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FIFTH UNITED NATIONS CONFERENCE TO REVIEW
ALL ASPECTS OF THE SET OF MULTILATERALLY
AGREED EQUITABLE PRINCIPLES AND RULES FOR
THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES
Antalya, Turkey, 14–18 November 2005
Agenda item 6(b)

KENYA VOLUNTARY PEER REVIEW¹

Chairperson's summary

1. The Chairperson said that the review was taking place at a time when there was a strong commitment on the part of the Kenyan Government to review its competition law. The country report put forward recommendations in six areas, all touching on the review of legislation, including such issues as the autonomy of the competition authority, its advocacy role, the relationship between the competition commission and sector-specific regulators in dealing with competition issues, merger control provisions with thresholds and timeframes, and consumer protection provisions to be included in the competition law in line with COMESA competition regulations and the ECA proposed competition law.
2. The Commissioner from the Kenyan Monopolies and Prices Commission (MPC) applauded the peer review process, which had enabled Kenya to determine the challenges faced by a competition authority that had to implement an outdated piece of legislation. The Kenyan Government had recently appointed a task force to review the competition law, and the terms of reference of the task force more or less addressed the concerns raised in the recommendations in the country report. However, he was open to any comments and questions from the reviewers that might assist in the review of the law.
3. The reviewers asked why the Commission had only 30 staff members currently in place, since it had 63 posts; what was meant by informal cooperation between competition authorities in the region; what type of autonomy was envisaged in the forthcoming revised competition law – financial or administrative – and how financial autonomy might affect the

¹ For details on participation in the peer review, see annex ...

budget of the commission; how Kenyan politicians had contributed to the advocacy of competition issues through their speeches; how the Commission handled being under the Ministry of Finance and also having to deal with the Ministry of Trade; whether the Kenya Association of Insurers was not exempted under section 5 of the Act, and if so, how the Commission managed to have a consent agreement signed and whether it was feasible to bring in sector regulation aspects of price determination and quality under competition law; whether the lack of thresholds in merger provisions might have prompted the low number of merger applications; whether the Commission had blocked any mergers or conditionally approved some; whether the use of employment criteria for merger analysis was not an avenue to promoting inefficiency; and whether there were plans to include abuse-of-dominance clauses in the proposed revised law.

4. The representatives of the MPC said that, on the staff issue, posts had been inherited from the price control regime which had not yet been abolished, but the Commission was satisfied with 30 staff members, given the current workload. On informal cooperation between competition authorities in the region, the competition authorities cooperated in case handling in terms of exchange of information, networking, sharing of relevant opportunities for training, and staff exchange. On autonomy, both financial and administrative aspects were envisaged, and even though the Commission's funds would come from government consolidated funds, as was the practice with other regulatory bodies, the use of the funds would be managed by the Commission; donors would be called upon to assist also. On the contribution of politicians through public speeches, it was actually a private motion raised by a member of parliament in the house that had started the law review process. Other areas where politicians had identified anti-competitive problems and raised them were the motor vehicle industry, fuel retailing and cement.

5. With regard to dealing with both the Ministry of Finance and the Ministry of Trade, that situation was due to the fact that the MPC had its roots in price control, which was the responsibility of the Ministry of Finance. However, due to the mandate of the Ministry of Trade on trade issues, including UNCTAD and WTO, the Commission also had to deal with the Ministry of Trade. The Commissioner chaired the WTO National Committee on Trade and Competition Issues. On the consent agreement with the Kenya Association of Insurers, the insurance law did not give the Commissioner of Insurance an explicit mandate to set premium rates, which were therefore not exempted under section 5 of the Competition Act, and it was therefore easy to negotiate the consent agreement. On sector-specific regulation under competition law, only aspects dealing with competition would be subject to competition law, and since there was no bidding requirement in sector-specific regulator laws, the competition law should include such provisions. On merger thresholds, timeframes, blocking and approval with conditions, the Commission had set its own operational thresholds and timeframes, and it did not appear that this had enabled firms to avoid filing merger applications. Certain mergers had been blocked, and others had been approved with conditions. It was true that using employment or labour-intensity criteria could be detrimental to efficiency, and the revised law would seek to separate these issues. Abuse-of-dominance provisions would be included in the revised law.

6. The representatives of the MPC sought views from participants concerning the convergence of national and regional laws and the link with consumers in terms of their involvement, the ways in which other competition authorities interacted with sector regulators, and the balance between cartel leniency programmes and penalties. The response to the convergence problem was that Governments would choose what to adopt from the review; UNCTAD had a mandate to deal with consumer matters. On sector regulators, one

delegate shared his country's experience with a system of concurrency in handling competition cases. On leniency programmes, a delegate said that the leniency programme was unbeaten in cartel investigations, but in some jurisdictions the competition authority had to convince the Government of its usefulness.

7. In conclusion, the representative of the UNCTAD secretariat reported on the efforts already made to develop a programme between UNCTAD and UNDP, Nairobi, to implement the recommendations of the peer review over a period of two years. Other development partners were invited to cooperate in the project. The Chairperson encouraged Kenya to consider the recommendation of the peer review report in its review of competition law.

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