



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

**MONGOLIA**

**Overview**



## NOTE

Voluntary peer reviews of competition law and policies carried out by UNCTAD fall within the 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. The set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

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(OVERVIEW)

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## PREFACE

1. This Report examines the current state of competition law and policy in Mongolia and is based on extensive desk-based research and a fact-finding visit to Mongolia. The desk-based research covered a review of, among other things, the Constitution of Mongolia, the Law on Competition of 2010 and old competition laws, other relevant legislation (Consumer Protection Law, Public Procurement Law), decisions by AFCCP and other government agencies, and market studies. The fact-finding visit to Mongolia was undertaken on 9–13 January 2012, where interviews were carried out with various stakeholders.<sup>1</sup>

## **1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY IN MONGOLIA**

### **A. Introduction: Mongolia's competition system in context**

2. Mongolia adopted its first competition law (the Law of Mongolia on Prohibiting Unfair Competition) in 1993. It precluded the government from restricting economic competition, prohibited monopolies and other restraints on fair competition and established guidelines for government intervention in markets.

3. The effective Competition Agency was established 12 years after the first Mongolian Competition Law was enacted. Until 2005, there had been no specific government agency responsible for safeguarding competition and competition law-enforcement efforts in this period were spontaneous. A consistent nationwide competition policy was not observable in this period.

4. The Mongolian Competition Law has undergone amendments five times. The first amendment made in 1995 stipulated the powers of the State Inspector charged with the enforcement of the Mongolian Competition Law more clearly than before. The second change made in 2000 clarified its definitions and provisions. The third amendment made in 2002 concerned the provisions related to bid-rigging. The fourth amendment made in 2005 converted the Unfair Competition Regulatory Agency into the Agency for Fair Competition and Consumer Protection

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<sup>1</sup> In addition to AFCCP, interviews were held with: (a) the City's Administrative Court; (b) government agencies including the Ministry of Foreign Affairs, Ministry of Finance, Ministry of Justice and Internal Affairs, Ministry of Mineral Resources and Energy, Anti-Corruption Agency and State Property Committee; (c) Chamber of Commerce, Meat and Gas Associations; (d) sector regulators in the energy, finance and telecommunications sectors; (e) Consumer Associations and other relevant non-governmental organizations (NGOs).

and thus launched effective enforcement. Finally, the new Law on Competition of July 2010<sup>2</sup> provided more powers to the Agency and increased sanctions.

## **B. Political, historical and economic context**

5. Mongolia is a landlocked country with 1,566,500 km<sup>2</sup> land and a population of approximately 2.7 million. In 1911, Mongolia declared independence. After the breakdown of communism in 1989, Mongolia saw its own democratic revolution in early 1990, which led to economic transition towards a market economy.

6. In recent years, Mongolia has seen a steady increase in the inflow of foreign direct investment in its mineral sector. The Mongolian economy has grown at an average of 7 per cent a year since 2003. During the fourth quarter of 2011 the economy was booming with a growth rate of close to 20 per cent.

7. Because its industrial structure is highly dependent on a number of primary products the economy is vulnerable to fluctuations in international raw material prices. A long-term solution will require a fundamental diversification of the economic base in Mongolia. Mongolia suffers from a wide range of social problems that include corruption, the growing gap between the rich and the poor, underdevelopment of the infrastructure and health care, and a high inflation rate.

8. The Mongolian Government pursues a set of industrial policies presented in its National Industrialization Plan. Besides the pro-competitive or competition-neutral policies such as the creation and management of the small and medium enterprise (SME) support fund or community development programme, the plan provides for government support to industrialization projects, some of which may raise competition concerns. For this purpose the Government intends to rely on public-private partnerships, private sector support programmes and granting concessions. Allocation of the concessions and construction projects related to this programme may also raise competition concerns.

9. The Government intends to use proceeds from the exploration and extraction of the country's rich mineral resources for the purposes of human development in Mongolia. In 2008 the Mongolian Parliament approved the National Development Strategy that included the establishment of the Human Development Fund that made every citizen of Mongolia legally eligible for his or her share in the country's mineral wealth. The Human Resource Fund is intended to finance cash payouts to citizens, pensions, housing, health insurance and educational benefits.

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<sup>2</sup> *The Law of Mongolia on Competition (revised version) 2010. The English version quoted in this review is an unofficial translation provided by the Mongolian authorities.*



10. By 2011 there were 97 natural monopolies, including utilities and 65 entities with a dominant position in their marketplace. From the competition point of view it is important to consider that more than 98 per cent of the Mongolian companies are SMEs. This provides a substantial influence on the possibility and scope of anti-trust violations, the volume of commerce affected and remedies sought.

## **2. THE LEGAL FRAMEWORK: THE LAW ON COMPETITION**

11. The competition legislation is rooted in the Constitution of Mongolia that provides that the national economy is “based on different forms of property consistent with universal trends of economic development...” thus implicitly acknowledging competition as part of universally recognized principles and conditions for successful economic development. However, the “country’s own specifics” are also indicated in the Constitution as a basic component of national economic development. At the same time the Constitution includes some limitations for the development of competition by limiting access of foreign nationals to land and subsoil, including natural resources and leaves a possibility of foreign entry in the relevant markets, although under less advantageous conditions compared to national companies.

12. The Mongolian competition legislation includes a set of laws among which the Law on Competition is the most important. It comprises five chapters with 28 articles including the most important aspects of safeguarding competition, such as provisions against cartels, unilateral abuses of dominant position, merger review, powers of the Competition Agency and its staff members, control of natural monopolies, public procurement.

### **A. Anti-competitive agreements**

13. Article 11.1 provides sufficient legal basis for anti-cartel enforcement. Articles 11.1.1 and 11.1.2 provide for a per se prohibition of horizontal agreements among competitors, such as price fixing and market allocation by territory, type of product/service and customers. Article 11.1.4 provides for the per se prohibition of bid-rigging in public procurement.

14. Meanwhile, article 11.2 seems to suggest the application of the term “cartel” both to horizontal and vertical agreements. The effects-based approach is used for the treatment of both horizontal (cartels) and vertical agreements by prohibiting them in situations “.. where they contradict the public interests or create

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circumstances restricting the competition...”<sup>3</sup> (sic). This controversy may lead to enforcement problems, particularly by leaving the alleged cartelists a possibility to defend their conduct by using effects-based defences. It is important to clarify the meaning of the terms definitions used in the Law.

## **B. Definition of the relevant market**

15. The relevant market is defined as “a territory on which a supply and sale of a certain product proceed...”<sup>4</sup> (sic). For the moment, this definitions looks suitable for competition enforcement in the country because of its focus on such characteristics of the market as territory.

## **C. Abuse of dominance**

16. Article 5.2 of the Law provides for the definition of a dominant position of a business entity based on market share: “A business entity shall be considered as having a dominant position where it ... occupies one third or more percent of the production and sale.” (sic)<sup>5</sup> This provision can be interpreted as an irrefutable presumption of dominance of an entity which market share exceeds the threshold indicated in this article. In addition, article 5.3 provides for the possibility of establishing a dominant position of an entity with a lower market share if it is “capable of constraining the conditions for other business entities to enter the market or forcing them out of the market ...” (sic).<sup>6</sup>

17. The use of this definition may run the risk of over-enforcement because it lacks some important qualitative characteristics such as the extent to which such prices can exceed competitive levels and the maintainability of such prices, the sustainability of dominance and entry/expansion possibilities.

18. Apart from a rather limited exception in article 7.1.3 of price discrimination that can be justified by differences in transportation costs in different locations, wholesale discounts and refusal to deal, unilateral abuse of dominance seems to be treated as a per se violation. Taking into account the fact that competition law enforcement is relatively recent in Mongolia this approach may work on a temporary basis since it is important for the enforcement authorities to eliminate the most evident and harmful unilateral violations by establishing themselves and applying the necessary sanctions and remedies. However, in the longer term, the per se violation approach may run the risk of over-deterrence particularly in the context of vertical restraints.

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<sup>3</sup> *The 2010 Law on Competition, Article 11.1.*

<sup>4</sup> *The 2010 Law on Competition, Article 4.1.2.*

<sup>5</sup> *The 2010 Law on Competition, Article 5.2.*

<sup>6</sup> *The 2010 Law on Competition, Article 5.3.*

## **D. Mergers and acquisitions**

19. According to article 8.1 dominant business entities should submit an application to AFCCP in situations where they are restructuring by means of mergers and/or acquisitions, purchasing 20 per cent of common or 15 per cent of preferred stock in a company competing in the relevant product market, or merging with “related business entities”

20. Articles 8.1 to 8.3 give AFCCP powers to review and authorise mergers and acquisitions. The Law leaves a possibility for behavioural remedies after the merger is implemented but does not provide for structural remedies. The lack of powers to request structural remedies from merging parties and the restriction of powers of the Agency to either approve or block mergers limit the opportunities for AFCCP to clear potentially pro-competitive mergers subject to structural remedies.

## **E. Procedural issues**

Investigations normally include the following steps:

- (a) Receipt of a complaint or start of a planned or ex-officio investigation;
- (b) Assignment of an inspector to the case by the Agency;
- (c) Preparation of the terms of reference for the inspector;
- (d) Gathering of materials by the inspector;
- (e) Preparation of the decision on the case by the inspector (cease and desist and financial penalty);
- (f) Report of the inspector to the Agency and approval of the inspector’s findings by his superiors.

21. If a violator repeats a practice the inspector can impose a higher fine. Fines are payable within 10 days after the Agency’s decision has been made official. If a fine is not paid the inspector who made the decision would apply to the court for the fine to be levied by the court. Where an entity disagrees with an inspector’s findings it is entitled to apply to AFCCP for revision of the decision within 30 days of the decision having been made. The application would then be considered by the director of the department where the inspector works. If the director upholds the inspector’s findings the entity has a right to apply to a higher level of the Agency’s hierarchy and the AFCCP Board and the Chairman would then consider the application. If they turn down the application and, therefore uphold the position of the inspector and his departmental director, the entity has the right to bring the case to court. The Agency makes its decisions public. The efficiency of anti-trust enforcement in Mongolia is being reduced by the lack of written procedures.

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## **F. Sanctions**

22. The Law on Competition adopted in 2010 provides for an increase in fines of up to 6 per cent of the concerned products' sales revenue in the preceding year, in addition to confiscation of the illegal gains. The increase in the amount of fines substantially strengthened the role of AFCCP in deterring anti-trust violations and created incentives for potential violators to comply with the law. However, it is likely to result in more fierce resistance by the most persistent violators, and an increase in the number of challenges to the Agency's decisions in court.

23. The damages recovered go to the State treasury since the legislation does not provide explicitly for the possibility of private damage claims, although formally Mongolian physical and legal persons can apply to the Civil Court for anti-trust damages. The legislation encompasses a possibility of implementing a corporate leniency programme for the purposes of cartel investigations.

## **G. State aid**

24. State aid is provided when it is necessary for "establishing the proper level of demand and supply of products and ensuring the stability of consumers' well being on compensating the damages occurring from sudden or force majeure circumstances, overcoming the economic crisis and approving the main strategic products, including, names and types of strategic reserve products and materials which are declared by Parliament according to the State reserving law..." (sic).<sup>7</sup> Thus, the provision of State aid is limited to measures in response to crises of different origin and accumulation of strategic reserves of specified products. This approach seems to narrow the application of state aid for the purposes of economic development and technological progress compared to the EU legislation, for example.

25. Additionally to addressing core types of anti-competitive conduct mentioned above the Law on Competition also gives AFCCP powers to approve price rises by natural monopolies, State aid control, exemptions from competition legislation and other matters mentioned in this Overview.

## **3. INSTITUTIONAL ASPECTS: ENFORCEMENT STRUCTURES AND PRACTICES**

### **A. Competition policy institutions**

26. AFCCP is the government agency that is most directly engaged in competition law enforcement and policy implementation. Among other executive

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<sup>7</sup> Law on Competition 2010, article 13.3

and judicial bodies alongside NGOs having substantial influence on the state of competition in the country, the following institutions are the most important:

- (a) National Development and Innovation Commission;
- (b) National Oil and Gas Association;
- (c) Civil Courts and Administrative Court of the Capital City;
- (d) Communications Regulatory Commission;
- (e) Ministry of Food and Agriculture;
- (f) State Property Commission;
- (g) SME Support Agency;
- (h) Chamber of Commerce;
- (i) Association of Mongolian Consumers.

## **B. Institutional framework and operations of AFCCP**

### **1. Institutional set-up of AFCCP**

27. According to the Law, AFCCP is an independent agency. However, in practice the Agency substantially depends on the Government. The Head of the Agency can be appointed and dismissed by Government decision. AFCCP is subordinated directly to the First Deputy Prime Minister. The lack of independence of the Agency from the Government leads to substantial difficulties in competition law enforcement, particularly due to appointments at AFCCP remaining unfilled.

28. According to the Law on Competition AFCCP is a Board or Commission that governs the work of the Competition Agency. However, the Agency itself is also called AFCCP. To delineate between this governance body and the competition Agency as a whole, the term “AFCCP Regulatory Board” is used to define the governance body and “AFCCP” to refer to the Mongolian Competition Agency as a Government agency.

AFCCP has a three-layer management structure comprising the following bodies:

- (a) The Regulatory Board is the highest governance body within the Agency responsible for making decisions of strategic and political significance
- (b) The Board of Directors is the executive body responsible for planning and controlling AFCCP’s operations. The Board of Directors does not have a formal status. It is composed of the Directors of AFCCP Departments who meet periodically to take executive decisions on a collegial basis. The decisions are then approved by the Chairman of AFCCP
- (c) Departments responsible for the performance of particular functions of AFCCP.

### **AFCCP Regulatory Board**

29. The Regulatory Board is comprised of the Chairman and eight members, two

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of which are staff and six are non-staff members. The Prime Minister nominates the Chairman, the two staff members and three non-staff members, while the remaining three members are nominated by the National Chamber of Commerce and Industry, the Mongolian trade unions body and the NGO engaged in protection of consumer rights for a period of four years renewable for another four years. All the members are to be appointed by the Government. Decisions are made by majority voting, and the Chairman of the Agency has the authority to resolve matters in cases where the vote is split evenly. A Board meeting is considered quorate if the majority of the members attend. Meeting decisions are issued in the form of resolutions.<sup>8</sup>

30. The Regulatory Board has the power to make decisions that are crucial for efficient competition law enforcement and policy development, including:

- (a) Approval of competition policy documents to be sent to the Government;
- (b) Preparation of comments and proposals to the Government on competition and consumer protection law and policies;
- (c) Setting the Agency's enforcement and competition policy priorities;
- (d) Definition of the relevant market and establishment of dominant position;
- (e) Monitoring competition law enforcement and prices;
- (f) Resolving disputes between inspectors and violators.

31. Draft documents are prepared by AFCCP staff members and directors of departments and submitted to the Regulatory Board.

32. The members of the AFCCP Regulatory Board were appointed by the Government at the end of February 2012. They need additional training in competition policy and law for the Regulatory Board to start operating at full strength.

### **AFCCP Board of Directors**

33. Decisions at executive level are taken by the Board of Directors comprising the Agency Chairman, Vice-Chairman and directors of four departments. The Board of Directors is responsible for the planning and control of investigations. It also serves as an instance a defendant can apply to in case he disagrees with the decision made by the State inspector and the department the inspector works in. Formally, the Board of Directors oversees the preparation of AFCCP legal initiatives; market studies reports and competition policy documents prior to their submission to the Regulatory Board.

### **AFCCP inspectors and departments**

34. Cases are handled by State inspectors ranked as general State inspectors, senior State inspectors, State inspectors and regional State inspectors. The

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<sup>8</sup> Article 16 of the Law on Competition, 2010.

Chairman of the Agency has the rank of general State inspector and has the authority to appoint or dismiss senior State inspectors and State inspectors. The inspectors have the authority both to carry out investigations and to make determinations on sanctions against violators. AFCCP departments are structured by function. AFCCP has the following departments:

- (a) Public Administration;
- (b) Law, Inspection and Regulation;
- (c) Consumer Protection;
- (d) International Cooperation;
- (e) Market Studies.

## **2. Agency resources, case-load and personnel incentives**

35. In 2011 the AFCCP budget amounted to Tog 427 million (about \$310,000) of which Tog 211 million (about \$150,000) was allocated for staff salaries. Staff salaries vary from \$150 to \$600 per month. AFCCP has 33 staff members, all of whom are located at the central office. In December 2011, 21 inspectors received authority to conduct inspections in 21 provinces of Mongolia and proceeded to take up their work there. The caseload of the Agency has grown constantly between 2005 and 2010. Currently, the number of cases is more than twice the total number of staff members, while the number of companies inspected is more than seven times the number of Agency employees.

36. The case-load is determined by the number of complaints of antitrust violations received by the Agency and also by the Agency's annual work plan. At the beginning of every year, AFCCP drafts its annual work plan based on statistics on former offences, repeated offences and former violations. The plan is broken down into sectors. Once approved the plan becomes the yearly programme of the Agency's ex-officio investigations. The reactive rather than proactive mode of initiating cases is mainly due to the lack of Agency resources for conducting market studies and the resulting inability to detect new competition problems on its own.

37. In 2011 AFCCP conducted 198 investigations. Most of the investigations were related to unfair competition, abuses (mainly price rises) by natural monopolies and cartels. Of the total number of decisions made, 44 were related to restrictions of competition and the remainder to bid rigging. Ten staff members are assigned to oversee public procurement. In 2011 they examined 107 public procurement tender bids and annulled 43.7 per cent of them. Considerable Agency resources are allocated to consumer protection cases.

38. Obtaining evidence seems to be the major challenge for AFCCP investigations, especially in cartel cases. For confidentiality reasons other government agencies cannot provide AFCCP with information from private companies. AFCCP staff

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members indicate lack of experience in conducting investigations, dawn raids and collection of forensic evidence, as well as insufficient planning of investigations and too short a time for them provided for by law. Assistance by the police in conducting anti-cartel investigations is not possible due to the lack of necessary regulations, guidelines and experience. Nevertheless, the Agency has some limited experience of joint work with the police in consumer protection cases. There is no transfer of investigatory skills from professional investigatory agencies to AFCCP.

39. Personnel policy is regulated by the legislation governing the Civil Service. The AFCCP staff is very enthusiastic and dedicated to their work. Nevertheless, they need better understanding and appreciation of their work by all government agencies as well as strong government support for the Agency's activities. The staff needs implementation guidelines the adoption of which depends on the Government.

40. The staff is overworked. Yet, the salaries are quite low, up to three times lower than in some other agencies. Staff can develop their knowledge and skills using international sources and best practices. This requires good foreign language skills. Lack of relevant skills is a reason for most of the challenges to AFCCP decisions in court. A strong Agency profile in the media and better media coverage highlighting the role and activities of AFCCP would have an encouraging effect on the staff.

41. The AFCCP does not have a mechanism for keeping institutional memory in the agency, or an internal network for this. Therefore, it is recommended for AFCCP to develop a consistent policy for human relations, staff development, knowledge management and experience sharing.

### **3. AFCCP functions and investigatory powers**

42. The Agency's major function is the prosecution of unilateral and collective abuse of dominant position as well as merger reviews. In addition the Agency has the possibility to promote competition principles in the country by using its powers to regulate output and pricing policies by natural monopolies, as well as prohibiting them from abusing their monopoly position.<sup>9</sup>

43. The Agency's enforcement powers spread over all economic entities that it can inspect and obtain evidence from regardless of property type. If necessary AFCCP can involve professional investigators and officials of other government institutions in its own investigations.<sup>10</sup> In a situation where AFCCP detects a violation of competition law by decisions of the State, local government body or administrative institution it has the right to submit a proposal to a superior

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<sup>9</sup> Article 7.1 of Article 7 of the Law.

<sup>10</sup> Article 15.1.10 of the Law.



government body or administrative court for such a decision to be set aside.<sup>11</sup> AFCCP can initiate an investigation either upon a formal complaint by a plaintiff or ex-officio.

44. AFCCP has formal powers to establish the relevant market and dominant position of an entity. The Agency was not able to exercise these powers until recently since the Regulatory Board was only appointed in February 2012.

#### **4. AFCCP and the courts**

45. There are two categories of court claimants can apply to in Mongolia: the civil courts and the Administrative Court of the Capital City which is the only administrative court in the country that has the authority to consider claims against AFCCP actions. However, so far administrative courts have not considered the substantive aspects of cases. All the overruled decisions of the Agency have been turned down on procedural and not substantive grounds. Lack of skills and written procedures seem to be the major reasons for this.

### **C. Consumer protection**

46. The Mongolian legislation on consumer protection includes the Constitution of Mongolia, the Civil Code, and the Law of Mongolia on Consumer Protection and other legislation, including the Law on Competition. Mongolian consumers enjoy similar rights and privileges to consumers of more advanced jurisdictions with respect to consumer protection legislation and its enforcement. Additionally, the Law on Competition also addresses issues related to deceptive or discrediting advertising.

### **D. Competition and public procurement**

47. AFCCP was attributed powers to enforce national public procurement legislation, namely the Law of Mongolia on Procurement of Goods, Works and Services with State and Local Funds (hereafter “Public Procurement Law”) in conjunction with the Law on Competition. The Mongolian competition law includes provisions on bid rigging while the public procurement legislation provides general principles and procedures.

48. The Public Procurement Law favours an open-type tender procedure,<sup>12</sup> which can be conducted in one or two stages, depending on the complexity of the public order.<sup>13</sup> At the customer’s discretion a preliminary selection procedure can also be applied in cases where verification of potential suppliers’ qualifications is needed.<sup>14</sup>

<sup>11</sup> Article 15.1.7 of the Law.

<sup>12</sup> Articles 7.1, 7.2 and 8.2 of the Public Procurement Law.

<sup>13</sup> Articles 17 and 18 of the Public Procurement Law.

<sup>14</sup> Article 13 of the Public Procurement Law.

The Law also provides for a possibility of using other selection methods such as limited tender selection, the comparison method and direct contracting. However, the use of such procurement methods is clearly conditioned by a limited number of circumstances and cannot be used without meeting the criteria specified in Chapter Three of the Law, which are in line with similar international best practices.

49. Meanwhile the application of the open tender procedure is limited to purchases at prices higher than the market price. For efficiency purposes it is recommended that some changes be made in the Public Procurement Law, which would provide for a fairly established price cap for the starting price of the tender without limiting the bidders' possibility to suggest lower prices, provided that the technical specifications of the goods and services procured and the eligibility criteria for bidders are met. Moreover, the Law also includes some exemptions allowing Government customers to purchase directly from suppliers and not to use the tender procedure in cases where the quoted cost of goods or services is lower than the maximum price set by the Government.<sup>15</sup>

50. Another advantageous feature of the Public Procurement Law is that it encourages customers to divide the goods and services into smaller lots and gives suppliers an opportunity to bid for one or more lots.<sup>16</sup> This facilitates the participation of SMEs in public tender bids. Articles 9 and 10 of the Public Procurement Law encourage mainly the participation of domestic suppliers in government tender bids, although foreign entities also have the right to submit bids.

51. The Public Procurement Law does not provide for the possibility of announcing and submitting tender bids electronically and of electronic tendering for the placement of Government orders. Nevertheless, the Law does not seem to exclude this possibility.<sup>17</sup> It is recommended to amend the Law so as to encourage the broader use of electronic tender bids and public procurement e-trade spots.

## **E. International cooperation**

52. AFCCP is open to international cooperation in anti-trust enforcement matters, including "cooperating and sharing information with foreign and international organizations."<sup>18</sup> However, Mongolia has not yet entered into any cooperation agreements. In the absence of such agreements, such as mutual legal assistance agreements, AFCCP cannot request a foreign agency to obtain evidence on anticompetitive agreements or other practices affecting competition

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<sup>15</sup> Articles 7.3, 9.3 and 8.1.2 of the Public Procurement Law.

<sup>16</sup> Articles 8.6 – 8.9 of the Public Procurement Law.

<sup>17</sup> Articles 9.3, 21 and 23 of the Public Procurement Law.

<sup>18</sup> Article 15.1.14 of the Law on Competition.

in Mongolia, nor can it obtain confidential information from competition authorities that are legally bound to keep this information confidential. Nevertheless, AFCCP can still benefit from cooperation. Thus, it is recommended for AFCCP to seek the possibility of information exchange with foreign authorities for non-confidential information, including sharing of knowledge and technical assistance. Good grounds for this are provided by memorandums of understanding signed with some competition authorities, including the Federal Antimonopoly Service of Russia, the Turkish Competition Agency and the Swiss Competition Commission, and well-established relationships with the Korea Fair Trade Commission, the Japan Fair Trade Commission, as well as international organizations including UNCTAD and the Organization for Economic Cooperation and Development (OECD).

#### **4. LIMITS OF COMPETITION POLICY: EXEMPTIONS, SPECIAL REGULATORY REGIMES AND POLICY COHERENCE**

##### **A. Economy-wide exemptions and special treatment**

53. The Competition Legislation applies to the whole Mongolian economy with a limited number of exemptions in areas such as:

- (a) Intellectual property rights (IPR) and results of human intellectual activity protected by copyright legislation;
- (b) Government purchases of strategic products for national security and in cases of emergency, natural disaster and market failure in the trade of commodities vitally important for the subsistence of the population;
- (c) Price increases of the natural monopolies authorized by the relevant sector regulator. AFCCP is in charge of approving such increases.

##### **B. Sector-specific rules and exemptions**

54. Although AFCCP is responsible for enforcing competition legislation throughout the economy, in practice the implementation of competition principles in many important sectors of the economy remains the task of the relevant sector regulators. Generally, AFCCP has legal powers to monitor adherence to competition principles by sector regulators. However, due to the lack of expertise in specific industries and the influence of the sector regulators in the Government, the role of AFCCP in some sectors may be rather limited.

##### **C. Policy coherence**

55. The Mongolian Government's industrial policy is presented in its National Industrialization Plan. Besides pro-competitive or competition-neutral

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policies such as the creation and management of the SME support fund or the community development programme, the Plan provides for Government support to industrialization projects. The industrialization projects are supposed to be implemented by means of concessions, as well as some regional development projects, including the Southern Gobi development project. The Government has to support only a few companies in such areas and this contradicts competition principles. Therefore, it is recommended that AFCCP participates in the development of licensing rules, criteria of granting concessions, selection of companies for Government support in order to ensure adherence to competition principles as far as possible, achieving quasi-competitive welfare effects and granting equal terms of access to essential facilities and supplies.

## **5. MARKET STUDIES AND COMPETITION POLICY**

56. With the assistance of the United States Agency for International Development, AFCCP attempted two major market studies in the fuel supply and meat trade sectors that play a very important role in national economic development and the well-being of the majority of the country's population. Based on the latter criteria the choice of the market research targets seemed to be appropriate. In 2010, almost half of oil products were consumed by households, while 30 per cent was accounted for by the mining sector, which was the most important sector for economic development ensuring export income. The remaining consumption was split between railways (8 per cent), agriculture (7 per cent), public transportation (4 per cent) and civil air transportation (3 per cent).<sup>19</sup>

57. Similarly, the choice of the meat market as a research target looked fair considering the crucial role it played for the wellbeing of the majority of the Mongolian population. Meat products traditionally comprise a very large part of total household food consumption, on the demand side, while on the supply side the proceeds from meat sales are vital for the survival of a significant part of the population in the country.

58. Both market studies pursued multiple goals related to both effective competition law enforcement and competition advocacy and policy development. Achieving these goals required better understanding of the functioning of the respective markets, which AFCCP considered to be the most valuable contribution of these market studies.

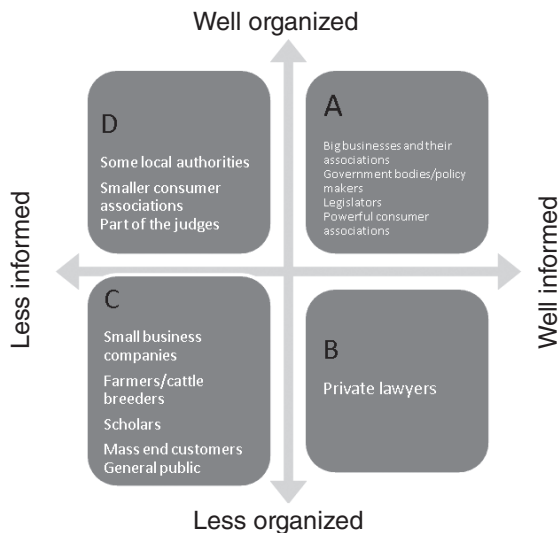
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<sup>19</sup> Agency for Fair Competition and Consumer Protection. *Market Study on fuel distribution: gasoline, diesel and jet fuel. First report: relevant markets and areas of concern for the competition, June 2011, Ulaanbaatar, Mongolia*, p. 8.

## 6. COMPETITION ADVOCACY

59. Present day Mongolian society includes numerous social groups that can be considered as actual or potential stakeholders in competition enforcement and policy development. The type of competition advocacy message advanced by AFCCP substantially depends on the characteristics of the stakeholders classified below in terms of their understanding of competition policy issues and their ability to support or oppose particular initiatives related to competition.

**Chart Classification of the stakeholders of competition enforcement and policy development in Mongolia.**



60. The stakeholders represented in quadrant A of the chart above constitute the most important target for competition advocacy. The proponents of competition policy in Mongolia have to consider the dual character of businesses' attitude to competition favouring it when they act as intermediate consumers of production goods or feel affected by restrictive practices, while tending to limit competition when obtaining an individual or/and collective dominant position in the market.

61. Compared to stakeholders included in quadrant A, the private sector lawyers comprising quadrant B have much less influence on the competition law enforcement process and the development of competition legislation and policies contrary to their colleagues in developed anti-trust jurisdictions.

62. Quadrant C generally reflects the state of competition culture in the country. Potential victims of anti-trust violations, such as consumers, small and medium entrepreneurs and farmers are dispersed, generally not organized and do not seem to be aware of the possibilities of using anti-trust legislation and applying for legal protection to the Government when confronted with anti-competitive practices affecting them. They are complemented to by dispersed anti-trust scholars and teachers who are very limited in number.

63. Quadrant D comprises an eclectic multitude of stakeholders who are relatively well organized by virtue of their professional or organizational affiliations. Although this category of stakeholder can exercise some political pressure in the course of the consideration of competition policies by the Parliament or the Government, they are not likely to have sufficient skills to be able to propose a coherent competition policy either for a sector, a region or nationwide. However, they can be considered as potential allies of AFCCP in their efforts in advocating for competition and introducing competition principles in other public policies. Amongst the quadrant D category of stakeholders, judges comprise an especially important part by virtue of their involvement in the competition law enforcement process.

64. To ensure effective competition advocacy with all of the above-mentioned categories of stakeholders it is important to develop a public relations policy in the Agency and appoint an officer responsible for its implementation. Relations with the media would require specific skills as well as a professional understanding of Agency policies, substantive issues of anti-trust analysis, and the ability to explain the link between competition and consumer welfare. Staff members should have sufficient skills to talk to the media and adhere to the agency media relations and information disclosure policies to be developed by AFCCP.

## **7. FINDINGS AND POLICY RECOMMENDATIONS**

### **A. Findings**

65. It is most important to provide training for and improve the proficiency of AFCCP Regulatory Board Members in anti-trust matters because of the central role of the Board in the implementation of competition law enforcement and policies. Priority should be given to this area.

66. Secondly, there is a need to improve and develop the skills of the staff and institutional capacities of AFCCP to deal with more sophisticated competition cases.

67. There is a need to improve Mongolian competition legislation, particularly by developing implementation guidelines and regulations for the implementation of said legislation. As AFCCP staff and other stakeholders' skills in considering anti-

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trust cases increase, amendments to the anti-trust law enabling broader use of an effects-based approach to unilateral violations may be needed.

68. The skills and capacities of AFCCP in designing and advocating policies to develop markets and facilitate competition need to be improved.

69. There is a need to improve the competition culture in the country by increasing the number of lawyers capable of handling anti-trust cases as well as by creating an appropriate legal framework for the award of anti-trust damages to private parties and for class actions to be brought by dispersed victims of anti-trust violations. It is also necessary to raise the awareness of various categories of stakeholders to apply for legal protection of their interests when confronted with monopolistic practices.

70. AFCCP needs better mechanisms for setting priorities for Agency enforcement and competition policy.

71. AFCCP and other stakeholders of anti-trust enforcement and policy development need training in the basics of anti-trust law and economics.

72. It is important to improve the image and visibility of AFCCP by implementing an effective public relations policy and establishing relations with the media. The Agency's capacities in public relations need to be increased.

73. Improvement of the State aid regulation and raising of awareness of State aid principles among other Government agencies would seem to be potentially very useful for achieving Government economic and social goals.

74. Public procurement rules and procedures need improvement aimed at ensuring greater competitiveness, including the use of electronic bidding.

75. There are considerable overlaps between AFCCP and sector regulators, so there is a need to provide for more distinct separation of responsibilities and coordination, especially in such sectors as public procurement, natural monopolies and dominant companies.

76. These needs can be addressed separately or through the National Programme of Competition Development.

## **B. Recommendations**

### **1. Institutional arrangements**

77. It is strongly recommended that the AFCCP Regulatory Board starts its operations at full strength, since enforcement actions and competition policy suggestions by the Agency do not have sufficient legal weight without it.

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78. Greater actual independence of AFCCP from the rest of the Government in prioritizing its enforcement actions and preparation of competition law and policy initiatives needs to be ensured.

79. The development of private lawyers specializing in anti-trust matters needs to be facilitated by creating the relevant professional associations, for example. Provision for the possibility at law to submit private claims for damages to a court could facilitate the development of private lawyers specialized in anti-trust matters.

80. Sufficient courses in anti-trust law and economics for anti-trust law enforcement practitioners need to be developed.

## **2. Improvement of competition legislation and policies**

81. Consider improvement of the English translation of the “Law on Competition” to make it clearer and more understandable for foreign investors, other stakeholders and foreign experts and international organizations.

### **Dominance assessment**

82. It is recommended to consider a possibility of using qualitative dominance assessment criteria in addition to market share-based thresholds, like entry/expansion possibilities, state of the market and sustainability of dominance in order to avoid over-enforcement and save the limited resources of AFCCP and finally to prepare guidelines on market definition and dominance assessment.

### **Cartels and anti-competitive agreements**

83. Consideration should be given to the possibility of amending the current Law on Competition to make a more definite distinction between horizontal (cartels) and vertical anti-competitive agreements. It is recommended to emphasize the per se illegality of cartel agreements in the Law and avoid a language that can be understood as a possibility of an effects-based treatment of cartels. Indicate the applicability of the corporate leniency programme provided for by the Law to cartel cases only and specify more clearly the terms for granting leniency depending on the agency’s awareness of the cartel violation, the stage of investigation, the participation of the leniency applicant in the cartel agreement and the type of evidence submitted by the applicant.

### **Unilateral abuses of dominant position**

84. There is a need for clarification of what is meant by the term “supervision” of dominant entities provided for in article 15.1.6 of the Law on Competition and how this supervision should be implemented in the Law or in Agency guidelines.

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85. It is recommended to gradually introduce and increase the use of the effects-based approach in the consideration of vertical restraints to competition depending on development of skills and improvement of the institutional framework of the competition law enforcement system. It would appear expedient to consider these factors in their interrelationship while developing the “National programme on supporting the market competition.” This programme development leaves broad possibilities for coordinated efforts by international donor organizations aimed at training and capacity-building of stakeholders involved in the consideration of unilateral abuses in Mongolia.

### **Merger review**

86. Introduce provisions for merger remedies, including structural remedies in the Law on Competition and develop merger guidelines which are provided for under the Law. The guidelines should include instructions on the use of remedies for the possible anti-competitive effects of a merger. It is also recommended to provide training in merger review to AFCCP staff members and then leave behind the necessary training and reference materials in Mongolian.

### **Sanctions**

87. Consider the introduction of more substantial penalties for impediments to inspections.

88. Introduce more effective legal provisions for collecting fines and the involvement of financial authorities in this process to the extent necessary.

### **Damage recoupment**

89. Consider the introduction of a legal possibility for recovering anti-trust damages by injured parties, as well as the development of a legal framework for class actions in the interests of numerous, dispersed and unorganized victims of anti-trust violations. Advertise a possibility of anti-trust damage recoupment to businesses, consumers and NGOs engaged in consumer protection

### **Investigation procedures**

90. It is recommended to develop guidelines on AFCCP anti-trust investigation procedures.

### **State aid control**

91. Consider a possibility of further developing competition legislation provisions related to State aid control. For the moment the possibility of State aid provision is limited to reactive measures to a variety of crisis situations including the stockpiling

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of strategic reserves of specified commodities. Taking into account the ambitious development and industrialization programmes pursued by the Mongolian Government it is important to develop legal provisions to ensure transparent and competitive State aid allocation for industrialization and regional development.

### **Public procurement**

92. The application of the open tender procedure is currently limited to purchases at prices higher than those that can be found on the open market. It is recommended that changes be made to the Public Procurement Law to provide for a fairly established price cap for the starting price of a tender without limiting the bidders' possibility to suggest lower prices, provided that the technical specifications of the goods and services procured and the eligibility criteria for the bidders are met.

93. Better coordination between agencies and with the Competition Agency for the purposes of meeting their procurement needs and ensuring adherence to competition principles is also desirable.

94. It is also recommended to provide for a legal possibility of electronic bidding for Government orders as well as to develop a pilot version and beta testing of an Internet-based electronic public procurement web site and train potential users.

### **3. Enforcement**

95. Consider the possibility of introducing amendments to the Law on Competition enabling the extension of time periods for anti-trust cases.

### **4. Sector regulation**

96. It is important to improve coordination between the Competition Agency and sector regulators and provide a legal delineation between the responsibilities of the Competition Agency and sector regulators in the sectors where they are present (e.g. telecommunications, electricity, and air transport) by means of introducing necessary amendments in the competition legislation and sector regulations. Taking into account the greater expertise of sector regulators in technical matters, AFCCP should focus on adherence to competition principles when sector regulators are licensing market participants, including control over equal access to markets and essential facilities and adherence to cost benchmarks in order to avoid customers being overcharged by market participants. However, price regulation itself should not be a direct concern of the Competition Agency. AFCCP is also encouraged to advocate competition principles and the introduction of pro-competitive modes of trade with sector regulators in the course of the liberalization and privatization of State-controlled entities.

97. Regulated and non-regulated sectors should be clearly defined and listed. Sectoral industrial associations should not have powers to coordinate prices/outputs/

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market allocation policies by suppliers. The Mongolian Government should not authorize or even consider suggestions by industrial associations on pricing. The development of sectoral competition policies, including government measures aimed at creating infrastructure and essential facilities for fostering competition, should be considered.

## **5. Competition in specific sectors**

### **Oil products sector**

98. Exclude the possibility of joint determination of prices for oil products by their traders (through their association) and the Government. The Government is recommended to choose between the introduction of Government regulation of prices, sales, technical standards, etc., in the oil products sector or the application of the competition legislation to it to the fullest extent, including the structural separation of the companies which persistently violate the competition law. The creation of a commodity exchange, including an e-trade facility and futures trade may facilitate competitive trade in the sector. It is also recommended to consider unbundling the wholesale and retail trade in oil products.

99. In the oil products sector a Government programme on facilitating the national oil refinery business in Mongolia would be extremely desirable to bring about more competition in the fuel trade.

100. It is also recommended for AFCCP to examine possibilities for detailed research into the reasons for the high cost of aviation kerosene in Mongolia with a view to considering a subsequent competition law enforcement action in the aviation kerosene market. In addition to that AFCCP can consider the planning and development of a competition advocacy programme aimed at persuading Government stakeholders to build a national oil refinery facility for the production of aviation kerosene for sale in the domestic market and based on the national oil deposits in Mongolia.

### **Trade in traditional products**

101. With a view to limiting exploitative behaviour by market intermediaries, introduce electronic Internet-based commodity exchanges for trading in traditional Mongolian agricultural and cattle-breeding products and provide training for potential users.

## **6. Competition and State-controlled enterprises**

102. It is recommended that AFCCP work jointly with the State Property Commission on projects for the further privatization and liberalization of entities controlled by the State. Major aspects to focus on are:

- (a) Avoid replacing State monopolies with private monopolies;
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- (b) Ensure reasonable unbundling of State-owned companies to enable competition;
- (c) Provide equal access to essential supplies and facilities;
- (d) Make a proper choice between anti-trust law enforcement and State control over prices and production, if necessary.

### **7. Policy coherence**

103. Considering the ambitious development programmes pursued by the Mongolian Government, it is important to strike a proper balance between industrial and regional development policies and safeguarding market competition. It is recommended that AFCCP participate in the development of licensing rules, criteria for granting concessions and the selection of companies for Government support.

### **8. International cooperation**

104. Improve AFCCP awareness of the possibilities of obtaining information from foreign competition authorities and international organizations engaged in cooperation work for the purposes of anti-trust law enforcement in Mongolia;

105. It is recommended that AFCCP participate in international forums, such as the International Competition Network, OECD, and UNCTAD, where competition issues are discussed and use this opportunity to exchange ideas and benefit from other jurisdictions' experiences in competition law enforcement;

106. Seek the signing of international legal assistance agreements providing foreign authorities with powers to compel evidence in violations in Mongolia on behalf of AFCCP. Prepare legal provisions on the confidentiality of information received from foreign authorities as a first step.

### **9. Competition advocacy**

107. Undertake to improve the Competition Agency's image and reputation among different categories of stakeholders involved in the competition law enforcement process and policy development. Develop the media relations policy and conduct personnel training for this purpose. Arrange for periodical updates on competition law enforcement and policy development and an Agency web site containing legal foundations, guidelines on specific anti-trust enforcement issues, updates on cases being considered, sanctions, discussion documents on competition policy issues.

### **10. Capacity-building**

108. It is recommended that AFCCP develop consistent human relations, knowledge management and experience-sharing capacities.

109. Create conditions for better coordination between AFCCP and the police in obtaining evidence, especially on cartel agreements and conducting dawn raids.

110. Improvement of the coordination of the Competition Agency with other government agencies is essential.

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