 3 Brokers control about 70% of the market share in a very large industry. A comment by one of the Brokers leads us to believe that if the Brokers are not closely regulated, it is very easy for the three to drive out the other 3 leaving this critical industry at the behest of an oligopoly. We believe this is an issue of concern perhaps which the Respondent should look into.

102. In orbiter, we wish to observe that the tea sector is the biggest foreign exchange earner and as a result should have a strong regulatory body to co-ordinate all the players in the tea industry. Lumping the regulatory function under the Agriculture and Food Authority – Tea Directorate does not reflect the urgent regulatory response required in this sector.

103. We further take Judicial Notice that there is *Tea Bill* before the Senate (Senate Bills No. 36) gazetted as Kenya Gazette Supplement No. 142 and the Memorandum of Objects and Reasons therein resonates with this Tribunal's finding.

104. The above stated pending Bill seeks to establish a regulator in the form of the Tea Regulatory Authority of Kenya with the mandate to regulate and maintain standards in the tea sector including regulating the operations of tea brokers and other players/actors.

105. This Tribunal is alive to the principle of separation of powers between the Legislature and the Judiciary (to which this Tribunal is part of) and wouldn't wish to meddle in the affairs of the former.

106. However, guided by the Supreme Court decisions of ***National Bank of Kenya Limited v Anaj Warehousing Limited* [2015] eKLR** and ***Michael Mungai v Housing Finance Co. (K) Ltd & 5 other* [2017] eKLR** this Tribunal recommends the enactment and establishment of the functionally strong Tea Regulatory agency with the power to set standards and regulate the market players. Vesting the regulatory function on a governmental agency increases transparency and curbs anti-competitive practices and cartel like conduct within the tea sector.

107. This recommendation is backed by the observation that tea sector regulation under the *Agriculture and Food Authority Act* No. 13 of 2013 (Revised 2019) has lost its lustre and robustness witnessed in the erstwhile Tea Board of Kenya under the *Tea Act*, Cap. 343 (Repealed by the *Crops Act*, No. 16 of 2013).

108. Taking into account the importance of tea in Kenyan economy, the critical role played by the Broker in promoting tea exports in Kenya, the percentage of the brokerage fee within the tea value chain, the fact that only 3 brokers handle 70% of the tea sold at the Auction, the views of the Tea directorate under AFA and the views of the tea farmer in Kenya with respect to the practice of fixing brokerage fee, we are of the view that a decision should not be made that suddenly destabilizes the production and export of tea in Kenya.

109. The best interest of the Kenyan tea farmer is at the heart of this matter. We believe an exemption under section 26 (3) (a) (b) (c) and (d) is merited but only for a while so as to allow adjustments in the industry.

110. We note and agree with the Respondent that regulation of prices is a hard-core restriction under the Act. An exemption that runs indefinitely in the circumstances would not be of any benefit to the public in the long-term. We have also noted the contempt accorded to such practice in other jurisdictions i.e. South Africa and the European Union. **(See, Peter Whelan, Cartel Criminalization and the Challenge of 'Moral Wrongfulness' (2013) 33(3) *Oxford Journal of Legal Studies*, pp. 535-561.) i.e.**

"Arguably, 'legal enforcement mechanisms cannot function unless they are based on a broad consensus about the normative legitimacy of the rules - in other words, unless they are backed by social norms'. The success of a project of antitrust criminalization therefore 'depends on the emergence of a genuine sense of "hard core" delinquency, without which effective regulation by means of criminal law is unlikely to be achieved'."

111. For this reason, we would grant the exemption for a period of two (2) years pursuant to the provisions of section 26 (4) of the Act just so as to allow the industry time to adjust and put in place regulatory mechanisms in conformity with international best practice.

112. The Appellant did not make a case with regard to allowing the Appellant to fix charges in respect of the warehouse charges and we would not allow the same.

G. ORDERS

113. The upshot of the above analysis and determination is that this appeal is partially successful and the Tribunal orders, that:

a. The Appellant's application under Section 25 of the Act for exemption with respect to fixing brokerage fees is allowed subject to the following conditions.

i. That any changes in Brokerage fees must be approved by the Tea Directorate or any agency for the time being the regulator in the industry

ii. This exemption is only allowed for a period of 2 (two) years from the date of delivery of this judgment.

iii. The changes proposed by the Respondent to the Appellant's rule book are upheld as they conform to international best practice and standards.

b. The Application by the Appellant for exemption to fix warehouse prices is dismissed.

c. Each party shall bear its own costs.

114. Finally, the Tribunal wishes to relay its sincerest regrets to the parties herein over the delay in delivery of this Judgement, which was occasioned by quorum hitches following the delay in gazettement of the current Tribunal Members.

DATED at NAIROBI this 24th day of April 2020

DELIVERED at NAIROBI this 4th day of May 2020

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STEPHEN KIPKENDA - CHAIRMAN

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