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VOLUNTARY PEER REVIEW ON COMPETITION POLICY: KENYA

OVERVIEW

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The Overview contained herein is also issued as part of the full version of the Voluntary Peer Review Report on Competition Policy: Kenya, 2005 (UNCTAD/DITC/CLP/2005/6).

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Overview

1. In the 1980s, Kenya's economy began to change from a price control regime with significant state intervention into a market economy. The Government recognized the need to introduce a competition law, and the Restrictive Trade Practices, Monopolies and Price Control Act came into force in 1989. It was intended to be a transitional measure, and it has now become outdated.

2. The Act provides for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and for the control of mergers and takeovers (as well as price control measures, which are no longer used). However, there is no reference to abuse of a dominant position. There is a wide-ranging exemption that excludes regulated sectors of the economy from the scope of the competition law. The investigation of possible contraventions of the Act is the responsibility of the Monopolies and Prices Commission, which is part of the Ministry of Finance. Decisions on particular cases are taken by the Minister. Decisions of the latter can be appealed to the Restrictive Trade Practices Tribunal and from there to the High Court.

3. The Commission has 33 staff members, of whom 22 have professional grades. The professional staff are well qualified, many holding master's degrees in law or economics. The caseload of the Commission has been relatively light since its inception, with 15 restrictive trade practices cases and 22 merger cases handled in 2004. Very few consent agreements or orders have been made since the Act came into force. The

Commission needs further capacity building, particularly in the area of enforcement and case handling.

4. There are many sector-specific regulators in Kenya, some of whom have responsibility for competition issues. However, it is not clear how technical regulation of these sectors relates to competition issues arising in the sector.

5. There is no consumer protection law in Kenya, and consideration should be given to including such measures in a new competition law. There are advantages in combining consumer protection work with competition policy enforcement, not least the fact that it allows the competition authority to achieve visible results and raise its profile in the community.

6. The Commission has had limited scope for advocacy activities. This is a serious disadvantage given the importance of competition advocacy work, particularly in a developing-country context, and the lack of a competition culture in Kenya. The Commission should promote the link between competition policy and poverty reduction.

7. The report concludes with policy options for consideration. These include replacing the current Act with a modern competition law and making the Commission into an autonomous competition authority. The Commission should also be given a formal competition advocacy role. The regulation of specific sectors should be brought within the scope of the competition regime, and the relationship between the sector-specific regulators and the Commission should be clarified. Thresholds for merger control should be introduced together with time frames for the review process.

Consideration should also be given to incorporating consumer protection provisions into the new competition law.

I. Context and history

8. Kenya attained its independence from the United Kingdom in 1963. Unlike other independent African countries in the region (such as Kenya's neighbour, the United Republic of Tanzania), Kenya did not follow the strict path of "African socialism". The country's independent Government, despite showing support for nationalist, socialist economic policies, opted for a mixed economy that was market based. Such a system was supportive of the already existing private sector and open to foreign investment.

9. Independent Kenya began a large-scale programme of state intervention, seeing this as an extension of the struggle for independence. In the first 10 years, there was a large injection of investment capital aimed at diversification, coupled with the deliberate generation of demand to stimulate the economy. The reform brought in another dimension, namely the creation of a large public sector, which the Government claimed as one of its achievements. As a result of these measures, non-Kenyan capital was displaced from the commanding heights of the economy and opportunities were created for individual entrepreneurs by restricting certain sectors to nationals. The measures led to the emergence of a kind of mixed economy with a large state sector consisting of the major industrial enterprises. Proportionally the state was in command of massive resources that seemed capable of becoming an engine for industrial growth and all-around development.

10. It was discovered that this economic model promoted import substitution and subsidized consumption. The arrangement was leading to stagnation of economic development. The inefficiencies inherent in the system contributed significantly to the economic decline of the country by the late 1970s.

11. In 1979, the Government introduced the Structural Adjustment Programme (SAP), comprising a set of economic reform policies. The basic objectives of SAP as initially conceived were to restore the country to macroeconomic stability and to revive economic growth through increased resource mobilization and more efficient utilization of resources. Efficiency gains would be achieved through greater reliance on market forces and on the private sector and by reducing the role of government in the economy. This meant eliminating market distortions and increasing competition in the domestic economy. Greater competition was to be achieved through deregulation, phasing out of public-sector monopoly control in markets for foreign exchange, credit and agricultural commodities, and privatization of commercial state enterprises. Further steps were also taken by the Government to eliminate barriers to foreign trade and foreign investment.

12. In response to the liberalization reforms, the Working Party on Government Expenditure in 1982 recommended that legislation with respect to unfair trade practices be enacted to provide a mechanism for monitoring and regulating the performance of the private sector. This was followed by Sessional Paper No. 1 of 1986 on "Economic Management for Renewed Growth", which articulated the need “to propose legislation to prohibit restrictive trade practices and establish an administrative mechanism to enforce the legislation”. This

undertaking led to the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 and the establishment of the Monopolies and Prices Commission as a department of the Ministry of Finance.

II. Substantive issues: content of the competition law

13. Kenya's competition law is contained in the Restrictive Trade Practices Monopolies and Price Control Act (Chapter 504 of the Laws of Kenya), which came into force on 1 February 1989. The Act replaced the Price Control Act, which was repealed, but the previous price control provisions were incorporated into the new law, which was intended to be a transitional measure to allow Kenya to move from a price control regime to a competitive market economy. The intention was that "Government will rely less on instruments of direct control and increasingly on competitive elements in the economy".[1]

14. Part IV of the Act relating to the control and display of prices has not been used since 1994, when petroleum products were the last item to be removed from the price control regime. This part of the Act will not be considered further in the report.

15. The Act provides for the control of restrictive business practices, which include both unilateral conduct and agreements. However, there are no provisions relating to dominance in this part of the Act, and, regarding conduct, there is no distinction between dominant and non-dominant companies. Complaints about anti-competitive conduct are made to the Minister through the Commissioner.

16. Where more than one third of a market is controlled by a single entity or there is vertical integration between

[1] Sessional Paper No. 1 of 1986 on "Economic Management for Renewed Growth", paragraph 2.53.

manufacturing, wholesaling and retailing, the unusual provisions relating to unwarranted concentrations of economic power become applicable. Such concentrations can be investigated at the request of the Minister.

17. There are merger control provisions that apply to certain mergers involving companies dealing in similar commodities or services. There are no turnover thresholds. Mergers falling within the ambit of the Act require an order from the Minister authorizing the transaction. Applications for an order are investigated by the Commissioner, who is required to consider broad public interest criteria and then make a recommendation to the Minister.

A. Restrictive trade practices

18. The provisions relating to restrictive trade practices are contained in Part II of the Act. Section 3 defines a restrictive trade practice as "an act performed by one or more persons" that eliminates opportunities to participate in the market or to acquire goods and services. It therefore encompasses both unilateral conduct and agreements. The elimination of opportunities is to be measured with reference to the situation that would have obtained in the absence of the practices in question. This is an unusual definition of anti-competitive conduct, although it is elaborated by a list of categories of conduct that are declared to be restrictive trade practices.

19. There is also a wide-ranging exemption in section 5. Under this section, trade practices are exempted from the provisions of the Act if they are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred by an Act of Parliament or by an agency of the Government acting under an Act of Parliament. Also

exempted are trade practices that are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting under an Act of Parliament.

20. The exemption has the effect of removing the public sector from the scope of the Act. The utility sectors, for example, come within this exemption and are therefore not subject to the general competition law. The exemption goes beyond the public sector to exempt trade practices relating to the licensing of participants in certain trades and professions.

21. The enumeration of restrictive trade practices (in section 6) includes nine categories of agreements. The list includes many of the types of agreements that are often the concern of a competition law. They include cartels, resale price maintenance, quantity rebates, discrimination and market sharing.

22. Where an agreement is made by a trade association, the agreement is deemed to have been made by the association and by all its members (section 6(4)). The Commission succeeded in ending a price-fixing scheme in the insurance industry. Following an investigation, the Commission established that the Association of Kenya Insurers (AKI) was making recommendations to its members concerning premiums rates to be charged. A consent order was agreed to in April 2003 whereby the AKI agreed to withdraw its recommendations and not to issue any further rate recommendations.

23. These restrictive trade practices are essentially agreements between two or more parties. The next three sections of the Act deal with unilateral conduct, but the scope of the sections is not confined to parties in a dominant position

in the market. Refusal or discrimination in supply is treated as a restrictive trade practice in sections 8 and 9 of the Act. Discrimination is defined in terms of providing less favourable conditions than are available to third parties. Section 9 sets out specific instances of refusal or discrimination in supply that are deemed to be restrictive trade practices.

24. Predatory pricing and related conduct are dealt with in section 10 of the Act. Predatory trade practices are defined in relation to an intention to drive a competitor out of business, or to deter a person from establishing a business, or to induce a competitor to dispose of a business or shut down any facility, or to induce a person to desist from producing or trading. The section then lists five types of conduct that are included in the definition of predatory trade practices

B. Collusive tendering

25. Collusive tendering is prohibited by section 11, which makes it an offence punishable by a fine or imprisonment, or both. The offence is committed when two or more persons, being manufacturers, wholesalers, retailers, contractors or suppliers of services, agree on the terms of their bids or agree to abstain from bidding. It is also an offence to collude when bidding at an auction (section 12).

C. Monopolies and concentrations of economic power

26. Part III of the Act deals with concentrations of economic power and with mergers and takeovers. The Minister of Finance is required (by section 23) to keep the structure of production and distribution of goods and services in Kenya under review to determine where unwarranted concentrations

of economic power exist. Such concentrations are those whose detrimental impact on the economy outweighs the efficiency advantages, if any, of integration in production and distribution.

27. The Minister is directed to pay particular attention to various factors and may direct the Commissioner to investigate any economic sector which the Minister has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power.

28. An unwarranted concentration of economic power is deemed to be prejudicial to the public interest if it has one of four specified effects. After receiving a report from the Commissioner, the Minister may make an order directing any person whom the Minister deems to hold an unwarranted concentration of economic power to dispose of such portion of his or her interests as the Minister deems necessary to remove the unwarranted concentration.

D. Control of mergers and takeovers

29. Mergers and takeovers that involve two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or supplying substantially similar services, are subject to control under section 27 of the Act. All such mergers and takeovers require an authorizing order issued by the Minister. Failure to obtain such an order renders the merger or takeover of no legal effect and is an offence punishable by a fine or imprisonment, or both.

30. Application for an order authorizing a merger or takeover is made to the Minister through the Commissioner,

who then investigates the application and makes a recommendation to the Minister. In evaluating the application for the purpose of formulating a recommendation, the Commissioner must have due regard to the criteria set out in section 30.

31. There are three evaluation criteria. They are in the nature of public interest criteria that go beyond competition concerns. The first criterion is that a merger or takeover will be advantageous to Kenya to the extent that it will result in a substantially more efficient unit with lower production costs and greater marketing thrust, thus enabling it to compete more effectively with imports, expand Kenya's exports and therefore increase employment. The second is that the transaction will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices owing to oligopolistic interdependence. The third is that the transaction will be disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labour-intensive technology.

32. The Premier Food Industries case demonstrates how the Commission was concerned about the employment effects of a proposed merger, even in the absence of competition concerns. The Commission recommended that the merger be approved on condition that the acquirer retained the existing workforce of the two target companies.

III. Institutional issues: enforcement structures

A. Enforcement institutions

33. The Act refers to four enforcement institutions, namely the office of the Minister of Finance, the office of the Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya.

Office of the Minister of Finance

34. The Act bestows the overall powers to administer and enforce competition law and policy on the Minister of Finance. When performing his or her duties under the Act, the Commissioner is under control of the Minister. The Minister is empowered to make orders required to be executed by the Commissioner. He or she also receives complaints relating to restrictive business practices, can direct the Commissioner to investigate any economic sector relating to unwarranted concentrations of economic power, and receives and authorizes applications for mergers or takeovers.

Office of the Commissioner for Monopolies and Prices

35. The Commissioner is appointed under section 3(1) of the Act and has the primary responsibility for the enforcement and administration of the Act subject to the control of the Minister. The Commissioner is responsible for advising the Minister on all matters pertaining to competition and receives and carries out orders by the Minister on matters relating to investigations into all allegations involving restrictive trade

practices, unwarranted concentrations of economic power, mergers and takeovers.

Restrictive Trade Practices Tribunal

36. The Tribunal is a judicial body appointed under section 64(1) of the Act. It is appointed every five years; the first appointment was made on February 1991. The Tribunal consists of the Chairman (who must be an advocate of the High Court of Kenya of not less than seven years' standing) and four other members. The Tribunal's main function is to hear appeals from ministerial orders, which in practice arise from the recommendations of the Commissioner. The Tribunal has the power to overturn, modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties. The decisions of the Tribunal can be appealed to the High Court.

High Court of Kenya

37. Section 25(2) provides that a party who is dissatisfied with the decision of the Tribunal can appeal to the High Court against that decision within 30 days after the date on which a notice of that decision has been served on that party, and that the decision of the High Court shall be final.

B. Enforcement procedures and practice

38. The Act provides for three categories of enforcement procedures as follows.

Restrictive trade practices

39. In relation to restrictive trade practices, sections 13-20 of the Act give a detailed procedure to follow when carrying out inquiries and investigations into restrictive trade practices.

40. In the case of restrictive trade practices, any aggrieved person may submit a complaint to the Minister, through the Commissioner, in the prescribed form. The Commissioner investigates the complaint and may inform the person complained against about the allegations and the evidence adduced, and invite the person to comment on the allegations and the evidence and to indicate what remedies the person would propose in order to bring his or her trade practices into conformity with the law. The Commissioner may also inform the person complained against that the weight of the evidence supports the allegations made, and request the person in question to take specific steps to discontinue the practice and, in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers, competitors or customers to participate fully in producing or trading in the goods or services to which the allegations relate.

41. In case there is no response to the Commissioner’s communication by the indicated date or any ameliorative action taken is deemed by the Commissioner to be inadequate, the Commissioner is required to invite the person to negotiate a consent agreement satisfactory to the Commissioner, binding the person to desist from specified practices and to compensate for their past effect. Such agreement is gazetted and copies are sent to any person complaining of the said practice(s) and to any other persons the Commissioner deems to be affected by the agreement.

42. Should the preceding measures not be effective, either because of lack of satisfactory steps or because of breach of agreement terms, the Commissioner informs the person in question that he or she proposes to recommend that the Minister make an order regulating the practices in question, and that a hearing on the desirability of an order will be held on a specified date. Upon concluding the requisite investigations under section 16, including the holding of a meeting, the Commissioner presents his or her report together with recommendations to the Minister.

Control of unwarranted concentrations of economic power

43. In the case of abuse of monopolies and dominant positions, the Minister can direct the Commissioner to investigate any economic sector that features one or more factors relating to unwarranted concentrations of economic power. The Commissioner then reports back to the Minister, who may make an order directing any person the Minister deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his or her interests in production or distribution or supply of services as the Minister deems necessary to remove the unwarranted concentration. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

Control of mergers and takeovers

44. Horizontal mergers or takeovers effected without an authorizing order from the Minister are illegal *ab initio* and not justiceable. Any person intending to effect a merger applies to

the Minister through the Commissioner for action by the Minister. After considering the recommendation of the Commissioner, the Minister may make an order concerning the application. The Minister's approval may be conditional or unconditional. The Minister is required to cause an order for authorization to be published in the *Kenya Gazette* as soon as reasonably practicable after the order is made. An aggrieved person has recourse to the Restrictive Trade Practices Tribunal and finally to the High Court.

C. The Commission's enforcement tools

Obtaining information, documents and evidence

45. A major tool that the Commissioner has access to is the use of section 14(2), which confers power on the Commissioner or any other person authorized in writing by the Commissioner to obtain information, documents and evidence when investigating possible restrictive trade practices, and to make copies of those documents. Section 14(3) empowers the Commissioner or any person authorized by the Commissioner in writing to enter any premises and to inspect any documents in the possession or under the control of a person who the Commissioner has reason to believe is in charge of the premises.

46. Under section 23(3), the Commissioner may require any person possessing records relating to investigations of unwarranted concentrations of economic power to give the Commissioner copies of the records or alternatively to submit the records to the Commissioner for copying. Section 29(1) empowers the Commissioner, when investigating a merger, to require any participant in any economic sector within which a

merger or takeover is proposed to take place to grant the Commissioner or any person authorized in writing by the Commissioner access to records and make copies of those records.

Penalties and offences

47. The Act provides for both civil and criminal sanctions for the contravention of the Act. Sections 21 and 26 of the Act makes it an offence for any person, whether as principal or as agent, to contravene or fail to comply with an order made by the Minister in respect of a restrictive trade practice, or in respect of unwarranted concentrations of economic power. As regards a merger, section 27(3) makes it an offence to carry out a merger or takeover without an authorization order from the Minister. In all the above three instances, the Act provides for jail sentences and fines.

D. Funding of the Commission

48. The Commission, being a government department, is solely dependent on government budgetary allocations. Unlike other autonomous Competition Authorities in the region, the Commission has no power to raise alternative funds (for example, through borrowing or by charging fees for the service it renders). The Commission has an average annual budget of US$300,000.

49. The Commission is headed by the Commissioner, who is accountable to the Minister of Finance through the Permanent Secretary to the Treasury. The Commission has an authorized staff of 63 officers. The actual staff employed currently numbers 33. The academic qualifications of the staff

are very high, with most staff members having a university degree. The Commission is currently organized into five divisions: Administration; Planning and Evaluation; Restrictive Trade Practices; Legal; and Computing and Documentation.

IV. Casework, exemptions and sector-specific regulation

A. Casework review

50. Over the last five years (2000 to 2004), the Monopolies and Prices Commission has dealt with an average of 20 restrictive trade practices cases and 27 merger and takeover cases each year (see table 1). The number of cases considered since the Commission was established is indicated in the table.

Table 1. Cases considered by the Monopolies and Prices Commission, 1989–2004

Year	Restrictive trade practices cases	Merger and takeover cases
1989	7	6
1990	6	9
1991	6	10
1992	7	9
1993	7	7
1994	13	9
1995	15	14
1996	15	11
1997	10	11
1998	15	12
1999	18	24
2000	18	37
2001	18	23
2002	15	35
2003	35	19
2004	15	22

Source: Monopolies and Prices Commission.

51. Only two consent agreements (under section 15(3) of the Act) relating to restrictive trade practices have been published in the *Kenya Gazette*. The consent agreements were made in 1991 (carbonated soft drinks) and 2003 (the insurance industry).

52. The Minister has made four orders (under section 18 of the Act) in relation to restrictive trade practices. The orders were in relation to tobacco distributorships (1992), the carbonated soft drinks market (1993), wines and spirits distributorships (1996) and computer software (2004).

53. The Commission has been directed by the Minister to investigate two economic sectors (under section 23 of the Act) because of the possible existence of an unwarranted concentration of economic power. These were the carbonated soft drinks sector (in 2003) and the cement industry (in 2004). The Commission did not find any need to recommend disposal of interests under section 24 of the Act.

B. Exemptions from the competition law

54. Section 5 of the Act has been interpreted as a wide exemption from the competition law. The exemption relates to trade practices that are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred by an Act of Parliament, and those associated with the licensing of participants in certain trades and professions by Government agencies acting in accordance with an Act of Parliament. Regulated enterprises consider themselves to be exempt from the competition law by virtue of this section.

C. Sector-specific regulation

55. There are sectoral regulators in the tea, coffee, sugar and petroleum sectors, and in the utility sectors (e.g. for telecommunications), as well as in the financial services sector.

56. There does not appear to be much communication between the Monopolies and Prices Commission and the various sectoral regulators, who act independently of the Commission. The sectoral regulators are obviously responsible for many technical issues other than competition. It is not clear how this technical regulation relates to any remit to consider competition issues. Where a regulator exists in a sector, section 5 of the Act is generally interpreted in such a way that the Commission has no jurisdiction to intervene in respect of any restrictive trade practices that may exist in the sector.

57. Some of the regulators have explicit responsibility for competition issues in their sector. For example, the Communications Commission of Kenya (CCK) has a duty under section 23 (1) (b) of the Kenya Communications Act to maintain and promote effective competition. Under the Kenya Communications Regulations 2001, the CCK "shall … promote, develop and enforce competition" (section 5(1)). The CCK can investigate any licensee that it has reason to believe has engaged in unfair competition. It may subsequently issue an order requiring the licensee to desist, to take action to remedy the unfair competition and to pay a penalty.

58. The Capital Markets Authority issues licences to companies operating in the capital markets. It can prohibit mergers between these companies and would seek advice from the Commission. Likewise, in the insurance industry, mergers need the approval of the Insurance Commissioner as well as the

Monopolies and Prices Commissioner, both of whom give their advice to the Minister.

D. Sector studies

59. The Commission has produced reports on eight sectors of the economy (the small-scale tea sector, coffee, sugar, petroleum, beer, carbonated soft drinks, cement and electronic media), considering the state of competition in the sector and the possible existence of restrictive trade practices. The reports suggest the possible existence of anti-competitive practices in a number of sectors that merit further investigation.

V. Competition advocacy, poverty reduction and consumer protection

A. Building a competition culture

60. Competition advocacy refers to those activities conducted by the Commission related to the promotion of a competitive environment for economic activities by means of a non-enforcement mechanism, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition. In most countries, this role is carried out by the national competition authority.

61. In Kenya, the commission has no mandate to carry out the competition advocacy function. The Act is silent on the issue of competition advocacy, and the latter is not legally covered as one of the functions of the Commission. The Commission, by virtue of being a government department, is precluded from carrying out most of the activities that constitute competition advocacy.

62. The Commission has, despite the legal and administrative constraints, taken the initiative to create public awareness and promote competition compliance. Since its establishment, the Commission has continued to face a formidable but highly important task in building awareness and support for competition policy among the public and within the business community. The lack of a "competition culture" within the country is a serious impediment to the work of the Commission and one of its major challenges.

63. The Commission's compliance and information strategy includes educating and informing the public through

the use of speeches, publications and guidelines, maintaining a comprehensive and up-to-date website, and having effective liaison programmes with all the District Councils in the Country. The Commission is also requested to provide its opinion on questions of competition by the Government, parliamentary committees, local authorities, professional organizations, trade unions and consumers.

64. The Commission has a very broad range of stakeholders with widely varying information requirements. It is therefore important that the Commission's information and compliance strategy be diverse enough to meet the needs of all of its constituents. The issue is exacerbated in Kenya by the country's geographic, economic and cultural diversity.

B. Competition policy and poverty reduction

65. Competition authorities in developing countries should promote competition policy as a means of reducing poverty. An effective competition policy can enhance economic growth by making individual markets more efficient, and the benefits can result in a reduction of poverty. Competition advocacy plays an important role in achieving these outcomes.

66. The private sector is an important engine of growth and can make a significant contribution to the reduction of poverty. Markets are the mechanism by which the private sector operates, and competition policy is concerned with ensuring that markets function efficiently and produce the predicted benefits. The World Bank's *World Development Report 2000/2001* argues that markets are central to the lives of poor people. By providing opportunities to engage in productive activities, markets in the private sector can promote growth and poverty reduction. The benefits of more efficient markets will

reach poor people and help reduce poverty to the extent that poor people can participate in these markets.

67. In developing countries, such as Kenya, poor people can participate in markets in a number of roles. As consumers, they can benefit from lower prices, improved quality and more choice, which are the expected outcomes of a competitive market. As employees, they can benefit from better-paid and more productive jobs, and the net effect on employment can be positive as the market expands. Poor people can also participate in the market as entrepreneurs, particularly if there is scope to establish small businesses. Finally, improved economic growth should result in higher tax revenues, and if these are used to provide services or infrastructure that poor people can access, this provides another means of reducing poverty.

68. Competition policy can make a direct contribution to economic development by promoting an efficient allocation of resources, preventing anti-competitive conduct and excessive levels of concentration in the economy, enhancing a country's ability to attract foreign direct investment, and ensuring the benefits of privatization and regulatory reform.

69. If economic growth is to reduce poverty and help achieve the Millennium Development Goals, the benefits must reach poor people. Establishing competitive markets in the private sector is one way of making a significant contribution to this process, provided poor people have access to the markets and thereby gain the incentive and the means to improve their economic position.

C. Consumer protection issues

70. The competition law in Kenya does not contain explicit provisions on consumer protection. In fact, if the Commission engaged in consumer welfare matters, it would be difficult for it to justify its activities. The need for comprehensive consumer legislation is still being debated, though such legislation is favoured by most stakeholders.

71. The issue most often discussed is whether there are reasons to combine competition policy and consumer protection in one authority. Obviously the protection of consumers against deceptive and fraudulent behaviour by sellers has strong links to competition policy, and many countries in the region have seen advantages in combining those branches of market regulation in one authority. Competition policy is designed to increase consumer welfare in one way or another. For example, increasing the efficiency of the economy is the best way of maximizing consumer welfare. Further, the optimal allocation of resources can be achieved by maintaining competition, and the beneficiaries are the general consumers.

72. There are strong reasons for the inclusion of appropriate consumer protection provisions in the law. Advantages of this approach include the following:

- It provides for a clear law on consumer welfare, which is needed because the COMESA Competition Regulations have embraced consumer provisions.
- It maintains an institutional emphasis on the consumer welfare objective of competition law.
- It reduces the opportunity for business to deny consumers the benefits of competitive markets in the short term by engaging in unfair practices.

- It gives the agency the opportunity to demonstrate tangible outcomes quickly and cheaply.
- It ensures earlier and stronger engagement with consumer stakeholders (through consumer groups).
- It provides market-driven inducements for domestically traded goods and services to meet basic standards of fair trading.
- It provides a basis for linking to overseas enforcement agencies and the International Markets Supervision network.

73. It should be acknowledged that inappropriate inclusion of consumer protection provisions can create disadvantages, such as the following:

- distraction of focus and diversion of scarce resources away from competition investigations;
- duplication of existing national laws and institutions;
- creation of higher standards for goods and services traded across national borders.

74. In a number of countries, consumer protection legislation is included in the competition law, while in others it is separate. All national competition laws within the region (except in South Africa) include consumer protection provisions, as do the national competition laws of countries as diverse as Australia, Canada, France, India, Lithuania, Poland and Venezuela.

VI. Findings and policy options

A. Overview

75. Kenya's current competition law was originally seen as a transitional measure as the country moved from a price control regime to a market economy. Its replacement by a modern competition law is now overdue. The Government of Kenya has recognized this situation and has established a Task Force to review the law.[2]

76. The Restrictive Trade Practices, Monopolies and Price Control Act is outdated and fails to provide a comprehensive and effective regime for competition policy in Kenya. The Act contains a number of unusual provisions that have proved difficult to implement. (For example, no orders have been made relating to unwarranted concentrations of economic power.) The most obvious gap in the current law is the lack of any provisions relating to abuse of a dominant position. Since Kenya is a member of COMESA and the East African Community, the new law should be harmonized with the competition regimes in these organizations.

77. The Monopolies and Prices Commission has responsibility under the Act for investigations of anti-competitive practices and provides advice to the Minister of Finance, who is the decision maker. The Commission is a department of the Ministry.

78. The Commission was established in 1989 and has therefore been able to acquire experience over the years,

[2] *Kenya Gazette* Notice No. 3692 of 20 May 2005.

although its caseload has been fairly light, particularly in the early years. The Commission's recent investigation of a number of sectors has revealed the possible existence of cartels and other anti-competitive practices, which warrants further investigation.

79. The Commission has a staff complement of 22 professional officials, all of whom have some training in the relevant areas of law and economics. (For example, three staff members completed master's degrees in 2003.) There is a need to gain further experience in enforcing the law and in case handling, and for this further capacity building is essential.

80. The Competition Tribunal has been under-utilized and has dealt with only one case since it was established. The Tribunal, whose members are appointed by the Minister, hears appeals from decisions made by the Minister, which is an unsatisfactory situation.

81. The Commission is not autonomous, being a department of the Ministry, and therefore has little scope to engage in competition advocacy activities. For example, the Commissioner does not directly issue press releases or give press conferences, which are generally handled by the relevant Minister. This is a serious restriction since competition authorities have an important advocacy role to play, particularly in developing countries. Indeed the terms of reference of the Task Force established to review the competition law include "to provide for an autonomous competition authority". There does not appear to be a strong competition culture in Kenya, and many stakeholders have referred to lack of knowledge of the competition law and the Commission. It is important that the Commission acquire a higher profile and assume a more proactive role in promoting

competition in the Kenyan economy. This is particularly important while the enforcement work undertaken by the Commission is limited.

82. The Commission should advocate competition policy as a means of aiding the reduction of poverty in Kenya. If markets are made more competitive, the benefits can reach poor people, provided the latter can participate in the markets in question. They can participate as consumers benefiting from lower prices, as employees with more jobs available, or as entrepreneurs with wider opportunities to earn a living. Consumer organizations are not prominent in Kenya, and consequently there is little lobbying for the benefits of competition. There are no consumer protection provisions in the current Act, but there are such provisions in the COMESA law. If the Commission were to be given powers to deal with consumer protection issues, it would help to raise the Commission's profile and would also provide a means of demonstrating how consumers can benefit directly from the work of the Commission.

83. There are a comparatively large number of sectoral regulators in Kenya ranging from telecommunications to the tea industry. All the regulated sectors are considered to be exempt from the competition law enforced by the Commission, although some of the sectoral regulators have responsibility for competition issues. Clearly, technical regulation has an important role to play alongside competition scrutiny – for example, when considering potential mergers. The case of the proposed merger between the media interests of Nation and Capital is an example where the technical regulatory requirements led to the prohibition of a merger that did not raise any competition concerns. However, the current

relationship between competition law and sectoral regulation is not clear. There is a need to rationalize the application of the competition law and to define the relationship between the various regulators and the Commission.

84. The overall architecture of the Kenyan competition regime needs to be redesigned. The Restrictive Trade Practices, Monopolies and Price Control Act should be repealed and replaced with a modern competition law. The institutional structure also needs to be revised. The interaction between the Commission, the Tribunal and the regulators should be clarified so that responsibilities are clearly assigned and understood. The new enforcement procedures should, in the words of the terms of reference of the Task Force appointed to review the competition law, be made "easy to follow by competition officials, the courts and also the business community".

B. Policy options for consideration

1. Replace the Restrictive Trade Practices, Monopolies and Price Control Act with a modern competition law

85. The Act, which was intended to be provisional, should be repealed. The Government has referred to the Act as "outdated",[3] and it is clear that it has outlived its usefulness. Part IV of the Act dealing with price control is now obsolete. A modern competition law, which could be based on the UNCTAD model law, should be drafted taking account of the particular circumstances of the Kenyan economy. The new law should provide for the control of anti-competitive agreements,

[3] Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003–2007.

the prohibition of abuse of a dominant position, and the control of mergers and takeovers. Enforcement procedures should also be revised to ensure that the new law provides for effective investigation powers and appropriate remedies. The new law should be harmonized with the COMESA competition law and the proposed EAC competition law.

2. Make the Monopolies and Prices Commission into an autonomous competition authority

86. The competition authority should be autonomous, but not independent of Government. The trend in many countries is towards a board structure, rather than a single individual being the decision maker, with the members of the board appointed by the Government. It is particularly important for the authority to be autonomous so that it can engage in advocacy activities and be a visible advocate of competition and consumer welfare.

3. Give the competition authority a formal advocacy role

87. Given the importance of advocacy work in a developing country, the competition authority should have a formal role, set out in the legislation, that includes commenting on matters relating to competition. The authority could be required to review proposed or existing laws and regulations and other activities of government, identifying and advising on any anti-competitive effects and consequent inefficiencies. Furthermore, the authority should address the general lack of knowledge about the competition law by educational activities and publicity, by commenting on topical issues and by pursuing high-profile cases of anti-competitive conduct. This will help

to generate a competition culture, which is currently lacking in Kenya.

4. Bring sectoral regimes within the competition law framework

88. In principle, the competition authority should be able to consider competition issues across all sectors of the economy. This is a practical arrangement, since in a developing country where specialized knowledge of competition issues is limited, it is unlikely that sectoral regulators will have the required expertise. However, sectoral regulators clearly have an important role to play in technical regulation, and this should be coordinated with the competition authority's scrutiny of competition issues. Several different models are to be found in other countries. The regulators can be given independent or concurrent competition powers (which is not recommended for the reason given above), or they can be required to consult the competition authority on competition issues, or the competition authority could be required to consult them before deciding any competition issues in the sector. However, there needs to be a clear understanding about how potentially overlapping or conflicting powers are to be exercised.

5. Introduce merger control thresholds and time frames for review

89. There are no merger thresholds in the current legislation, which means that all mergers, even small transactions that are very unlikely to have any adverse effect on competition, are subject to the approval process. This results in a misallocation of resources that could be better used for other

matters. Thresholds should be introduced in the new law and should be set by empirical research to ensure that only potentially anti-competitive transactions are subject to control. Consideration should also be given to introducing time frames for merger review. This is referred to in the Task Force's terms of reference, together with merger thresholds, and would have the effect of providing greater certainty for the business community.

6. Add consumer protection provisions to the law

90. Although consumer protection measures, such as the control of misleading advertisements, are not, strictly speaking, part of the competition law, they are closely related and there is considerable advantage in combining the two areas, particularly in the developing-country context. Taking action to enforce consumer rights is often easier than competition policy enforcement, and it can produce results that are obvious and of immediate benefit to many consumers. This has the effect of raising the profile of the competition authority and demonstrating its relevance and effectiveness.