



# UNCTAD peer review mechanism for competition law: 10 years of existence



# UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

## UNCTAD peer review mechanism for competition law: 10 years of existence

*A comparative analysis of the implementation of the Peer Review's  
recommendations across several assessed countries\**

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## Abbreviations

COMPAL	Competition and Consumer Protection policies for Latin America
COPROCOM	Comisión para Promover la Competencia (Competition authority of Costa Rica)
EU	European Union
FCA	Fair Competition Act (Jamaica)
FTC	Fair Trading Commission of Jamaica
GDP	Gross Domestic Product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
ICL	Indonesia Competition law
ICN	International Competition Network
IMF	International Monetary Fund
IGE	Intergovernmental Group of Experts on competition law and policy
KPPU	Komisi Pengawas Persaingan Usaha (Competition authority of Indonesia)
OECD	Organisation for Economic Cooperation and Development
PRC	Peer Review on competition law and policy
UNCTAD	United Nations Conference on Trade and Development
WAEMU	Western African Economic and Monetary Union

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## Executive summary

The Voluntary Peer Reviews of competition law and policy (PRCs) are one of the core activities of the United Nations Conference on Trade and Development (UNCTAD) and fall within the scope of The United Nations Set of Principles and Rules on Competition. UNCTAD Voluntary Peer Review mechanism was first carried out in 2005 and as such, will celebrate its 10<sup>th</sup> anniversary in 2015. To assess the value and impact of UNCTAD Voluntary Peer Reviews, UNCTAD commissioned this external and independent ex post evaluation of the reviews, with particular focus on the strength of implementation of the recommendations formulated in these Peer Reviews.

UNCTAD's work on competition law and policies is closely linked with development policies for partner countries, with a strong focus on developing countries. In order for these countries to better benefit from increased competition, open markets enhance consumer welfare and form attractive investment regimes, UNCTAD initiated the Peer Review Mechanism, which has become one of the most appreciated parts of UNCTAD's work in the field of competition law and policy.

This report covers six countries or regional organisations that participated in UNCTAD Voluntary Peer Review Mechanism between 2005 and 2009, and that were not thoroughly covered by a complementary report to this one.<sup>1</sup> The countries and entities that are subject to an in-depth analysis for this report are: Kenya, Jamaica, Tunisia, the Western African Economic and Monetary Union (“WAEMU”), Costa Rica and Indonesia. The purpose of the report is to systematically and objectively assess and identify the strengths, weaknesses and outcomes of the Peer Review Mechanism and the associated Peer Review Report.

This report uses a multifaceted approach to triangulate and cross-check all available information and data in order to reach robust, well-founded and objective findings and conclusions. The methodology used consisted of, *inter alia*, desk review; content analysis of the Peer Review Reports and other relevant UNCTAD documents; content analysis of the responses of national competition authorities to a detailed questionnaire; and telephone interviews with both UNCTAD staff and direct beneficiaries of the Peer Review Mechanism in the reviewed countries.

In order to provide a comprehensive overview of the effectiveness and impact of UNCTAD Peer Review Mechanism, the mechanism has been assessed both generally and at the level of the particular recommendations made in the Peer Review Reports

The PRC has been regarded as highly relevant both to the configuration of the process in general and to the issue of the report. Due to UNCTAD's experience with interfaces between competition policies and development matters, the Peer Review is considered by all respondents as well-tailored to the needs of developing countries.

An analysis of the concrete implementation of the particular recommendations made in the framework of the Peer Reviews is also an important and crucial part of this report.

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<sup>1</sup> L. Melikyan, "External Evaluation – UNCTAD's Development Account 7th Tranche Project 'Strengthening capacities in developing countries for the effective enforcement of competition law to minimize constraints to economic productivity'", Report to the General Secretariat of UNCTAD, 31 March 2014.

Comparing the different levels and intensities of implementation of the recommendations between the chosen reviewed countries allows us to pinpoint the deficiencies of the Peer Review Mechanism and to identify ways to bridge the gaps. For the sake of clarity and to ease comparison, recommendations were classified in five categories: recommendations relating to merger review; recommendations relating to competition advocacy; recommendations relating to the investigative powers of the Competition Agencies; recommendations relating to the prioritisation of cases; and recommendations relating to the deterrent power of sanctions for breaches of competition law. Overall, recommendations across all categories have been significantly implemented. For countries that were the subject of the first Peer Reviews in 2005, the implementation of recommendations has not been as successful as with countries that have been peer reviewed more recently (i.e. in term of this report, Costa Rica and Indonesia). Often due to the need to amend legislations and to advocate for legal changes, which is a time-consuming and lengthy process, the implementation of recommendations has often been delayed and takes place several years after the countries have been reviewed.

For the sake of completeness, follow-up activities to the Peer Review Report are discussed in a separate section of this report. Respondents indicate that follow-up activities, consisting of the dissemination of the results of the Peer Review, capacity-building and technical assistance, were paramount for competition agencies. These follow-up activities were very effective in giving competition agencies greater public visibility, with both national and international stakeholders. They also complement the limited capacity-building and training activities of the competition agencies themselves, due to scarce resources, which enable competition agencies to speed up the implementation of the recommendations.



## I. Introduction

The United Nations Conference on Trade and Development (UNCTAD) has attached a particular importance to Voluntary Peer Reviews of competition law and policy (PRC). UNCTAD's PRC fall within the broader framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices ("The United Nations set of Principles and Rules on Competition"), adopted by the General Assembly in 1980.<sup>2</sup>

Peer Reviews of competition law and policy are conducted by competition policy experts from both developing and developed countries and aim to provide technical assistance in the implementation and formulation of competition law and policies. UNCTAD's PRC is characterised by a focus on developing countries and examines the consequences of competition law on the economic development of such countries. The Peer Review Reports are delivered on the occasion of the annual session of the Intergovernmental Group of Experts (IGE), held in Geneva.

UNCTAD's PRC on competition law and policy was first carried out in 2005 and will celebrate its 10<sup>th</sup> anniversary in 2015. To mark this occasion, UNCTAD has ordered an external evaluation in order to assess the impact of the Peer Reviews performed throughout the last 10 years. It is indeed of utmost importance for UNCTAD to analyse the current situation of competition law and policies, and to track compliance with the recommendations made in the framework of the Peer Review for the reviewed countries.

The purpose of this report is to assess UNCTAD PRC's in a systematic and objective manner, in order to identify how the mechanism can be improved in terms of design, project management, implementation and effectiveness. Tracking the successful implementation of the recommendations made in the framework of the PRCs is indeed a good indicator as to the relevance of the mechanism itself.

The report is organized as follows: Part II informs about the design, effectiveness and configuration of UNCTAD Peer Review Mechanism; Part III analyses the categories of recommendations addressed to the reviewed countries; Part IV contains an extensive and detailed analysis, for each reviewed country, of every category of recommendation that was set out in the corresponding Peer Review Reports; and Part V concludes.

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<sup>2</sup> UNCTAD, "The United Nations set of Principles and Rules on Competition", TD/RBP/CONF/10/Rev.2, available at: <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf> (retrieved on 8 November 2014).

## **II. Short Description of UNCTAD Voluntary Peer Review for competition law and policy**

### **2.1 Configuration of the UNCTAD Peer Review Process**

The Peer Review process entails several stages, which can be summarised in three major steps.

The first stage consists of a consultation phase, which involves the production of a Peer Review Report after thorough analysis of the reviewed country's competition law and policies.

The second step is an assessment phase, during which the Peer Review Report is delivered and the beneficiary country and a formal panel of reviewers work together to shed light on the issues at hand. The reviewing panel has an advisory role and assists the beneficiary country to address the weaknesses pointed out by the Peer Review Report. Dissemination events also held in the beneficiary country.

The third step of the Peer Review Mechanism is the post assessment phase, during which areas and issues for possible improvement are pinpointed. The beneficiary country, with the assistance of UNCTAD, prepares a technical assistance and capacity building project proposal consisting of activities designed to fulfil the recommendations of the Peer Review Report. A specific session is held to look into the needs of the beneficiary country's competition agency in terms of capacity-building and the ways in which UNCTAD can provide assistance – in terms of design, implementation and review of technical assistance – to contribute in meeting these needs.

### **2.2 Relevance of UNCTAD Peer Review Mechanism as a tool for cooperation and development**

UNCTAD's work on competition law and policies is *inter alia* to ensure that competition law and open-market rules are applied, especially in developing countries. Indeed, consistent with UNCTAD's philosophy and role, the focus is set on developing and transition economies due to the important role competition law plays in the development of economies and the limiting effect anti-competitive practices can have on effective economic development.

UNCTAD has longstanding experience of working with competition authorities in developing countries and takes a development perspective when conducting competition policy Peer Review. All respondents were aware of peer reviews conducted by other international organisations or agencies (e.g. OECD) and other capacity-building and technical assistance projects related to competition law (e.g. ICN). Although acknowledging the relevance of these other tools, a majority of respondents stated that the strength of UNCTAD's Peer Reviews resides in the fact that it is more targeted to developing countries.

Further, UNCTAD has initiated Voluntary Peer Reviews as a tool for its capacity-building projects.<sup>3</sup> Peer Reviews have become one of the core activities of UNCTAD's work in competition law and policy.

Typically the key element to ensuring the effectiveness of the peer review is peer pressure, i.e. the pressure exerted upon the beneficiary country by other countries. Moreover, countries ready to undergo such an in-depth assessment as the peer review may benefit from taking an increasingly positive attitude in terms of public opinion and civil society, which may also act as an impetus for countries to volunteer. The mere fact that the peer review is undergone on a voluntary basis also contributes to it being more effective, as there is a willingness to bring about changes and make improvements. Through the combination of these different factors, the peer review really is a way to build-up incentives for improved competition law and policy.

More concretely, one may ask the question of the effectiveness of UNCTAD's Peer Review in particular. Indeed, a widespread concern for UNCTAD is the actual effectiveness of the peer review in ensuring quality recommendations and efficient improvements of the beneficiary country's competition policy and law. The effectiveness of the peer review can be measured against several factors. These include capacity building, the quality of the technical assistance, the adoption and implementation of the recommendations, and the place, role and visibility of competition law and policy inside the beneficiary country.

Countries turn to the UNCTAD PRC for several particular reasons. Some respondents indicate that the decision to participate to UNCTAD's Peer Review was linked with the will for political, legislative and economic changes in their countries. In case of the Komisi Pengawas Persaingan Usaha (Competition authority of Indonesia, hereinafter "KPPU"), the Peer Review was an instrument to acquire deeper knowledge and expertise that could be used in the drafting process of the amendment on the Indonesian Competition Law, which was then ongoing.<sup>4</sup> In Tunisia, the Peer Review coincided with the strengthening of economic liberalisation measures in the country and so it an accompanying role for these measures to be put in place.<sup>5</sup> The Fair Trading Commission of Jamaica (FTC) of Jamaica stated that, being aware of the weaknesses in legislative instruments as well as operational procedures, the Peer Review seemed an interesting path to highlight which measures ought to be taken to fill the gaps in the design and implementation of competition law and policies.<sup>6</sup> Also in Kenya, the Government acknowledged the need to modernise the then existing competition law and recognised the benefits that UNCTAD's Peer Review could bring for this delicate exercise.<sup>7</sup>

For several respondents, the need to gain international acknowledgment also played a key driving factor to approach UNCTAD and undergo the Peer Review.<sup>8</sup>

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<sup>3</sup> UNCTAD, "Review of capacity-building and technical assistance in competition law and policy", TD/B/C.I/CLP/30, 24 April 2014, available at:

[http://unctad.org/meetings/en/SessionalDocuments/ciclpd30\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd30_en.pdf) (retrieved on 18 November 2014), page 6.

<sup>4</sup> Reply of Indonesia to the Questionnaire to competition law experts, Question 15 and 16.

<sup>5</sup> Reply of Tunisia to the Questionnaire to competition law experts, Question 15 and 16.

<sup>6</sup> Reply of Jamaica to the Questionnaire to competition law experts, Question 15 and 16.

<sup>7</sup> Reply of Kenya to the Questionnaire to competition law experts, Question 15 and 16.

<sup>8</sup> Reply of Indonesia to the Questionnaire to competition law experts, Question 15.

Building national awareness of competition law and policy and its benefits for society, as well as the role and functions of the competition agency, were mentioned as decisive factors for participating in UNCTAD's Peer Review.<sup>9</sup>

In light of the above, UNCTAD's Peer Review Process is considered by all respondents as a preeminent tool to enhance competition law and policy in their countries. Due to UNCTAD's longstanding experience in working with competition authorities in developing countries and its particular development perspective, the PRCs bring an added-value to the interactions between competition policies and their development dimension. The specific configuration of UNCTAD's Peer Review Process is one of the reasons why countries are willing to voluntarily undergo the mechanism.

### **III. Comparative analysis & Findings of the PRC's recommendations**

Since 2005, 18 countries have undergone UNCTAD's Voluntary Peer Review mechanism. This report focusses on 6 of those reviews: Kenya, Jamaica, Tunisia, Costa Rica, Indonesia and the West African Economic and Monetary Union, Benin and Senegal. A second external evaluation, conducted earlier in 2014, addressed the other countries<sup>10</sup> and should be read as a complement to this report.

The overall level of implementation of the recommendations made in the framework of UNCTAD's Peer Review is rather satisfying - approximately 50% of the recommendations were taken on board by the various reviewed countries and their competition agencies.<sup>11</sup> Following the Peer Review Report, competition agencies engaged in an advocacy process towards their governments to make sure that the recommendations were taken into account. Most countries, having undergone UNCTAD's PRC, made efforts towards a genuine implementation of the recommendations and amended or completed their competition legislation and policies.

As the PRC is tailored to the peculiarities of the different reviewed countries, the recommendations stemming from the PRC Report are diverse and heterogeneous. However for the purpose of this analysis and to ease comparison, a classification of the categories of recommendations has been made.

A first section analyses the views of the reviewed countries on the Peer Review Mechanism and Report in general and a second section deals, in a comparative way, with the selected (five) categories of recommendations that are to be found in the different Peer Review Reports.

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<sup>9</sup> Replies of Indonesia, Jamaica, Tunisia, Costa Rica to the Questionnaire to competition law experts, Question 15.

<sup>10</sup> L. Melikyan, "External Evaluation – UNCTAD's Development Account 7th Tranche Project 'Strengthening capacities in developing countries for the effective enforcement of competition law to minimize constraints to economic productivity'", Report to the General Secretariat of the UNCTAD, 31 March 2014.

<sup>11</sup> When counting the substantially implemented as well as the implemented recommendations, 18 out of the 36 overall recommendations for all the reviewed countries were put into practice by the relevant stakeholders.

### 3.1 The Peer Review mechanism and report in general

Regarding the design of the PRC in itself, experts indicated that the several stages of the Peer Review were suited and adapted to the purpose of the mechanism. The majority of respondents find that the PRC is comprehensive and covers a large part of relevant areas, namely legislation, administrative aspects related to competition law and policy, operational issues, investigative powers of competition agencies and their general decision-making procedures.<sup>12</sup> It is considered by most of the respondents that the PRC overall and as a whole contributes to strengthen competition law and policy as well as the role of the competition agencies, in particular thanks to the analytical and critical method used to issue recommendations.<sup>13</sup> Moreover, respondents acknowledged the advantage of the PRC for taking the development aspects of competition law and policy, as well as the specificities of developing countries, into account.<sup>14</sup>

However some respondents mentioned some shortcomings of the PRC that should be addressed by UNCTAD in order to enhance the effectiveness of the mechanism in general. For some respondents one of the weaknesses of the Peer Review resides in the fact that it tends to approach competition laws and policies of reviewed countries from a technical point of view only.<sup>15</sup> While technical assistance is paramount in supporting the countries with the implementation of the recommendations, reviewed countries note that due to its technical perspective the PRC itself has a lack of understanding of the fact that not every problem can be solved by technical assistance. This is particularly the problem when the implementation and enforcement issues and limits that a competition agency is facing stem from the institutional framework of competition law and policy and depends very much on the political will in the country.<sup>16</sup> Respondents therefore indicate that UNCTAD should not only approach the implementation and follow-up of the Peer Review from a technical point of view but also include more advocacy activities towards the Governments of the reviewed countries to ensure that the recommendations will be backed up efficiently by political will.

In addition, a contrast between the respondents as to the quality of the recommendations set out in the Peer Review Report has been detected. While most respondents find that UNCTAD's Peer Review Report contains concrete, clear and detailed recommendations, others state that the level of detail and practicality of the recommendations should be further strengthened by UNCTAD.<sup>17</sup>

In general, experts indicated that the Peer Review Report didn't take into account the time needed for competition authorities and reviewed countries in general to implement the recommendations.<sup>18</sup> It should be kept in mind when designing the Peer Review Report, that changes and amendments in competition law and policies are a time-consuming exercise and

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<sup>12</sup> See replies of Jamaica, Costa Rica, Tunisia, Kenya to the Questionnaire to competition law experts, Question 13.

<sup>13</sup> See replies of Costa Rica to the Questionnaire to competition law experts, Question 13 and 14, Replies of Tunisia to the Questionnaire to competition law experts, Question 13 and 16, replies of Jamaica to the Questionnaire to competition law experts, Question 13.

<sup>14</sup> See replies of Tunisia, Jamaica to the Questionnaire to competition law experts, Question 13.

<sup>15</sup> See replies of Indonesia to the Questionnaire to competition law experts, Question 13.

<sup>16</sup> See replies of Indonesia to the Questionnaire to competition law experts, Question 13.

<sup>17</sup> See replies of Kenya to the Questionnaire to competition law experts, Question 13.

<sup>18</sup> See replies of Costa Rica, Jamaica, Kenya to the Questionnaire to competition law experts, Questions 13 to 16.

require a lot of time to be concretely put in practice. Indeed, changes in legislation and or in the institutional and judicial system of countries can only be materialized by going through several – often time consuming – internal processes. The Peer Review Reports should take this feature into account when drafting recommendations in order to ensure an efficient and concrete matching with the reality. Therefore, a longer-term perspective when formulating the recommendations of the Peer Review reports should be adopted.

Moreover, Indonesia noted that a disadvantage of UNCTAD's Peer Review was the costs and expenses it entailed. According to the KPPU, the PRC is an expensive programme to execute and the funding provided by UNCTAD for the implementation of the PRC is very limited.<sup>19</sup> Finally and although this is part of the follow-up activities, the dissemination part of the Peer Review has also been highlighted as an important feature for the reviewed countries and their correspondent competition agencies (see section 3.3).

### **3.2 Specific recommendations**

#### ***3.2.1 Recommendations relating to Merger Review***

It appears that there is often a general misconception as to what purposes and benefits merger control can achieve. Merger regulation is often seen by public opinion as preventing growth and competitiveness of businesses. It is counterintuitive to think that competition law is to be seen as "anti-merger" as its aim is not to prevent mergers *per se* but rather to ensure that there remains a significant level of competition in the markets post-merger. In four of the six analysed Peer Reviews, recommendations on merger control in the reviewed countries were formulated.<sup>20</sup> In three of these four countries, the respondents indicated that the Peer Review triggered material reforms of merger regulations. The ambit of these reforms varies from country to country. In Kenya and Indonesia, for instance, the Peer Review highlighted *inter alia* the need to higher the thresholds for notification. This avoids the misallocation of resources and enables the competition authorities to focus on the cases that would be more likely to raise competition concerns. In both reviewed countries, the recommendations were substantially implemented. At the time the Peer Review took place, Costa Rica had a non-mandatory merger notification system, which was complemented by an *ex-post* assessment of the transaction and its effects through other competition rules. For Costa Rica the Comisión para Promover la Competencia (Competition authority of Costa Rica, hereinafter "COPROCOM") stated that this system undermined the effectiveness of its role in merger review. COPROCOM indicated that the recommendations and findings made in the framework of the Peer Review enabled it to leverage support of the Government and other stakeholders for adopting new merger control provisions. Only one of the respondents, Jamaica, did not take on board the recommendations as suggested by the Peer Review and presently, there is still no merger control.

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<sup>19</sup> See replies of Indonesia to the Questionnaire to competition law experts, Questions 13.

<sup>20</sup> Recommendations as regards merger control were made for Kenya, Jamaica, Costa Rica and Indonesia.

### ***3.2.2 Recommendations relating to competition advocacy***

For all the reviewed countries, recommendations on the need to enhance competition advocacy and to establish a genuine competition culture were formulated. Competition advocacy is one of the core missions of competition agencies. It is especially important for competition agencies in developing countries to communicate the benefits of competition to the public and civil society, as the purposes of competition law and policies are not always properly understood or are not given a prominent role in policy debates.<sup>21</sup> However, it is difficult for competition agencies to acquire sufficient influence and visibility to engage in competition advocacy.

Overall, the Peer Review Reports urged the competition agencies to take an active role in competition advocacy in order to create a genuine competition environment that is backed-up by the public opinion. In general, the reviewed countries noted that the Peer Review had a positive and stimulating effect for the implementation of measures and initiatives related to competition advocacy. The Peer Review helped competition authorities to gain awareness and recognition from the public in general but also from other particular stakeholders such as universities, media, judicial bodies, chambers of commerce, etc.<sup>22</sup>

In some countries a formal reference to the advocacy functions of the competition agency has been inserted in legislative instruments.<sup>23</sup> These functions also encompass the possibility (or obligation in some cases) given to the competition authority to give opinions and advices on various issues related to competition law and policies – such as government policies, legislative instruments, legislative proposals, etc. By exercising such powers, competition authorities develop their presence in the whole legislative process, thus becoming more visible in the public sphere.

### ***3.2.3 Recommendations relating to the investigative powers of the Competition Agencies***

The quality of the enforcement activities of competition authorities is contingent on the possibility for these authorities to conduct effective and efficient investigations. Legislative provisions should clearly list which investigative tools a competition authority has at its disposal to carry out its mandate. A clear statement in a legislative instrument ensures both legal certainty, the principle of the protection of legitimate expectations and a good administration to economic operators.

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21 J. Clark, "Competition Advocacy: Challenges for Developing Countries", *OECD Journal: Competition Law and Policy*, 2004, vol. 6, issue 4, pages 69-80; International Competition Network, "Advocacy Toolkit - Part I: Advocacy process and tools", presented at the *10th Annual Conference of the ICN*, The Hague, May 2011, available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc745.pdf> (retrieved on 28 November 2014); UNCTAD, "Communication strategies of competition authorities as a tool for agency effectiveness", TD/B/C.I/CLP/28, 28 April 2014, available at:

[http://unctad.org/meetings/en/SessionalDocuments/ciclpd28\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd28_en.pdf) (retrieved on 10 January 2015).

<sup>22</sup> See replies from Jamaica, Tunisia, Costa Rica and Indonesia to the Questionnaire to competition law experts.

<sup>23</sup> For instance, in Tunisia through Article 9 and 16(bis) of the Competition and Prices Act and in Kenya through Paragraph 9(1)(c) of Competition Act No. 12 of 2010, as revised in 2012.

Recommendations suggesting a substantial broadening of the available investigative tools to competition authorities were made in five out of the six countries assessed here. The scope of the proposed measures varied from country to country and so does the concrete implementation of the recommendations.

In some countries an amendment of competition rules has been adopted following UNCTAD's Peer Review Report. In Costa Rica for instance, COPROCOM has been empowered with wider-ranging investigative powers through the amendment of law 7472, which took place in 2012. Indeed, dawn raids and inspections at companies' premises are now provided for in law 7472. In addition, leniency procedures have been put in place that benefit both economic agents and COPROCOM, notably in the collection of evidence. It should also be noted that in Tunisia there is currently a proposed amendment of the Competition and Prices Act that contains several provisions to strengthen leniency programmes for the Council. This will address the recommendation concerning the need to solve difficulties encountered in collecting information in the framework of competition investigations. In Indonesia, a specific regulation relating to investigative powers has been issued in order to enable the KPPU to suspend deadlines of investigations. This modification addressed one of the concerns raised by the PRC, where it was found that the stringent time restrictions impeded the KPPU in performing in-depth investigations and opportune economic analyses.

In Jamaica, the Fair Competition Act (FCA) has not been amended since 2001, whereas it was peer reviewed in 2005. Also in this case, the Peer Review identified shortcomings as to the tools available to the FTC for the exercise of its mandate. While the FTC has adopted several guidelines to clarify its investigative processes and its capacity to conduct investigations and market studies, an amendment of the FCA appears to be both urgent and necessary.

### ***3.2.4 Recommendations relating to the prioritisation of cases in order to allocate resources efficiently***

Prioritisation and efficient resource allocation are of utmost importance to ensure that competition agencies can perform their functions effectively. Setting priorities is even more significant in developing countries in particular because of the scarce resources that these competition agencies have at their disposal.<sup>24</sup> Priority setting and efficient resource allocation varies from one competition agency to another, depending on the functions they have been empowered with and on the competition law mandate itself.<sup>25</sup>

Recommendations made in the framework of four out of six Peer Review Reports suggested enhancing prioritisation of cases.

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<sup>24</sup> T. Serebrisky, "What do we know about competition agencies in emerging and transition countries? Evidence on workload, personnel, priority sectors, and training needs", World Bank policy research working paper 3221, (2004).

<sup>25</sup> UNCTAD secretariat, "Prioritization and resource allocation as a tool for agency effectiveness", 26 April 2013, presented at the 13<sup>th</sup> session of the IGE on Competition Law and Policy, Geneva, 8–12 July 2013; International Competition Network., "Agency Effectiveness", *Competition Agency Practice Manual*, March 2010.

Some countries enshrined prioritisation of cases for the competition agency in law. In the case of Indonesia, the Peer Review Report recommended a clear priority setting for anti-competitive practices to the KPPU, so as to avoid overly focusing on anti-corruption cases. In order to address UNCTAD's recommendations, the KPPU revised its guidelines on the prioritisation of cases. The Case Handling Procedure was revised and the KPPU adopted the Commission Regulation No 1/2010, which provides for a mechanism to filter cases. The KPPU also indicated that priority cases will be those anti-competitive practices affecting the overall economy and key sectors of the economy, e.g. cartels, price fixing, abuse of dominance, rather than cases concerning vertical tenders.<sup>26</sup> The latter will be delegated to other investigators, in cooperation with the anti-corruption units. In this way, the KPPU will be able to limit its resources and allocate them efficiently to cases related to anti-competitive practices in key economic sectors.

Priority setting can also be done more informally, without a legal obligation, by the competition authority. For Costa Rica, UNCTAD's Peer Review recommended that COPROCOM focus its activities on key sectors of the economy, such as industrial raw materials, energy, basic foods, medicines, health services and education. COPROCOM addressed these recommendations through informal priority setting within the agency. However, as COPROCOM is part of the Ministry of Economy but reports to both the Ministry and the Competition Commission, it may be that the policy objectives set by these two organisations are in contrast to each other. Priority setting may thus be challenging for COPROCOM. In the case of Tunisia, the recommendations primarily outlined the need to carry out sector-wide investigations as a matter of prioritisation. The Council for Competition (Conseil de la concurrence, hereinafter also "the Council") has taken this on board and installed internal case-prioritisation. In addition, sector-wide inquiries have been carried out, namely in private health care, fast moving consumer goods (such as coffee and pastries), the pharmacy industry and the telecommunications sector. However, the Council has the legal obligation to declare a decision on every request of action that is submitted to its scrutiny. This is a very time-consuming exercise and undermines the efforts of the Council to allocate resources in an efficient way.

The Peer Review Report that assessed Jamaica's competition law and policy also contained several recommendations regarding priority-setting. In the case of the FTC, the recommendations were more targeted and related to the fact that the FTC put a too much emphasis on the consumer protection aspects of competition law. At the time of the Peer Review, 50% of the FTC's resources were still allocated to consumer protection. The FTC indicated that the Peer Review resulted in a certain shift of priorities and permitted the agency to focus on the assessment of anti-competitive practices. Guidance in making this shift was needed and provided by the Peer Review Report.

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<sup>26</sup> The KPPU is constrained in setting up its priorities by other governmental policies and Goals. Law No. 25/2004 concerning National Development Planning System (NDPS) provides explanations relating to the necessity of Mid-term National Development Planning (MNDP) and has been developed in parallel with the Long-term National Development Planning (LNDP) 2005-2025. To this extent, all Ministries and State Independent Agencies have to develop their strategies based on the MNDP and LNDP. See also Indonesia's contribution to 13<sup>th</sup> session of the IGE on Competition Law and Policy, Geneva, 8–12 July 2013, "Roundtable on: Prioritization and resource allocation as a tool for agency effectiveness", available at: [http://unctad.org/meetings/en/Contribution/IGE2013\\_RT3\\_Indonesia\\_en.pdf](http://unctad.org/meetings/en/Contribution/IGE2013_RT3_Indonesia_en.pdf) (retrieved on 8 November 2014).

In the light of the above, some improvements as to prioritisation of cases and efficient resource allocation have been implemented by the reviewed countries and their competition agencies. Despite these efforts, some challenges persist and general prioritisation should still be enhanced.

### ***3.2.5 Recommendations relating to the deterrent power of sanctions for breaches of competition law***

In order to ensure the effective implementation and enforcement of competition law, competition authorities should have at their disposal a variety of measures sanctioning breaches of competition law. Sanctions imposed on economic operators for infringing competition rules should be strict enough in order to ensure a genuine deterrent effect, both for the contravening economic operator and for other market players, in order to incentivise them to not engage in anti-competitive practices.<sup>27</sup> However, the fact that a sanction should have a deterrent effect does not mean that no account should be taken as to their proportionality.<sup>28</sup> In addition, sanctions and pecuniary sanctions in particular should not be excessive.

In Tunisia, Costa Rica and Indonesia, recommendations highlighted the need to increase the level of the fines and to adopt alternatives to financial sanctions. In all of the countries concerned by this category of recommendations, competition rules are currently being reviewed to put a greater emphasis on penalties.

In the case of Tunisia, the proposed amendment provides for an increase of the fine threshold from 5% to 10% of the infringing undertaking's turnover achieved in Tunisia. The maximum thresholds have also been strengthened and could now reach a financial sanction ranging from 200 to 4000 dinars.

In Costa Rica, the reform of the legislative framework for competition law carried out in 2012 did not include substantial amendments as regards the sanctions regime. However, a recent amendment containing several provisions on sanctions for breach of competition law is currently being reviewed by the Parliament and considers increasing the nominative amount of monetary fines.

In Indonesia, an amendment of the Indonesia Competition Law (ICL) containing sanction-related provisions has been proposed to the Parliament. The KPPU indicated that such an amendment requires strong political support from the Government of the Republic of Indonesia. Moreover the period during which the proposal for the adoption of the amending legislation was made, was characterized by the General Election of the President and the Vice President, and the General Election of Members of the Parliament, which delayed its adoption. The main problem that KPPU is currently facing is the negotiation and lobbying process, which should be directed to the recently-elected President and the recently-elected Members of the Parliament.

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<sup>27</sup> E. Combe, "Quelles sanctions contre les cartels? Une perspective économique", *Revue internationale de droit économique*, 2006/1, p. 11-46.

<sup>28</sup> P. Whelan, "Cartel Criminalization and the Challenge of 'Moral Wrongfulness'", *Oxford Law Journal*, OUP, 2013, 33 (3), 535-561.

From the above, it is clear that competition authorities advocate for stringent and deterrent sanctions in order to discourage economic operators to engage in anti-competitive behaviour. Although the Peer Review Reports for all the concerned countries emphasized the importance of deterrent sanctions, until now none of the reviewed countries has implemented the recommendations properly. It should however be noted that significant efforts are being made as all three countries are currently in the process of amending and reviewing their competition law and policies to take the recommendations on board.

### **3.3. Follow-up activities**

Follow-up activities include the dissemination of the results of the Peer Review Reports, as well as capacity-building and technical assistance from UNCTAD to reviewed countries. These follow-up activities are an essential component of UNCTAD's Peer Review.

#### ***3.3.1. Dissemination of the results***

The dissemination of the results of the Peer Review Reports and, in particular, of the individual recommendations flowing from the Reports has also been highlighted as an important factor by all respondents. Indeed, the Peer Review Process and Report provide the competition authorities and regulators with greater visibility, thus making it possible to engage in a more effective competition advocacy process. This was very much needed for the competition agencies, as confirmed by several respondents.

#### ***3.3.2. Capacity-building and technical assistance provided by UNCTAD***

PRCs are a core activity of UNCTAD's work on technical assistance. To help reviewed countries to implement the various recommendations of the Peer Review Report, that give guidance on how the application and formulation of competition legislation can be enhanced, UNCTAD organizes capacity-building, technical assistance and training activities for the reviewed countries and their correspondent competition agencies. Thus, UNCTAD contributes to building capacity of competition agencies in implementing their mandates and exercise their functions.

In general, most respondents<sup>29</sup> took the view that the follow-up activities of the Peer Review Report, in terms of capacity-building and technical assistance, should be strengthened.

For some reviewed agencies capacity-building and technical assistance are strongly intertwined and capacity building was seen as directly related to the technical assistance

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<sup>29</sup> See replies from Kenya, Tunisia and Jamaica to the Questionnaire to competition law experts, Questions 13 and following. See replies from Indonesia and Tunisia to subsequent individual questionnaires. Costa Rica benefited from the COMPAL programme thanks to which other technical assistance activities were offered to the COPROCOM. Therefore, Costa Rica didn't make a specific statement regarding the need to strengthen technical assistance and capacity-building in the framework of the PRC.

provided by UNCTAD.<sup>30</sup> Others found that capacity building differs strongly from technical assistance and took the view that capacity building was directly linked with the Peer Review Process as a whole, rather than flowing from technical assistance.<sup>31</sup>

UNCTAD's Peer Review raised awareness of the need to provide other competition law and policy stakeholders – such as judicial bodies empowered with the scrutiny of breaches of competition law, private practitioners, Ministries, academia and universities, journalists and the media in general – with capacity-building and training activities. The Peer Review Reports incentivised these exercises and made training activities available to some of these stakeholders. These were organised by UNCTAD, in cooperation with national competition agencies, for both competition agency officials and other stakeholders, such as the judiciary for instance.

UNCTAD organized numerous training activities for local officials and regional and sub-regional cooperation activities in the reviewed countries, as illustrated by the table below.

<b>Country</b>	<b>Year of the Peer Review</b>	<b>Training of local officials</b>	<b>Regional and subregional cooperation activities</b>
Kenya	2005		
Jamaica	2005	2006, 2007	2006
Tunisia	2006		2010
WAEMU	2007		2007
Costa Rica	2008		2006-2007
Indonesia	2009	2006, 2009	2006

Source: UNCTAD's Review of capacity-building and technical assistance in competition law and policy (report)<sup>32</sup>

UNCTAD organized workshops on competition law and policy for the staff of the competition agencies, including round-table discussions on these subjects. For the organisation of such workshops, UNCTAD works closely with other national competition agencies and stakeholders who have more significant experience in competition law and policies than the reviewed agencies.<sup>33</sup>

<sup>30</sup> See replies from Jamaica and Tunisia to the Questionnaire to competition law experts. See further replies of Tunisia to the subsequent individual questionnaires and replies of the WAEMU and Benin to the subsequent individual questionnaires.

<sup>31</sup> See replies from Indonesia to the Questionnaire to competition law experts, Questions 13 and following as well as replies to the subsequent individual questionnaires.

<sup>32</sup> UNCTAD, "Review of capacity-building and technical assistance on competition law and policy", TD/RBP/CONF.7/7, 30 August 2010, available at: [http://unctad.org/en/docs/trbpconf7d7\\_en.pdf](http://unctad.org/en/docs/trbpconf7d7_en.pdf) (retrieved on 18 November 2014), page 15; UNCTAD, "Review of capacity-building and technical assistance on competition law and policy", TD/B/C.I/CLP/30, 24 April 2014, available at: [http://unctad.org/meetings/en/SessionalDocuments/ciclpd30\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd30_en.pdf) (retrieved on 18 November 2014).

<sup>33</sup> See for instance the workshops and round-table discussions held in Jakarta in April 2007, which were co-organised by the KPPU, UNCTAD and the GTZ of Germany.

Study-tours are also an important element of capacity-building. They enable an enriching exchange of views on best practices between competition authorities and give the opportunity for competition agencies of developing countries to deepen their knowledge of competition law in general and of specific anti-competitive practices in particular.<sup>34</sup> The purpose of study-tours resides also in the possibility to discuss internal organisation of competition agencies and to seek advice on internal work practices and case allocation methods.

The case of WAEMU is very illustrative on the ongoing and practical follow-up activities that can be triggered by the PRC. Indeed, in order to assist WAEMU to implement the recommendations suggested by the Peer review report, a Framework Agreement was signed between WAEMU and UNCTAD in 2008.<sup>35</sup> Following the agreement, high level workshops on institutional, legislative and procedural questions and issues were organised in several WAEMU member states. These consultations gave rise to the realisation of a report entitled "Study on the revision of the institutional framework of the implementation of the WAEMU's Community competition rules", which was presented to WAEMU member states in April 2012. Consultations with member states followed the dissemination of the report and in 2013, high level meetings between the member states' national experts took place in the margins of UNCTAD's IGE.<sup>36</sup> The efforts made by WAEMU to formally address the recommendations made in the framework of the PRC will have to be re-assessed once the final consultation process on the new measures comes to an end and will be properly implemented by the relevant WAEMU community and national stakeholders.<sup>37</sup>

Consequently, countries having undergone the PRC can be provided with technical assistance for the implementation of the recommendations stemming from the Peer Review Report, which is especially valuable in developing countries where resources for competition law and policy tend to be rather scarce. All respondents indicated that one of the main reasons of undertaking UNCTAD's voluntary Peer Review is the high level of the technical assistance provided within that framework.

### ***3.3.3. Further remarks: a path for improvement***

A majority of respondents indicated that implementing the recommendations as stated in the Peer Review Reports was often a difficult task to realise, due to the lack of resources of the agencies but also due to the need to convince the Government – and the political Authorities in general – to genuinely enforce the recommended measures. Recommendations may therefore be hard to implement because of expectations that are too high regarding the timeframe of the PRC in general and the implementation of the recommendations in particular. The limited resources of competition agencies are also a factor that may delay a

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<sup>34</sup> See for instance the study-tour to the Swiss competition authority for the WAEMU in 2007.

<sup>35</sup> Framework Agreement for Cooperation and Partnership between the West African Economic and Monetary Union of (WAEMU) and the United Nations Conference on Trade and Development (UNCTAD) signed on 17 September 2008.

<sup>36</sup> The totality of the reports as well as the evolution and follow-up of the projects are available at: <http://cms.projetconurrenceuemoa-cnuced.org/>.

<sup>37</sup> See UNCTAD's presentation on "Les examens collégiaux de la CNUCED en matière de droit de la concurrence – analyse des objectifs, portée des travaux de suivi", at the OECD in 2014.

sound and timely implementation of the recommendations. Besides, implementation of the PRC may be made more difficult when political will to bring about relevant the changes is absent.

UNCTAD should keep track of the implementation of the Peer Review Reports and the recommendations contained therein on a regular basis. As UNCTAD cannot constrain reviewed states to implement the recommendations by adopting new legislation or amending the existing legislation for instance, other ways should be explored.

In more recent PRC exercises, UNCTAD has tried to overcome some difficulties for competition agencies concerning the implementation of the recommendations and has made efforts to develop political will for changes in beneficiary countries. UNCTAD has engaged in significant advocacy work with the Geneva-based mission of the beneficiary country in early stages of the PRC and government officials are included in the report session of the PRC and its results. Although these are first steps showing that the design and effectiveness of the PRC has evolved, there remains space for improvement.

#### **IV. Country by Country Assessment of the implementation of the recommendations as set out in the Peer Review Reports**

For the sake of completeness, the report contains a detailed country-by-country assessment of the recommendations as addressed to the reviewed countries in the framework of the PRC. The recommendations have been assessed in a table format for each report under analysis, i.e. Kenya, Jamaica, Tunisia, WAEMU, Costa Rica and Indonesia. For each recommendation, a score board taking the form of implementation thermometers has been used to ease comparison, with rankings not implemented, partially implemented, substantially implemented and implemented.

## Comparative table on the implementation of the recommendations made in the framework of UNCTAD's voluntary Peer Review

### Kenya

#### Key figures

- ✓ Peer reviewed 2005<sup>38</sup>
- ✓ Gross domestic product per capita in 2013: 994,3 US\$<sup>39</sup>
- ✓ Number of inhabitants: 44,3Mln in 2013<sup>40</sup>

Kenya's economy shifted from colonial rule with an agriculture-based economy to a mixed market-based economy, characterised by strong State intervention after independence in 1963. State intervention materialised through government ownership of industries, price control and other related consumer subsidies, and import substitution. Economic reforms took place in 1979 and were characterised by the 'structural adjustment' (SAP), leading to less governmental action in the economy and to market deregulation, which triggered the adoption of competition provisions. In 1988, Kenya enacted the

<sup>38</sup> Peer Review Report for Kenya, document UNCTAD/DITC/CLP/2005/6, 2005, available at: [http://unctad.org/en/Docs/ditcclp20056\\_en.pdf](http://unctad.org/en/Docs/ditcclp20056_en.pdf) (retrieved on 25 October 2014).

<sup>39</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/KE?display=graph> (retrieved on 05 November 2014).

<sup>40</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (retrieved on 05 November 2014).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya (“Chapter 504 Act” or the “repealed Act”). The Chapter 504 Act was repealed by the enactment of the current Competition Act No. 12 of 2010 (“the Act”), which came into force on 1 August 2011. The Act establishes the Competition Authority (the “Authority” or “CAK”) whose principal function is enforcing compliance with the Act. It also establishes the Competition Tribunal (the “Tribunal”), which hears appeals from decisions of the Authority.

Kenya peer review recommendations implementation matrix			
Recommendation	Why	Status	Findings
<b>I. Replace the Restrictive Trade Practices, Monopolies and Price Control Act with a modern competition law</b>	The Restrictive Trade Practices, Monopolies and Price Control Act (“the repealed Act”) was originally seen as a transitional measure accompanying Kenya’s reforms towards a market economy. The repealed Act was outdated and UNCTAD’s PRC suggested adopting new legislation that would provide for the control of anti-competitive agreements, the prohibition of abuse of dominance, for a merger review and for efficient enforcement procedures.		The recommendations made in the framework of UNCTAD’s PRC had an accompanying effect for the adoption of the new Competition Act No. 12 in 2010 <sup>41</sup> (“the Act”), which repealed the Restrictive Trade Practices, Monopolies and Price Control Act.
<b>II. The Monopolies and Prices Commission to become an autonomous competition authority</b>	The Monopolies and Prices Commission was a department of the National Treasury. Recommendations suggested the Commission be more autonomous – but not necessary independent – from Government. This would afford the Commission a more visible place and role, and would raise competition-awareness in Kenya.		The Act establishes the Competition Authority of Kenya, which is functionally and operationally independent from the National Treasury <sup>42</sup> . Although the Minister is empowered to appoint five Members of the Authority, <sup>43</sup> this does not adversely affect the Authority’s independence as the Parliament has to vet and approve the proposed candidates.

<sup>41</sup> Competition Act No. 12 of 2010 as revised in 2012, available at : [http://www.researchictafrica.net/countries/kenya/Kenya\\_Competition\\_Act\\_revised\\_2012.pdf](http://www.researchictafrica.net/countries/kenya/Kenya_Competition_Act_revised_2012.pdf) (retrieved on 22 November 2014)

<sup>42</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 7.

<sup>43</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 10(f).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>III. Competition authority to have a formal advocacy role</b></p>	<p>In order to introduce a genuine competition culture in Kenya, the PRC report suggested the insertion of a formal reference to advocacy functions of CAK in the legislation. Recommendations included <i>inter alia</i> the possibility for CAK to review proposed or existing legislation and more generally, to comment on matters relating to competition.</p>		<p>CAK has been granted several formal functions related to competition advocacy. Firstly, the Authority has the duty to promote the compliance of the Act in general. Secondly, CAK has received competence to promote public knowledge and to raise awareness of the purposes of the Act and the role of CAK itself. In addition, CAK is involved in competition policy-making as it has the duty to study government policies, legislative instruments and legislation proposals in order to assess their effects on competition and consumer welfare.<sup>44</sup> CAK gives solicited and unsolicited advice in various issues related to competition law and policy. Efforts towards capacity-building of all actors involved in competition law and policies should still be strengthened, as should cooperation with universities.</p>
<p><b>IV. Sectorial regimes to be brought within the competition law framework</b></p>	<p>According to the PRC report, CAK should consider competition issues across all sectors of economy and complement the action of sectoral regulators.</p>		<p>The Act empowers CAK to investigate anti-competitive behaviour “<i>in the economy as a whole or in particular sectors.</i>”<sup>45</sup> In particular, CAK may conduct sectoral studies or inquiries when it considers it relevant for carrying out its functions or upon a direction by the Minister.<sup>46</sup> CAK has some overlapping roles with several sectoral regulators. In general, sectoral regulators and CAK are increasingly cooperating with each other. Although the Act provides that CAK has primary jurisdiction in all competition and consumer welfare matters, lack of cooperation from some sector regulators led to increased transactions costs and also increasing the risk of contradictory decisions emanating from two government agencies.<sup>47</sup> Therefore, efforts towards cooperation between both types of authorities should still be made.</p>

<sup>44</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 9(1)(c).

<sup>45</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 9(1)(i).

<sup>46</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 18.

<sup>47</sup> Competition Authority of Kenya, Annual Report 2012/2013, page 33.

<p><b>V. Merger control thresholds and time frames for review to be introduced</b></p>	<p>At the time the PRC was carried out, no merger thresholds were provided in the legislation. This was a major concern that the recommendations suggested to address as it resulted in a misallocation of resources. Indeed, all mergers were subject to regulatory approval, even the smallest transactions that were very unlikely to raise competition concerns. Besides, the PRC report proposed to include a strict timeframe for the review of mergers, so as to minimise the burden on notifying undertakings.</p>		<p><i>Merger thresholds</i></p> <p>Relevant legislation for merger control in Kenya are the Act – and more specifically Part IV thereof – and the Capital Markets (Take-overs and Mergers) Regulations 2002 promulgated under the Capital Markets Acts, Chapter 485A of the Laws of Kenya. The Act does not prescribe any thresholds for merger notification. It gives however the possibility to the Authority to develop merger notification thresholds.<sup>48</sup> CAK has published Merger Thresholds, effective since 1 August 2013, in order to specify which transactions require mandatory notification and formal application, as well as those that require pre-notification for exemption and those that do not require notification or approval. As a consequence, all merging entities – including those not meeting the prescribed thresholds – have to notify their transaction to CAK. However, only some transactions require the formal approval of CAK to be implemented. Entities with a combined annual turnover of a minimum of Kshs 1 billion and above will require approval from CAK.<sup>49</sup> Additionally, transactions having a regional scope are also expected to consider the implications of the COMESA Competition Regulations, 2004, and the EAC Competition Regulations, 2010.<sup>50</sup></p> <p>Although CAK has made significant progress in adopting thresholds for merger control, there is still room for improvement. Indeed, the Merger Thresholds guidelines have not been published in the <i>Gazette</i> and as such, have no force of law. Moreover, the obligation to notify should be waived for small merging entities. This still leads to unnecessary administrative burden for business actors and for a misallocation of resources for CAK.</p>
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<sup>48</sup> Competition Act No 12 of 2010 as revised in 2012, Part IV, paragraph 42(1).

<sup>49</sup> Some sectors are being applied lower thresholds, because they are considered as being “sensitive” sectors. For instance, entities in the health section will have to apply for approval if the combined turnover is minimum Kshs 500 million.

<sup>50</sup> Kiptiness & Odhiambo Associates, “Competition Authority of Kenya publishes Merger Threshold Rules”, 1 November 2013 available at: <http://koassociates.co.ke/competition-authority-of-kenya-publishes-merger-threshold-rules/> (retrieved on 22 November 2014); CG. MBUGUA, “Merger Control”, 4 March 2014, available at: <http://www.lexgroupafrica.com/merger-control-competition-authority-of-kenya/> (retrieved on 22 November 2014).

			<p><i>Timeframe for merger review</i></p> <p>The Act also provides for a strict timeframe regarding merger control. A decision regarding the compatibility of a merger with competition rules should be taken within sixty days starting from the date of receipt of the notification by CAK; or if CAK requests further information under section 43(2), within sixty days after the date of receipt by CAK of such information; or if a hearing conference is convened in accordance with section 45, within thirty days after the date of conclusion of the conference. These deadlines can be extended by CAK in exceptional circumstances in relation to the complexity of the case.<sup>51</sup></p>
<p><b>VI. Consumer protection provisions to be added to the law</b></p>	<p>The PRC report indicated that the combination of competition law provisions with consumer protection measures is of particular interest for developing countries. Therefore, recommendations suggested that consumer protection provisions should be added to the piece of law relating to legislation.</p>		<p>The Act entrusted CAK with functions and duties relating to consumer protection. CAK has the duty to promote the creation of consumer bodies and the establishment of standards to be followed by such bodies in the protection of consumer welfare.<sup>52</sup> In addition, the Act has included more extensive consumer protection provisions under Part VI. CAK has competence in the following areas of consumer protection: false or misleading representations, unconscionable conduct, unconscionable conduct in business transactions, publication of public warning notices, product safety standards and unsafe goods, product information standards, notice to consumers for newly marketed goods, authority to declare product safety or information standards. For all its consumer protection related competences, CAK works in close cooperation with specialized agencies of the Government and a referral mechanism of consumer complaints has been foreseen by the Act in order to facilitate such cooperation.</p>

<sup>51</sup> Competition Act No 12 of 2010 as revised in 2012, Part IV, paragraph 44.

<sup>52</sup> Competition Act No 12 of 2010 as revised in 2012, Part II, paragraph 9(1)(d).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

# Jamaica

Key figures
✓ Peer reviewed in 2005 <sup>53</sup>
✓ Gross domestic product per capita in 2013: 5290,0 US\$ <sup>54</sup>
✓ Number of inhabitants: 2,7 Mln in 2013 <sup>55</sup>

Jamaica's economic structure evolved from a typical colonial economy, based on the production of sugar cane, bananas and coffee, to a diversified and, to a greater extent, services-based economy. Economic reforms were gradually undertaken to implement an open market economy in Jamaica. In this framework, Jamaica adopted its Fair Competition Act in 1993, which was amended in 2001. The Fair Trading Commission (FTC) is the administrative body responsible for the implementation of the Fair Competition Act (FCA).

<sup>53</sup> Peer Review Report for Jamaica, document UNCTAD/DITC/CLP/2005/5, 2005, available at: [http://unctad.org/en/Docs/ditcclp20055\\_en.pdf](http://unctad.org/en/Docs/ditcclp20055_en.pdf) (retrieved on 9 November 2014).

<sup>54</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/JM?display=graph> (retrieved on 05 November 2014).

<sup>55</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (retrieved on 05 November 2014).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

Jamaica peer review recommendations implementation matrix			
Recommendation	Why	Status	Findings
<b>I. Legislative review</b> ----- <b>a) as to the structure of FTC</b>	The biggest challenge the FTC was facing at the time of the Peer Review was its own structure, which was found by the Appeal Court to be contrary to the principles of natural justice. <sup>56</sup>		Several amendments to the FCA are now being considered. Some of these include institutional changes and will address the ruling of the Appeal Court. The amendments will be presented to the Parliament for discussion during the course of 2015.
<b>b) to the lack of merger and acquisitions provisions in the FCA</b>	One of the most notable recommendations lies in the advocacy to adopt provisions to regulate mergers under competition rules. A competition agency has the responsibility of ensuring that mergers and acquisitions do not thwart competition in the post-transaction market structures. Therefore, it is of utmost importance to provide for provisions relating to the control, by competition authorities, of such transactions. At the time of the Peer Review, the Competition Act of Jamaica didn't provide merger control.		Jamaica has not adopted merger control provisions in its competition legislation. Mergers are addressed through section 17 of the FCA, relating to anti-competitive agreements. <sup>57</sup> As this provision relates to anti-competitive agreements, the FTC can only carry out <i>ex-post</i> merger control.  Merger control regulation should be adopted in Jamaica in order to maintain competitive market structures post-mergers. A clear legislative amendment laying down a specific provision for merger review by the FTC should urgently be adopted.

<sup>56</sup> Supreme Court Civil Appeal No. 92/97, Jamaica, *Jamaica Stock Exchange v FTC*. See also P.-J. Gordon, "The case for maintaining a single competition agency for investigation and adjudication of anti-trust cases", available at: [http://www.jftc.gov.jm/Libraries/Speeches\\_and\\_Presentations/The\\_Case\\_for\\_Maintaining\\_a\\_Single\\_Competition\\_Agency\\_for\\_Investigation\\_and\\_Adjudication\\_of\\_Antitrust\\_Cases\\_-\\_Dr\\_Peter\\_-\\_John\\_Gordon.sflb.ashx](http://www.jftc.gov.jm/Libraries/Speeches_and_Presentations/The_Case_for_Maintaining_a_Single_Competition_Agency_for_Investigation_and_Adjudication_of_Antitrust_Cases_-_Dr_Peter_-_John_Gordon.sflb.ashx) (retrieved on 28 November 2014).

<sup>57</sup> See for example case 6997-11, Oceanic Digital (Jamaica) Limited by Digicel Jamaica Limited, available at: [http://www.jftc.gov.jm/Libraries/Case\\_Reports/Case\\_No\\_6997\\_Proposed\\_Acquisition\\_of\\_Claro\\_by\\_Digicel.sflb.ashx](http://www.jftc.gov.jm/Libraries/Case_Reports/Case_No_6997_Proposed_Acquisition_of_Claro_by_Digicel.sflb.ashx) (retrieved on 25 November 2014).

<p><b>c) clarifying, in the FCA itself, the interface between the FCA and other laws and regulations</b></p>	<p>In the framework of the Peer Review, it was found that the FCA contains a lot of contradictions and duplications, therefore creating certain confusion as to its concrete application. Two paths for addressing this issue were proposed in a recommendation. In order to enhance clarification, one method would "be to amend the law to make clear what conduct is prohibited and under what test" and the other would be "for the FTC to adopt clear policies stating which circumstances will lead to a conduct being challenged and under which specific provisions". Moreover, recommendations were made to advocate for the clarification of the existing relations between the FCA and other regulations and laws to be incorporated in the FCA itself. A holistic approach giving the FCA statutory powers to intervene before regulators would be of special importance.</p>		<p>Despite the recommendations and the urgent need to carry out the clarification, as proposed in the Peer Review Report, no amendments of the FCA has taken place since 2001.<sup>58</sup> The proposed recommendations relating to the structure and wording of the text, as well as a general clarification of the terms used, were thus not implemented.</p>
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<sup>58</sup> Fair Competition (Amendment) Act, 2001 (JM015).

<p><b>d) precise the tools available to the FTC in the exercise of its powers</b></p>	<p>The Peer Review Report identified shortcomings in the tools available to the FTC in order to fully exercise its mandate. Neither the FCA nor any other legislative instruments contain provisions on wiretaps, on confidentiality, on the protection of informants and leniency, on telemarketing or on the possibility for the FTC to engage in international cooperation with other agencies.</p>		<p>The FCA has not been amended since 2001 and therefore, has not been amended since Peer Review took place. As such, no new investigation tools have been made available to the FTC. A guideline issued by the FTC itself before the Peer Review has taken place ("The Fair Competition Act - A General Guide – 2002")<sup>59</sup> and improved the FTC's investigative processes and its capacity to conduct competition investigations and market studies. However, these guidelines do not empower the FTC with new investigative powers, which should be done by a legislative proposal to the Parliament.</p> <p>However, the FTC indicated that the Peer Review Report triggered the adoption of several internal procedures and the development of guidelines.<sup>60</sup> Several guidelines were already adopted by the FTC before the Peer Review was carried out. However, following recommendations set out in the Peer Review report, more specific guidelines relating to particular issues or sectors have since been adopted, such as the guidelines on purchasing motor vehicles<sup>61</sup> and guidelines on telecommunications.<sup>62</sup></p>
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<sup>59</sup> Adopted in 2002, available at: [http://www.jftc.com/Libraries/Pamphlets\\_Advisories/The\\_Fair\\_Competition\\_Act\\_-\\_A\\_Guide\\_to\\_Anti-Competitive\\_Practices\\_-\\_2002.sflb.aspx](http://www.jftc.com/Libraries/Pamphlets_Advisories/The_Fair_Competition_Act_-_A_Guide_to_Anti-Competitive_Practices_-_2002.sflb.aspx) (retrieved on 28 November 2014).

<sup>60</sup> See also P.Goldson, "Competition and Regulatory Guidelines", available at <http://www.myersfletcher.com/newsletter-issues/item/competition-and-regulatory-guidelines.html> (retrieved on 28/11/2014).

<sup>61</sup> Adopted on 28 September 2012, available at: [http://www.jftc.com/Libraries/Pamphlets\\_Advisories/Guideline\\_on\\_Purchasing\\_Motor\\_Vehicles\\_September\\_28\\_2012.sflb.aspx](http://www.jftc.com/Libraries/Pamphlets_Advisories/Guideline_on_Purchasing_Motor_Vehicles_September_28_2012.sflb.aspx) (retrieved on 28 November 2014).

<sup>62</sup> Adopted on 9 July 2010, available at: (retrieved on 28 November 2014).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>II. Shift of priorities of the FTC – too big accent to the consumer protection side</b></p>	<p>Another area of concern highlighted in the Peer Review Report relates to the priorities of the FTC's actions. At the time of the Peer Review, 50% of the FTC's resources were allocated to consumer protection. In 2005, the Government enacted, the Consumer Protection Act, in order encourage the FTC to shift its priorities. The FTC should concentrate on anti-competitive practices and only use its consumers' protection role where there is an impact on competition, thus leaving cases of individual consumer redress to the Consumer Affairs Commission.</p> <p>The recommendations made in the framework of the Peer Review also called for a stringer focus on conspiracy cases.</p>		<p>Other priorities than consumer protection were addressed by the FTC. Indeed, the FTC started to shift priorities to sectorial competition issues and focussed <i>inter alia</i> on the Credit Union Sector,<sup>63</sup> the Petroleum Prices, the Private Post-Secondary, Technical and Vocational Education and Training Institutions, the Commercial Banking Sector, the Jamaican Tourism Industry, the Jamaican Telecommunications Sector, etc. However, a lot of anti-competitive behaviours – such as exclusive dealing, price discrimination, tied selling, abuse of a dominant position, predatory pricing, etc. – continue to be seen as falling under the remit of consumer protection.</p> <p>The FTC indicated that no conspiracy cases have been brought forward.</p>
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<sup>63</sup> FTC, "Prospects for Competition in the Credit Union Sector (November 2012)", "An Examination of Variation in Petroleum Prices" (February 2012), "A Note on Stimulating Competition in the Private Post-Secondary, Technical and Vocational Education and Training Institutions "(September 2011), " The Nature and Extent of Competition in the Commercial Banking Sector (December 2010)", " Identifying the Drivers of Competitiveness in the Jamaican Tourism Industry (August 2009)", " A Review of the Jamaican Telecommunications Sector (August 2007)", all available at: <http://www.jftc.com/Research/IndustryStudies.aspx> (retrieved on 28 November 2014).

<p><b>III. Improved communication, advocacy and capacity building</b></p>	<p>The Peer Review showed that insufficient information on the FTC and its actions, as well as on the FCA, was available to the public. In addition, there is a degree of scepticism on the benefits that a free market, characterised by competition policies, will bring for Jamaica. A real communication approach in order to raise awareness of the public should be adopted by the FTC.</p> <p>Another drawback highlighted during the Peer Review was the shortage of personal at the FTC. No regular capacity-building and training courses are organised in universities, at the FTC itself, at the judiciary or even in private law firms. Therefore, antitrust expertise knowledge is rare in Jamaica. Recommendations were made towards the development of the relationship between the FTC and universities, as well as between the FTC and other competition agencies.</p>		<p>Communication to the public should still be improved by the FTC. If some improvements to the visibility of the FTC's actions through the publication of case briefings on its website, the issuing of guidelines related to competition advocacy<sup>64</sup> and the increased presence of the FTC in the media can be noted, efforts should still be made in order to continue on that path. Creating a competition culture in Jamaica, which is supported by public opinion, will enable the FTC to better carry out its functions. The FTC could increase the publication of case reports on its website, which is easily accessible for the general public. In order to ensure some clarity and legal certainty to economic agents, the FTC could issue staff opinions providing for additional guidance on the application of the FCA.</p> <p>Capacity building was primarily internal to the FTC <i>i.e.</i> to its Staff and the Commissioners, through structured training programmes conducted by international competition experts. The FTC also participated in numerous conferences and workshops related to competition law and policies. In addition, training programmes were specifically tailored for other stakeholders such as law firms, the judiciary, and regulatory agencies. Further, the FTC is cooperating closely with academia and some programmes at the University of the West Indies have been put in place regarding competition law.<sup>65</sup></p>
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<sup>64</sup> FTC, "Guidelines on Competition Advocacy in Jamaica", 8 October 2004, available at: [http://www.jftc.com/Libraries/Pamphlets/Advisories/Competition\\_Advocacy\\_in\\_Jamaica\\_-\\_October\\_8\\_2004.sflb.aspx](http://www.jftc.com/Libraries/Pamphlets/Advisories/Competition_Advocacy_in_Jamaica_-_October_8_2004.sflb.aspx) (retrieved on 28 November 2014).

<sup>65</sup> For instance, the Caribbean Commercial Law Workshop (CCLW) - however this workshop does not treat competition as a subject in se, but rather includes it in a general commercial law approach. Some specific classes (*e.g.* competition law in a global economy) have been included in the programme of legal studies.

# Tunisia

## Key figures

- ✓ Peer reviewed in 2006<sup>66</sup>
- ✓ Gross domestic product per capita in 2013: 4 329 US\$<sup>67</sup>
- ✓ Number of inhabitants: 10,9MIn in 2013<sup>68</sup>

Tunisia, officially the Tunisian Republic, bordered by the Mediterranean Sea and situated between Libya and Algeria. From its independence in 1956 until the mid-1980s, Tunisia had a centrally-planned economy. The State nationalised companies in several economic sectors (such as the gas, electricity and water sectors) and directly controlled strategic economic sectors.

Since 1986, Tunisia engaged in a thorough programme of economic reforms to achieve a market economy, promoting liberalisation and the privatisation of State-owned enterprises.<sup>69</sup> Tunisia's economic transformation was accompanied by its accession, in 1990, to the General Agreement on Tariffs and Trade (GATT) and other free-trade agreements, among which was the association agreement signed between Tunisia and the European Union (EU),<sup>70</sup> the Greater Arab Free Trade Agreements (GAFTA), the Arab-Mediterranean Free Trade Agreements ("the Agadir Agreement").

<sup>66</sup> Peer Review Report for Tunisia, document UNCTAD/DITC/CLP/2006/2, available at: [http://unctad.org/en/Docs/ditcclp20062overview\\_en.pdf](http://unctad.org/en/Docs/ditcclp20062overview_en.pdf), 2006, (retrieved on 8 November 2014).

<sup>67</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/TN?display=graph> (retrieved on 8 November 2014).

<sup>68</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (retrieved on 8 November 2014).

<sup>69</sup> UNCTAD, "Issues related to competition law of particular relevance to development", *Handbook on Competition Legislation*, TD/B/COM.2/CLP/15, 17 November 1999, page 12 and following, available at <http://unctad.org/en/docs/c2cp99d15.en.pdf>.

<sup>70</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, OJ L 97 of 30 March 1998.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

Economic liberalisation is also enhanced by the enactment of the Competition and Prices Act No 91-64 (“the Act”), on 29 July 1991.<sup>71</sup> The Act provides for price liberalisation, for the prohibition of anti-competitive and discriminatory practices, and includes provisions on consumer protection. To support the efforts towards more competitiveness and an open market economy, the Act has been amended several times (lastly in 2005). The bodies responsible for implementing competition policy are the Competition Board and the Department of Competition and Economic Investigations of the Ministry of Trade.<sup>72</sup>

The Peer Review of Tunisia’s competition law and policy was carried out in 2006. The recommendations made by the experts in the framework of the Peer Review were mainly concerned with the implementation of competition law, rather than the legal framework of competition law. When replying to the questionnaire however, Tunisia’s competition authority indicated that the recommendations stemming from the Peer Review Report were integrated into studies carried out since 2010. These studies concern the implementation of competition law as well as its legal framework, and were used to prepare an amending project to the Act, currently being discussed in the Parliament. Thus, the recommendations had a direct effect on the implementation of competition law but also an indirect influence on the shaping of amendments to the legal framework.

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<sup>71</sup> Competition and Prices Act No 91-64 as amended on 18 juillet 2005, *JORF* No. 057 du 19 juillet 2005, available at [http://www.legislation.tn/fr/detailtexte/Loi-num-2005-60-du-18-07-2005-jort-2005-057\\_\\_2005057000601](http://www.legislation.tn/fr/detailtexte/Loi-num-2005-60-du-18-07-2005-jort-2005-057__2005057000601) (retrieved on 15 November 2014).

<sup>72</sup> For a more extensive overview, please consult the Peer Review Report on Tunisia itself available at:

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

Tunisia peer review recommendations implementation matrix			
Recommendation	Why	Status	Findings
<b>I. Strengthening of the culture of competition among consumers and companies (advocacy)</b>	In a recently opened market economy like Tunisia, economic agents may not have a sufficient understanding of competition law and policies, and in particular of their goals and usefulness. Competition may also be perceived as a sort of threat in the eyes of the public, for whom price regulation seems more stable and reassuring. Awareness-raising regarding the benefits of competition policies is thus needed to strengthen the culture of competition <i>per se</i> among economic operators and consumers.		<p>The reputation of the Council is growing as the implementation of competition law is improving. Currently, the Council continues to strengthen communication towards the regulatory authorities, media, universities<sup>73</sup> and academics, public purchasers, the National Public Procurement Authority, NGOs, ministries and chambers of commerce. In general, a better understanding of competition law is evident among economic operators.</p> <p>The Council also has an important role in the development of a genuine competition culture in Tunisia. Indeed, the Competition and Prices Act empowers the Council to give an opinion regarding legislative proposals submitted by the Ministry of Trade to the Parliament. Other mandatory consultations of the Council are imposed on the Ministry for specific situations.<sup>74</sup> By exercising these powers, the Council develops its presence in the whole legislative process relating to competition law, thus being more visible to the public.</p> <p>Finally, civil society insisted on the importance of strengthening the capacity and role of the association of consumer protection. Indeed, this association has a primordial role in the implementation of a genuine competition culture, specifically through the defence of collective and individual interests of consumers. However, in the current legislative reforms, the association for the Protection of Consumers still has a limited role. Regarding the place given to the association in competition matters, there is still room for improvement.</p>

<sup>73</sup> Cooperation between the Council and several universities such as The Higher Institute of the Magistrature ("L'Institut Supérieur de la Magistrature") and The Faculty of Law of the University of Tunis has been established.

<sup>74</sup> Competition and Prices Act of Tunisia, Article 9 and 16(bis).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>II. Strengthening competition policy in the public sector and sectoral ministerial developments</b></p>	<p>Training seminars on the culture of competition and the importance of the market economy should be set up for civil servants with significant economic responsibilities.</p>		<p>The Council indicated that thanks to the PRC, the public sector has become more aware of the benefits of competition law. Much effort was made towards a better understanding of competition rules when applicable to the public sector. Representatives of public entities and enterprises take part in workshops and conference organized by the Council or its cooperation partners. Although significant improvements can be noted in this area, the Council still deplores the persistent tendency of the public sector to rely on exemptions to competition law (linked with, for instance, the will to protect basic industries from inflation, universal access to certain services, price control in order to ensure a certain degree of buying power to consumers etc.). More competition advocacy and training events have to be organized in this regard, in order to make the public sector and administration more acquainted with the positive impact of competition law, as well as to diminish the distrust these public bodies may have in competition policies.</p>
<p><b>III. Greater emphasis on penalties</b></p>	<p><i>Sanctions in general</i> From the analysis carried out by the experts in the framework of the PRC, it appeared that fines were not a priority for the Competition Board. Currently, fines for anti-competitive practices are set by the Board on the basis of four criteria: the seriousness of the offending practices, the damage done to the economy, the profit accrued by the economic operators concerned and their cooperation with the Board during the investigation.  Presently, article 34 of the Competition and Prices Act provides for a possible fine amounting to up to 5% of the undertaking's</p>		<p><i>Sanctions in general</i> Sanctions are particularly important to enforce competition law. It is thus decisive to develop a varied mix of sanctions and an appropriate level of sanctions to be applied to ensure deterrence of potential anticompetitive behaviour. The maximum penalties applied by Tunisia for anti-competitive practices are rather low for anti-competitive practices. This issue was highlighted by the Competition Board during consultations regarding the amendment of the Act, and is now part of ongoing reforms.  The current project for the re-examination of the Act provides for reinforced and more dissuasive sanctions and enhanced penalties. The amendment project suggests raising the threshold of the possible fine from 5% to 10% of the undertaking's turnover achieved in Tunisia. The maximum thresholds have also been strengthened and could now reach a financial sanction ranging from 200 to 4 000 dinars.</p>

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

	<p>turnover achieved in Tunisia. Imprisonment of up to one year may be imposed by the judge to any individual who has played a decisive role in the violation of the prohibitions of Article 5 of the Act. Thus, the peer review report concluded that the level of fines imposed was symbolic and didn't actually imply a preventive or punitive role.</p> <p>Recommendations were made for an increase in the level of fines, especially for hardcore infringements of competition law – such as price-fixing agreements. In addition, fine decisions should be sufficiently and clearly motivated in order to ensure a better understanding, by the economic operators, of the motives for sanction. This would help to ensure legal certainty and more transparency.</p> <p><i>Conciliation mechanism</i></p> <p>In addition, the PR report contained a recommendation relating to the need for the amendment of the conciliation mechanism provided for in article 59 of the Act. This mechanism allows the Ministry to revise the level of the fines decided on by the Board.</p>		<p><i>Conciliation mechanism</i></p> <p>The amendment of article 59 of the Act has been presented to the Parliament and is part of the ongoing reforms.</p>
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<p><b>IV. Establishment of an internal information documentation and training system for the institutions responsible for applying competition policy (capacity building)</b></p>	<p>In the Peer Review report, the experts concluded that a documentation centre, supplied with academic works and focused on competition matters, should be established. Recommendations were also made towards the development of notices and guidelines dealing with specific anti-competitive practices. These notices and guidelines would be specifically useful for newly recruited staff in the competition authorities, but also for economic operators. In addition, university programmes should include some competition-centred courses in order for new generations to get better insights into the benefits of competition.</p>		<p>The Peer Review triggered the establishment of a documentation centre dedicated to competition law and policy. The Council mentioned that a special intranet and a web exchange platform have been put in place in order to make the Council's decisions and opinions easily accessible and available.</p> <p>In addition, universities in Tunisia now give special attention to competition law and provide for both general and specialised competition-focused classes. This will enable the future generation to better understand competition law and policy.</p>
<p><b>V. Reconciling the regulatory approach and the competition-based approach</b></p>	<p>Positive synergies emerge from the collaboration between regulators and competition authorities. During the peer review, the recommendation was made that the Ministry should be required to refer competition-related complaints to the Competition Board as soon as they are filed with a Regulator, the telecommunications regulator (INT) for instance.</p>		<p>The cooperation between the Competition Board and regulators has been enhanced through several instruments, for instance via memoranda of understanding signed between the Competition Board and INT. Other efforts to enhance contacts and collaboration between the Competition Board and the Regulators have been achieved. It should be particularly noted that there is an increased participation of both types of authority in networks and forums specialised in competition issues in order <i>inter alia</i> to strengthen mutual understanding and cooperation.</p> <p>The Council should also engage in similar cooperation mechanisms with other regulators in order to create positive synergies, better resource allocation and quicker case treatment.</p>

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>VI. Difficulties encountered in conducting investigations and collecting information</b></p>	<p>The Peer Review mentioned the difficulties for the Tunisian competition authorities to gather sufficient evidence of anti-competitive practices as the statistical system in the country was not adequately developed. Thus, it was recommended to set up databases in order to facilitate the work of the Tunisian competition authorities.</p>		<p>The statistical system of the country is going through a slow, but certain development phase. Together with the Ministry, the Council tries to collect and analyse more economic data in order to exercise its implementing powers with more accuracy. A database relating to the follow-up of the functioning of markets has been set up by the Ministry, which is also available to the Council. The more cooperation is strengthened between the Ministry and the Council, the better and more accurate these databases will be. Moreover, it should be noted that the proposed amendment of the competition rules contains several provisions in order to strengthen leniency programmes before the Council. There is much hope that this will support the possibility of collecting more information and evidence of anti-competitive practices.</p>
<p><b>VII. Choice of sectors and priorities</b></p>	<p>Prioritizing the investigations and carrying out sector-wide inquiries were recommended during the PRC. Indeed, these practices enable the competition authorities to get better insights and understanding of the sector and its practices.</p>		<p>The action of the Council has evolved both in regard to administrative and jurisdictional cases and to consultative powers. The Council has initiated internal case-prioritization. Moreover, sector-wide inquiries in key sectors of the Tunisian economy, in which anticompetitive practices were found to exist, have been conducted by the Council.</p> <p>However, the Council must decide on every request of action that is submitted before it. This is a time-consuming exercise that may lead to a misallocation of resources. Therefore, some improvements regarding prioritisation of cases should be carried out.</p>

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

## West African Economic and Monetary Union, Benin and Senegal

Key figures
✓ Peer reviewed in 2007 <sup>75</sup>
✓ Gross domestic product per capita in 2013: 865,31 USD <sup>76</sup>
✓ Number of inhabitants: 102,5 Mln in 2013 <sup>77</sup>

The Treaty signed on 10 January 1994 (“the Dakar Treaty”) between seven West African countries sharing a common currency – the CFA franc – established the West African Economic and Monetary Union (WAEMU).<sup>78</sup> Members of WAEMU are Benin, Burkina Faso, Cote d’Ivoire, Guinea-Bissau (joined in 1997), Mali, Niger, Senegal, and Togo.

WAEMU is pursuing several objectives, among which are the coordination of economic policies and national sectoral policies in areas such as transport, telecommunications, the environment, agriculture, energy, industry and mining.<sup>79</sup> In order to attain its objectives, WAEMU established a framework of operating rules and set up several bodies to carry out the integration tasks.

<sup>75</sup> Peer Review Report for WAEMU, document UNCTAD/DITC/CLP/2007/1, 2007, available at: [http://unctad.org/en/Docs/ditccplp20071\\_en.pdf](http://unctad.org/en/Docs/ditccplp20071_en.pdf), (retrieved on 8 November 2014).

<sup>76</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.KD> (retrieved on 02 November 2014).

<sup>77</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (Retrieved on 12 November 2014); Benin – 10,3 Mln, Burkina Faso – 17 Mln, Ivory Coast – 20,3 Mln, Guinea-Bissau – 1,7 Mln, Mali – 15,3 Mln, Niger – 18 Mln, Senegal – 14 Mln, Togo – 7 Mln.

<sup>78</sup> WAEMU is also known by its French acronym « UEMOA ».

<sup>79</sup> WAEMU, article 4 Treaty establishing UEMOA, also known as the “the Dakar Treaty” of 10 January 1994, entry into force on 1 August 1994.

WAEMU is more than a simple regional cooperation organization. It has indeed been conferred a supranational character, thus having a sovereign subregional power – including in cases related to competition law and policies – over its Member States. With regard to competition rules, WAEMU enacted a community competition ‘code’, included in the Treaty under “Section III – Common Market”.

Although the Treaty entered into force in 1994, it was only in 2002 that regulations and implementation guidelines were adopted.<sup>80</sup>

Fruitful implementation of the WAEMU Treaty – including the provisions relating to competition rules – was impeded by major security and political crises in the region, as well as by several environmental (e.g. drought, floods) challenges that the region has had to face since 2007.

The Peer Review Report consisted of a thoroughgoing analysis of WAEMU’s competition law provisions, but it also focused more specifically on Benin and Senegal. For the implementation of competition rules, WAEMU has the Commission as an institution. In Benin, the Directorate for Competition and Fight against Fraud, established under the authority of the Ministry of Trade, is empowered to control the implementation of competition rules at the national level.<sup>81</sup> However, there is no proper national competition legislation in Benin. In Senegal, liberalization policies were initiated in 1979, which was preceded by the adoption of price regulations and control of economic fraud Act in 1965. In 1994 important structural, regulatory and institutional reforms took place and a new law, “law No. 94-63 of 22 August 1994 on Prices, Competition and Economic Litigation” (hereinafter the “PCEL law”) repealing the Act of 1965, set up the National Competition Commission (“La Commission Nationale de la Concurrence”, hereinafter the “Senegalese NCC”).

Following the PRC, WAEMU and UNCTAD signed a Framework Agreement for Cooperation and Partnership in 2008, in order to ensure a genuine follow-up on the implementation of the recommendations.

<sup>80</sup> The communitary legislation as regards competition entered into force on 1 January 2003.

<sup>81</sup> OECD, Forum mondial sur la concurrence – Lutte contre la corruption et promotion de la concurrence - Contribution du Bénin, DAF/COMP/GF/WD(2014)1, 9 January 2014, available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD%282014%291&docLanguage=Fr> (retrieved on 02 November 2014).

West African Economic and Monetary Union, Benin and Senegal peer review recommendations implementation matrix			
Recommendation	Why	Status	Findings
<b>I. Strengthening the culture of competition (advocacy)</b>	Recommendations have been formulated in order to strengthen the competition culture both at subregional and local level. Experts advocated – among others – the need to raise public awareness through interventions explaining competition law and policies in the media, the opportunity of organizing training events for officials, practitioners, academics and also for students - by providing competition law courses in universities and establishing competition documentation centres.		WAEMU, in cooperation with the Directorate of Benin, organized several awareness and dissemination activities, particularly addressed to the Consumer Protection Organisation, to practitioners, to economic operators and to the public in general. In the framework of the strengthening of competition culture in Benin, the Directorate initiated a process of international cooperation to adopt best practices and to benefit from the experience of longer-standing institutions, e.g. Tunisia.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>II. Adapting and clarifying some of the basic rules; need for a legislative review</b></p>	<p>The Peer Review revealed some shortfalls as regards the content of the legislative instruments that govern competition rules in WAEMU. Therefore, recommendations were made to amend and clarify the law so as to ensure its efficient implementation by the competition authorities. Indeed, the relationship between the hardcore competition rules listed in article 88 of the WAEMU Treaty and the rules falling outside of this list – and thus being under national remit – should be urgently established. In addition, the Peer Review calls for a distinction to be made between the monitoring of collective and individual practices. This distinction is of utmost importance as it distributes the competences between the WAEMU Commission (for collective practices) and national competition authorities (individual practices).</p>	<p>In general, the implementation of the recommendations relating to legislative review takes time. Moreover, the application and the acceptance of Community competition rules is a long-term process which entails that in-depth and significant legislative changes have to be spread over time instead of implemented in a radical way.</p> <p>Legislative review and amendments of the WAEMU community legislation on competition law has been carried out in the context of the Framework Agreement signed between the WAEMU and UNCTAD in 2008<sup>82</sup>. High level consultations, workshops and meetings between UNCTAD staff, WAEMU representatives and member states' experts have taken place. As a consequence, concrete measures and reports were developed.</p> <p>Prior to their implementation, the proposed reforms have to go through a last round of consultations. Then a prompt application of the reforms, through appropriate actions stemming from national authorities, sectoral authorities, the business community, trade and consumer organisation and all other interested stakeholders, will be launched.</p> <p>The adaption and clarification of the basic rules of the WAEMU competition framework as well as a general legislative review is on a good path. Although the substantive measures and amendments for the legislative reviews are being adopted, their implementation will remain a challenge for WAEMU. The assessment of the realisation of the recommendations made in the context of the PRC and the reports made in the context of the subsequent Framework Agreement will only be able to be carried out in the coming years, when concrete measures will have been put in place.</p>
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<sup>82</sup> Framework Agreement for Cooperation and Partnership between the West African Economic and Monetary Union of (WAEMU) and the United Nations Conference on Trade and Development (UNCTAD) signed on 17 September 2008.

<p><b>III. Reorganising competition institutions</b></p>	<p>Reforming administrative structures of national and community institutions was one of the primary steps to be taken, according to the Peer Review Report. Such reform would ensure a better distribution of functions between both types of institutions – community and national. Moreover, sectoral inquiries should be carried out in order to adopt a global approach when implementing competition law.</p>	<p>The competition institutions have still not been reorganised at the WAEMU Community level. During the first years, WAEMU focussed its efforts on legislative activity, as well as on the strengthening and development of trustful relations with its member states. However, major legislative and institutional changes did not occur and when taking stock of the implementation of competition law, one can see the difficulties still faced by WAEMU and its member states. The advisory and litigation practice with regard to anti-competitive practices remains low at both WAEMU Community and national level.<sup>83</sup></p> <p>A series of criticisms as to the institutional organisation of the WAEMU system and its articulation with national institutions and legislations has been growing over the years, especially in member states that adopted a competition legislation and policy. In Senegal, in particular, the principle of exclusive competence of WAEMU is seen as very negative, as it freezes the nascent action on the national level. This poses a psychological problem of frustration, impeding an efficient implementation of competition rules both at WAEMU and national levels.</p> <p>In the context of the Framework Agreement signed between WAEMU and UNCTAD in 2008,<sup>84</sup> high level workshops on institutional questions and issues were organized in several WAEMU member states. These consultations gave rise to the realisation of a report entitled "Study on the revision of the institutional framework of the implementation of the WAEMU's Community competition rules", which was presented to member states in April 2012. Consultations with member states followed the</p>
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<sup>83</sup> At the level of the WAEMU Commission, seven cases have been identified between 2001 and 2007 (One case related to a merger through a purchase of shares, three cases related to State aid, two other cases related to 'practices attributable to States' and one related to a fraudulent practice) but none of them concerned hardcore anti-competitive practices i.e. cartels or abuse of dominance. The litigation activity of the Court of Justice was also limited: two cases were brought in front of the Court, one of which was declared inadmissible and the other dismissed on substance. Only one preliminary ruling was decided upon by the Court of Justice.

<sup>84</sup> Framework Agreement for Cooperation and Partnership between the West African Economic and Monetary Union of (WAEMU) and the United Nations Conference on Trade and Development (UNCTAD) signed on 17 September 2008.

	<p>The set of recommendations equally mentioned the need to provide the competition authorities with a higher number of well-trained staff, as well as better material support used in competition law investigations.</p>		<p>dissemination of the report and in 2013 high level meetings between the member states' national experts took place in the margins of UNCTAD's IGE in Geneva.<sup>85</sup></p> <p>Although some efforts are being made by WAEMU and its member states to address the recommendations concerning the institutional framework of the implementation of competition law and policy, there is still a long way to go. UNCTAD is supporting the technical work that is done by WAEMU to improve and to timely implement institutional changes.</p> <p>The Court of Justice itself has initiated several seminars for judges and officials on WAEMU community law in general and on the application of competition rules in particular. Moreover, the training of staff also goes through international cooperation from WAEMU with other competition authorities (for instance the WAEMU study-tour to the Swiss competition authority in 2007). UNCTAD also organized staff training through the technical assistance and capacity-building activities flowing from the PRC. However, training activities should be undertaken at both WAEMU and national levels to ensure continuity in the competition agencies' staff competences.</p>
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<sup>85</sup> The totality of the reports as well as the evolution and follow-up of the projects are available at: <http://cms.projetconurrenceuemoa-cnuuced.org/>.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>IV. Adapting procedures</b></p>	<p>The need for the adoption of clear procedures, that would take the exclusive community competence of the WAEMU Commission into account, was singled out. Indeed, the WAEMU Commission has an exclusive competence for cartel and abuse of dominance cases. Better coordination and cooperation between the WAEMU Commission and national competition authorities for the investigation of these anti-competitive practices would create more synergies and a more efficient allocation of resources.</p>		<p>The efficient application of competition law by WAEMU institutions remains a difficult task. This is due to a psychological factor making it difficult for WAEMU member states— and their competition agencies – to accept the opinion of the Court conferring exclusive jurisdiction to the WAEMU Commission. The second factor resides in the fact that national legislations still have to be amended in order to include WAEMU's community legislation.<sup>86</sup></p> <p>Again, procedural measures have been addressed in the technical work taken place in the context of the Framework Agreement, signed between WAEMU and UNCTAD in 2008.<sup>87</sup> The efforts made by WAEMU to formally address the recommendations made in the framework of the PRC will have to be reassessed once the final consultation process on the new measures comes to an end and is properly implemented by the relevant WAEMU community and national stakeholders.<sup>88</sup></p>
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<sup>86</sup> UNCTAD, "La répartition des compétences entre les autorités communautaires et nationales chargées de concurrence dans l'application des règles de concurrence", TD/B/COM.2/CLP/69, 2 May 2008, available at: [http://unctad.org/fr/docs/c2clpd69\\_fr.pdf](http://unctad.org/fr/docs/c2clpd69_fr.pdf) (retrieved on 12 January 2015).

<sup>87</sup> Framework Agreement for Cooperation and Partnership between the West African Economic and Monetary Union of (WAEMU) and the United Nations Conference on Trade and Development (UNCTAD) signed on 17 September 2008.

<sup>88</sup> All of the reports, as well as the evolution and follow-up of the projects, are available at: <http://cms.projetconurrenceuemoa-cnuued.org/>.

## Costa Rica

Key figures
✓ Peer reviewed in 2008 <sup>89</sup>
✓ Gross domestic product per capita in 2013: 10184,6 US\$ <sup>90</sup>
✓ Number of inhabitants: 4,9 Mln in 2013 <sup>91</sup>

Costa Rica made a progressive transition from a State intervention-based economy to a market-oriented economy, focused on important export promotion and export agriculture. In Costa Rica, competition law has very early roots. In the Constitution of 1917, article 16 established the defense of economic freedom as long as it does not harm third parties. The Constitution of 1949, in effect today, sets out the fundamental rights of citizens to free trade, agriculture and businesses and expressly prohibits private monopolies.<sup>92</sup> Provisions of the Constitution are complemented by Law 7472 on Promotion of Free Competition and Effective Defense of Consumers (LPCDEC)<sup>93</sup> which addresses deregulation policy, economic openness and the prohibition of anti-competitive practices.

<sup>89</sup> Peer Review Report for Costa Rica, document UNCTAD/DITC/CLP/2008/1, 2008, available at: [http://unctad.org/en/Docs/ditcclp20081\\_en.pdf](http://unctad.org/en/Docs/ditcclp20081_en.pdf), (retrieved on 18 November 2014).

<sup>90</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/CR?display=graph> (retrieved on 05 November 2014).

<sup>91</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (retrieved on 05 November 2014).

<sup>92</sup> Constitution of Costa Rica, adopted on 7 November 1949, entered into force on 8 November 1949, article 46, available at: [http://www.costaricalaw.com/constitutional\\_law/constitution\\_en.php](http://www.costaricalaw.com/constitutional_law/constitution_en.php) (retrieved on 28 November 2014).

<sup>93</sup> Law 7472 Consumer Protection Law (LPCDEC), adopted on 20 December 1994, available at: <http://www.costaricalaw.com/Consumer-Protection-Law/consumer-protection-law-7472.html> (retrieved on 28 November 2014).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

The Commission for Promoting Competition (COPROCOM) has been created by the LPCDEC to implement competition law and free competition. COPROCOM comprises two different bodies: an adjudicating body and a technical support unit (TSU). They receive their budget and administrative support from the Ministry of Economy.

Costa Rica peer review recommendations implementation matrix		
Recommendation	Why	Status
<p><b>I. Adapting and clarifying some of the basic rules; need for a legislative review</b></p>	<p>The Peer Review Report based its recommendations relating to legislative review of competition rules in Costa Rica on a previous report, prepared in the framework of UNCTAD's COMPAL programme. The report pinpointed the need for legislative reform (a) to include all economic agents, including State enterprises and public concessions; (b) to provide COPROCOM with a more robust institutional framework, increasing its independence and its resources to enforce the competition rules; (c) to clarify the methodology for analysing absolute and relative monopolies.<sup>94</sup></p>	<p>Status</p> 
		<p>Findings</p> <p>COPROCOM indicated that UNCTAD's Peer Review, as well as UNCTAD's COMPAL Programme, had a determinant influence on the progress of competition policies in Costa Rica, particularly that they triggered legislative amendments. A reform of Law 7472 took place in 2012 and addressed the concerns raised during the Peer Review.</p> <p>(a) The amendment provided for the inclusion of previously exempted economic actors in the scope of competition law rules.</p> <p>(b) Through the amendment, COPROCOM has also been empowered to conduct inspections – with a priori judicial authorisation – at premises of companies. Moreover, leniency and settlement procedures have been provided by the legislative reform, thus enabling COPROCOM to pierce the cloak of cartels, to gather evidence more effectively and to speed up procedures.</p>

<sup>94</sup> Likewise, legislative review has been proposed by the COMPAL programme for other areas of law, such as the need to incorporate a pre-merger control mechanism for concentrations and the need to provide for more deterrent sanctions in case a breach of competition rules is proven. These are examined under a specific section of this report; see table number (II) and (III).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>II. Increasing the deterrent power of the sanctions</b></p>	<p>UNCTAD's Peer Review highlighted the need to provide for more deterrent sanctions in cases of competition law infringements. This could take the shape of an increase in the level of fines that can be imposed on contravening economic operators. The recommendations included alternatives to higher pecuniary sanctions, such as the possibility to involve economic agents' reputations (obligation to notify to their consumers, suppliers, shareholders and the general public that there is a breach of competition rules).</p>		<p>The reform of the legislative framework regarding competition law in Costa Rica did not include substantial amendments as regards the sanctions regime. According to Law 7472, non-pecuniary and pecuniary sanctions can be ordered by the Council for breaches of competition rules.<sup>95</sup> Non-pecuniary sanctions include, for instance, the suspension, correction and removal of the anti-competitive behaviour or the proposed merger. Pecuniary sanctions do not have sufficiently high thresholds to be deterrent enough.<sup>96</sup> However, a recent amendment containing several provisions on sanctions for breach of competition law is currently being reviewed by the Parliament and considers increasing the nominative amount of monetary fines.</p>
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<sup>95</sup> Law 7472 of Costa Rica, Article 25.

<sup>96</sup> Law 7472 of Costa Rica, Article 25(e) provides for, instance, that for absolute monopolistic practices, the fine can amount to 604 times the smallest minimum wage. Note that the minimum wages are set by Decree number 38101-MTSS, 1 January 2014 and is approximately USD20. Therefore, the fine will only amount to approximately USD 12000. Other levels of fines are set in Law 7472 of Costa Rica, Article 25(f) to (h).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>III. Set up a mechanism for preventive control of concentrations</b></p>	<p>When the Peer Review took place, Costa Rica's legal system did not provide for a mandatory notification of mergers, so that no <i>ex ante</i> concentration control was established. Regarding mergers, COPROCOM only had the power to investigate concentrations that have already been formed. This unusual ex-post control of concentrations had led COPROCOM to deal with very few concentrations since it began its operations and undermined the effectiveness of the role of COPROCOM in this area.</p>		<p>Merger control in Costa has been fully reviewed through a legal reform that came into effect on 5 April 2013 and introduced a notification obligation of certain mergers to the COPROCOM.<sup>97</sup> Notification thresholds are established as follows: the total sum of the productive assets of the concerned economic agents exceeding 30000 times the minimum wage (approximately USD 15 Mln) in the national territory or the total generated income in the national territory of the concerned economic agents during the last fiscal year exceeding 30000 times the minimum wage. Merger notification is also mandatory if an economic operator involved in the proposed merger has a market share of more than 40% of the affected markets. The proposed merger has to be notified to COPROCOM before it is implemented or within five business days of its execution. Failure to comply with the mandatory notification is punishable with fines up to 400 times the minimum wage.</p> <p>COPROCOM indicated that the recommendations and findings made in the framework of the Peer Review enabled it to leverage more support from the Authorities for adopting these new merger control provisions. Following the amendment of competition rules in 2012, UNCTAD and COPROCOM launched new guidelines on merger review under the COMPAL programme.</p>
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<sup>97</sup> Law 7472 of Costa Rica, Article 16.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>IV. Provide COPROCOM and its technical support unit with more investigation tools</b></p>	<p>The recommendations found that COPROCOM and its technical unit would need wider investigation tools in order to carry out their powers effectively. The Peer Review Report urged to give COPROCOM and its technical unit the power to conduct visits, inspect domiciles and collect evidence and documents without consent (search and seizure). Moreover, COPROCOM should be empowered to give lenient treatment to economic agents who confess their participation in a cartel.</p>		<p>As stated above, COPROCOM has been empowered with wider-ranging investigative powers. Indeed, dawn raids and inspections at companies' premises are now provided for in the legislation. In addition, leniency procedures have been put in place that benefit both economic operators and COPROCOM.</p>
<p><b>V. Give COPROCOM more institutional independence</b></p>	<p>To carry out its functions, a competition authority should benefit from a sufficient degree of independence in the institutional framework. During the Peer Review, recommendations were made to strengthen COPROCOM's independence from government administration and from the lobbying power of economic agents through several measures. The proposed measures were <i>inter alia</i> (i) the appointment of commissioners on the basis of a competitive examination; (ii) making it mandatory for commissioners to work exclusively for COPROCOM; (iii) giving both COPROCOM and its technical unit budgetary independence and control over the hiring of staff; (iv) clearly setting out the causes for dismissal of commissioners.</p>		<p>Although the legislative reform of 2012 gave COPROCOM more powers and tools to carry out its mandate, there are still efforts to increase its independence. COPROCOM is advocating for budgetary independence. This would also allow COPROCOM to consolidate its image as an autonomous competition authority rather than being a ministerial agency. In conclusion, although significant improvements have been made in this area, there are still efforts to be made.</p>

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>VI. Prioritization of cases; concentrate efforts on key sectors of the economy</b></p>	<p>UNCTAD's Peer Review recommended that COPROCOM to focus its activities on key sectors of the economy, such as industrial raw materials, energy, basic foods, medicines, health services and education.</p>		<p>Most of the cases that were assessed by COPROCOM consisted of unilateral conducts and horizontal agreements. Most investigations of COPROCOM concentrated on the retail sector and on the financial services. However, there seems to be no formal prioritisation of cases. This should be enhanced in order to allow an efficient resource-allocation.</p>
<p><b>VII. Strengthen competition advocacy</b></p>	<p>Competition advocacy is of utmost importance in strengthening competition agencies' legitimacy and visibility. The Peer Review recommended that COPROCOM execute an action plan identifying the sectors and problems to be analysed over the next years, in the form of a three years agenda for sectoral competition studies and pre-competition recommendations.</p>		<p>COPROCOM organised a large dissemination of the recommendations made by UNCTAD's Peer Review. This contributed an increase in the awareness of competition law and policies but also of the role and purpose of COPROCOM. It also ascertained the need for a comprehensive and thorough reform as regards competition law and leveraged support in the Government to carry this out.</p> <p>Training activities, technical support and capacity-building programmes have been implemented in the judicial bodies so as to familiarise these agents with the particularities of competition law.</p>

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

# Indonesia

## Key figures

- ✓ Peer reviewed in 2009<sup>98</sup>
- ✓ Gross domestic product per capita in 2013: 3475,3 US\$<sup>99</sup>
- ✓ Number of inhabitants: 250Mln in 2013<sup>100</sup>

Indonesia's economy has recorded strong economic expansion in the past few decades and is considered as a new industrializing economy and as a major emerging market.<sup>101</sup> Economic reforms led to today's market-oriented economy, in which the government still plays a significant role. The rapid growth recorded by the Indonesian economy undermined institutional structures, which were not able to keep pace with these developments. In the 90s, Indonesia and the International Monetary Fund (IMF) initiated discussions on economic, governmental and structural reforms – including competition law and policies. Institutional reforms in the area of competition law were introduced by the adoption of Law No 5 on 5 March 1999 on the Prohibition of Monopoly and Unfair Business Competition Practices (the “Indonesian Competition law” or “ICL”), triggered by the Agreement between Indonesia and the IMF adopted in 1998.

<sup>98</sup> Peer Review Report for Indonesia, document UNCTAD/DITC/CLP/2009/1, 2009, available at: [http://unctad.org/en/Docs/ditclp20091\\_en.pdf](http://unctad.org/en/Docs/ditclp20091_en.pdf) (retrieved on 20 November 2014).

<sup>99</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/ID?display=graph> (retrieved on 8 November 2014); see also

<http://www.worldbank.org/en/country/indonesia> (retrieved in 8 November 2014).

<sup>100</sup> <http://data.worldbank.org/indicator/SP.POP.TOTL> (retrieved on 8 November 2014).

<sup>101</sup> S. Elias and C. Noone, « The Growth and Development of the Indonesian Economy », Reserve bank of Australia Bulletin, December quarter, 2011, pp. 33 to 43.

Indonesia's competition authority, Komisi Pengawas Persaingan Usaha<sup>102</sup> (the "Commission for the Supervision of Business Competition" or "KPPU") has been responsible for the enforcement of the ICL. The KPPU is an independent institution, free from Government and other stakeholders' influence, and accountable to the President of Indonesia. Its members are appointed and dismissed by the President upon approval of the People's Legislative Assembly. The KPPU is responsible for supervising and evaluating the conduct of business actors in the Indonesian markets under the ICL. It carries out investigations and enforces the Law (e.g., issues decisions on the alleged violations), provides advice and opinions concerning Government's policies related to monopolistic practices and/or unfair business competition, issues guidelines and submits periodic reports on its activity to the President of Indonesia and the People's Legislative Assembly.

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<sup>102</sup> Decision of the President No 75, of 8 July 1999 following article 34, paragraph (1) of Law No 5.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

Indonesia peer review recommendations implementation matrix		
Recommendation	Why	Status
I. Merger control	<p>At the time of the report, provisions for merger review were pending for governmental regulation. UNCTAD's Peer Review suggested that Article 28 of the ICL should be clarified in order to include a relatively high threshold for merger notification. A recommendation towards the assessment of only these mergers or acquisitions that were meeting a threshold for competition harm in Indonesia would be prohibited or subject to conditions for clearance.</p>	<p><b>Findings</b></p> <p>This recommendation was followed by Indonesia through the issuance of Government Regulation No 57 of 2010 on the Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices (the Merger Regulation). The Merger Regulation provides for two alternative threshold criteria, calculated on a national basis. As a consequence, business actors have an obligation to report the contemplated merger, consolidation or acquisition if the assets value of the merged entity exceeds IDR 2.5 trillion or the turnover of the merged entity exceeds IDR 5 trillion. For banking corporations, only the assets value criteria applies and the criteria is that the consolidated national assets exceed IDR 20 trillion.<sup>103</sup></p> <p>The KPPU has adopted four commission regulations in the framework of merger control.<sup>104</sup></p> <p>Currently, an amendment process of the ICL regarding several areas of competition law – among which merger review – has been launched.</p>

<sup>103</sup> USD-IDR: 12,142.0000 IDR is 1 USD, <http://www.bloomberg.com/quote/USDIDR:CUR> (retrieved on 8 November 2014).

<sup>104</sup> Commission Regulation No 10 of 2010 on the Form of Post-Merger Notification ; Commission Regulation No 11 of 2010 on Pre-Merger Notification ; Commission Regulation No 2 of 2013 on the Third Amendment of Guidelines of Mergers, Consolidations and Acquisitions (which superseded Commission Regulation No 13 of 2010 on the Guidelines of Mergers, Consolidations and Acquisitions) ; Commission Regulation No 4 of 2012 on Guidelines for the Imposition of Fines for Delay of Notifying Mergers, Consolidations and Acquisitions of Shares.

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>II. Issuing guidelines focusing on specific matters for more transparency and predictability</b></p>	<p>Guidelines are helpful for several major actors in the competition landscape. They provide for increased transparency and enhanced predictability for business actors and for the society as a whole, and strengthen the legal certainty of the actions of the KPPU as well as of the judiciary. Recommendations were made towards the adoption of matter-specific guidelines in order to meet all the above-mentioned objectives.</p>		<p>According to Article 35 of the ICL, the KPPU has been empowered to adopt implementing guidelines of the ICL. These implementing guidelines can be used for the KPPU and the judiciary when dealing with competition cases but will also be useful for the various competition stakeholders. Over the years, the KPPU adopted supporting legal instruments to improve the fulfilment of its functions in an effective way. Various guidelines have been enacted by the KPPU, addressing specific developments of business behaviours related with competition law in Indonesia. Since 2009 with the adoption of the KPPU's first guideline on the exemption of Intellectual Property Rights Agreements (Article 50b), 23 other guidelines dealing with various matters have been adopted.<sup>105</sup></p>
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<sup>105</sup> Guideline on Relevant Market (Article 1(10)) adopted on 1 July 2009, Guideline on Administrative Sanction (Article 47) adopted on 7 December 2009, Guideline on the Exemption of Regulated Practices (Article 50a) adopted on 7 December 2009, Guideline on the Exemption of Franchise Agreement (50b) adopted on 7 December 2009, Guideline on Interlocking Directorate (Article 26) adopted on 7 December 2009, Guideline on Case Handling Procedure adopted on 6 January 2010, Guideline on Bid Rigging (Article 22) adopted on 6 January 2010, Guideline on State Owned Enterprises (Article 51) adopted on 6 January 2010, Guideline on Cartel (Article 11) adopted on 9 April 2010, Guideline on Vertical Integration (Article 14) adopted on 9 April 2010, Guideline on the Abuse of Dominant Position (Article 25) adopted on 9 April 2010, Guideline on the Exemption of Agency Agreements (Article 50d) adopted on 9 April 2010, Guideline on Merger & Acquisition Consultation adopted on 20 August 2010, Guideline on Discrimination Practices (Article 19d) adopted on 7 June 2011, Guideline on Price Fixing (Article 5) adopted on 7 July 2011, Guideline on Exclusive Dealing (Article 15) adopted on 7 July 2011, Guideline on Predatory Pricing (Article 20) 12 August 2011, Guideline on Share Ownership (Article 27) adopted on 12 August 2011, Guideline on Resale Price Maintenance (Article 8) adopted on 23 August 2011, Guideline on the Exemption of Small & Medium Enterprises (Article 50h) adopted on 23 August 2011, Guideline on Monopoly Practices (Article 17) adopted on 28 September 2011, Guideline on Merger & Acquisition (Revised Edition) adopted on 27 August 2012, Guideline on Administrative Sanction of Overdue Post – Merger Notification adopted on 27 August 2012.

<p><b>III. Procedural issues:</b></p> <p><b>(a) Adopt procedures to suspend deadlines for investigation and decision-making</b></p> <p><b>(b) Procedure allowing the KPPU to correct factual mistakes, not impacting the merits of the decision should be adopted</b></p>	<p>(a) When carrying out the Peer Review, the experts analysed the timeframe provided for KPPU's investigations as enshrined by the ICL. One of the concerns raised by in recommendations related to the strict deadlines for the investigations, without any possibility of suspension. Time restrictions make it difficult to perform an in-depth investigation and an opportune economic analysis.</p>		<p>(a) The KPPU revised the Case Handling Procedure and issued Commission Regulation No 1/2010, which provides for a mechanism to suspend the deadlines of investigation. According to Article 38 of the above-mentioned Regulation, the investigation period lasts for a maximum of 60 days. After this time has lapsed, a report on the progress of the investigation has to be made to the Commission. However, paragraph 2 of the same Article provides for a possible extension of the investigation period by the Commission. Indeed, according to Article 38 of this Regulation, the KPPU may discontinue or extend the investigation period.</p> <p>(b) The KPPU is currently in the process of drafting a Commission Regulation on Decision Drafting Procedures, in which it will provide for the possibility to correct factual mistakes without impacting the merits of a decision. Although this is already an improvement that should be welcomed, it would contribute to more legal certainty if this newly acquired power of the KPPU was provided for in a legislative instrument that is not stemming from the competition agency itself.</p>
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**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>IV. Mechanism to filter and prioritise cases and concentrate efforts on key sectors of the economy</b></p>	<p>UNCTAD's Peer Review recommended that the KPPU prioritise cases and fields of action, particularly in order to focus not only on anti-corruption cases, and that the KPPU adopt a mechanism to filter and handle the most important cases in order to optimise the use of its resources and develop high-quality decisions.</p>		<p>In order to address UNCTAD's recommendations, the KPPU revised its guidelines on the prioritization of cases. The Case Handling Procedure was revised and the KPPU adopted the Commission Regulation No 1/2010, which provides for a mechanism to filter cases.</p> <p>The KPPU also indicated that priority cases will be those regarding antitrust matters – such as cartels, price fixing, abuse of dominance – rather than those regarding vertical tenders.<sup>106</sup> The latter will be delegated to other investigators, in cooperation with the anti-corruption units. This way, the KPPU will be able to limit its resources and allocate them efficiently to cases related to anti-competitive practices in key economic sectors.</p>
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<sup>106</sup> The KPPU is constrained in setting up its priorities by other governmental policies and Goals. Law No. 25/2004 concerning National Development Planning System (NDPS) provides explanations relating to the necessity of Midterm National Development Planning (MNDP) and has been developed in parallel with the Long-term National Development Planning (LNDP) 2005-2025. To this extent, all Ministries and State Independent Agencies have to develop their strategies based on the MNDP and LNDP. See also Indonesia's contribution to the Intergovernmental Group of Experts on Competition Law and Policy Session held in Geneva, 8-10 July 2013, "Roundtable on: Prioritization and resource allocation as a tool for agency effectiveness", available at: [http://unctad.org/meetings/en/Contribution/IGE2013\\_RT3\\_Indonesia\\_en.pdf](http://unctad.org/meetings/en/Contribution/IGE2013_RT3_Indonesia_en.pdf) (retrieved on 8 November 2014).

**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>V. Improve enforcement of the decisions through more deterrent sanctions</b></p>	<p>When enforcing the ICL, the KPPU has the power to order the discontinuation of unfair business competition practices, but may also impose sanctions amounting to a fine to the perpetrators.</p> <p>Despite the existence of these possibilities, UNCTAD's Peer Review concluded that the enforcement of the ICL was weakened by gaps in the sanction regime. Recommendations stated that significant sanctions and penalties must be imposed, in order to maintain incentives for businesses to effectively comply with the law.</p> <p>The ICL foresees the possibility for the KPPU to impose both administrative and criminal sanctions. Criminal sanctions are never imposed without police or judicial support. Moreover, the provisions of the ICL governing the sanction regime are not clear in their wording, which creates legal uncertainty regarding this matter. In addition, the Peer Review highlighted that the level of fines in Indonesia is too low to really deter anti-competitive practices. Finally, because of the lack of stringent follow-up of the imposed sanctions, a lot of perpetrators do not honour their payment obligation and a lot of imposed fines remain unpaid.</p>		<p>Currently, a proposed amendment of the ICL has been proposed to the Parliament. One of the main focusses of this amendment proposal is related to the sanction regime for breaches of competition law. However, the KPPU indicated that such amendment requires a strong political support from the Government of the Republic of Indonesia. Moreover the period during which the proposal for the adoption of the amending legislation was made was characterized by the General Election of President and Vice President, and the General Election of Members of Parliament, which delayed its adoption.</p> <p>The main problem that is currently faced by KPPU is the negotiation and lobbying process towards recently-elected President and the recently-elected Members of Parliament.</p>
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**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

<p><b>VI. Strengthen competition advocacy in all the sectors and conduct capacity building exercises</b></p>	<p>UNCTAD's Peer Review pinpointed the emergence of a competition culture in Indonesia and acknowledged the KPPU's efforts in contribution to a genuine competition advocacy. However, efforts can still be made. In particular because many policy makers and enforcers are unfamiliar with the goals and the effects of competition law. Moreover, at the time the Peer Review was conducted there were still many monopolies and state-owned enterprises, supported by local governments. Recommendations were made to the KPPU to address these concerns, notably through the promotion of a competition culture on national and regional levels.</p>		<p>In general, the KPPU takes the view that UNCTAD's Peer Review helped stakeholders to realize the global importance of competition law and policies. The fact that the UNCTAD Peer Review is voluntary enabled Indonesia to strengthen its presence and cooperation on the international scene regarding competition law and policy-making.</p> <p>The KPPU mentioned that the Peer Review helped the competition authority in gaining awareness and recognition from judicial bodies. Following increased interest for competition law and policies, the KPPU organized capacity building programs for judges in Indonesia, who might be concerned by competition law matters.</p> <p>Support and awareness to the KPPU also emanated from related Ministries and other Institutions – such as the National Police, the Financial Services Authority, the Ministry of Trade – regarding the importance of effective implementation of competition law and policies.</p> <p>Other competition advocacy activities were undertaken in order to promote a genuine competition culture throughout Indonesia. Indeed, the KPPU signed a cooperation agreement with the Universitas Sumatera Utara (the North Sumatra University) on advocacy, including the dissemination of information to enhance the comprehension of the ICL. The KPPU also launched cooperation with the Persatuan Wartawan Indonesia, the Indonesian Journalists' Association or PWI, of Yogyakarta in order to organize workshops on fair competition.</p>
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**Status:**  Not implemented  partially implemented  Substantially implemented  Implemented

## V. Conclusion

UNCTAD's Peer Review on competition law and policy has been successful in many regards. Thanks to its high quality assessment and clear-cut recommendations that flow from the Peer Review Report, the mechanism has reinforced the understanding of the strengths and weaknesses of the reviewed countries' competition law and policy, as well as their enforcement.

The design of the PRC itself, with its three major steps including a consultation phase, an assessment phase and a post-assessment phase, was considered as suitable to fulfil its objectives

The mere fact that the PRC is carried out on a voluntary basis is already an indication as to the relevance of the mechanism. Reviewed countries expressed their appreciation for UNCTAD's professionalism and its longstanding experience of working with competition authorities in developing countries. This characteristic of UNCTAD enables the PRC to also cover the development dimensions of competition law and policy. Although countries turn to UNCTAD's PRC for several reasons – such as the will for political, legislative and economic changes, more international and national visibility, the need for strengthening economic liberalisation reforms, need to modernise existing competition law and policy – the fact that the PRC takes development issues into account was named as paramount to undergo the PRC.

The configuration of the PRC carried out by UNCTAD, as well as the methods used to obtain the Report, are seen as relevant by most respondents.

The recommendations themselves had effects on substantial issues of material law entailing legislative changes, in particular regarding merger control as well as prioritisation of cases and efficient resource allocation. Further in regards to competition advocacy, reviewed countries note important developments. Thanks to the Peer Review, competition authorities gained more visibility and built awareness of their role and functions. The PRC provided the competition authorities with more leverage in negotiations with their Governments for the adoption of new legislative instruments or for the amendment of existing ones. Therefore, it can be said that the PRC really contributed to install a genuine competition climate and environment in the reviewed countries.

Recommendations as to the investigative powers of the competition agencies and to the deterrent power of sanctions for breaches of competition law were the ones less implemented. One of the reasons could be that such measures entail important legislative changes, which imply going through lengthy and time-consuming procedures at the national level. Respondents acknowledge the responsibilities of their national authorities in the less successful implementation of these types of recommendations and advocated for UNCTAD to have a more decisive and influential role towards their authorities in order to speed up procedures.

Follow-up activities have in general been well received and appreciated by the reviewed countries. Dissemination of the results of the PRC had a positive influence on the visibility and credibility of competition authorities. In addition, capacity-building and technical assistance provided by UNCTAD in cooperation with competition authorities and others stakeholders are seen as inseparable from the success of the PRC as such.

Despite the numerous advantages and efficiencies of the PRC, there is still space for improvement in order to make the mechanism more effective.

Respondents mentioned that implementing the recommendations stemming from the PRC is a time-consuming exercise. Therefore, the recommendations should perhaps also contain long-term measures, as everyone knows that their enforcement will have to go through Parliament and other legislative procedures, which are lengthy and time-consuming.

Also better links should be developed among UNCTAD's own programmes, e.g. between PRCs and the COMPAL programme or the programme for MENA countries.

The PRC is a dynamic exercise generating spill-over effects. In order to properly assess and make efficient use of these effects, follow-up activities should be strengthened and include a reporting phase as stated above. Moreover, capacity-building and technical assistance should be reinforced according to the majority of respondents. This is an aspect of the PRC that is of paramount importance, especially in developing countries in which competition agencies face scarce resources.

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