



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

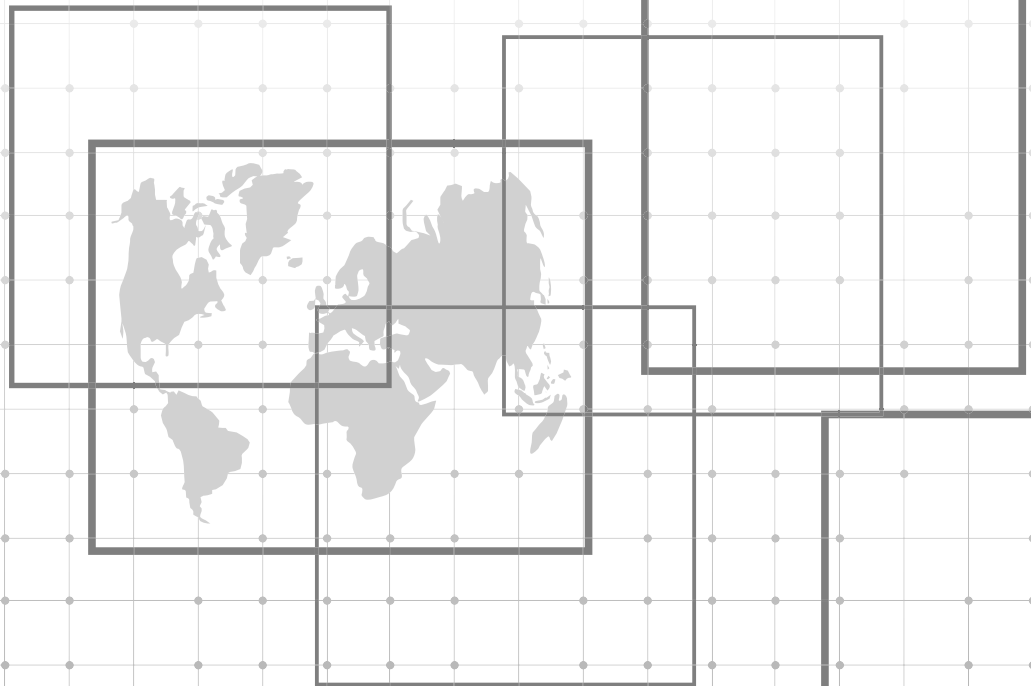
SEYCHELLES





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This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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This review was prepared for UNCTAD by Alex Kububa and Carl Buik. The substantive backstopping and review of the report was the responsibility of Hassan Qaqaya. UNCTAD would like to acknowledge the valuable assistance provided by George Tirant, Chief Executive Officer of the Fair Trading Commission of Seychelles. UNCTAD would also like to acknowledge the commissioners and staff of the Commission who contributed during the preparation of this report, as well as all the representatives of different public and private sector institutions who were interviewed.

LIST OF ABBREVIATIONS

CCC	COMESA Competition Commission
CCPOLC	Competition and Consumer Policy and Law Committee
COMESA	Common Market for Eastern and Southern Africa
EEMZ	Exclusive Economic Maritime Zone
FTC	Fair Trading Commission
IPRs	intellectual property rights
ICN	International Competition Network
ICPEN	International Consumer Protection Enforcement Network
IMF	International Monetary Fund
GDP	gross domestic product
NATCOF	National Consumer Forum
OFC	Offshore Financial Centre
PUC	Public Utilities Corporation
PPP	purchasing power parity
SADC	Southern African Development Community
SCCI	Seychelles Chamber of Commerce and Industry
SENPA	Seychelles Enterprise Promotion Agency
SFA	Seychelles Fishing Authority
SBS	Seychelles Bureau of Standards
SIB	Seychelles Investment Board
SIBA	Seychelles International Business Authority
SLA	Seychelles Licensing Authority
SMB	Seychelles Marketing Board
SPTC	Seychelles Public Transport Corporation
SRC	Seychelles Revenue Commission
SSDS	Seychelles Sustainable Development Strategy
STC	Seychelles Trading Company
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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PREFACE

This report was prepared following a review of the competition and consumer protection laws of Seychelles.¹ These laws are the Fair Competition Act 2009, the Consumer Protection Act 2010 and the Fair Trading Commission Act 2009. This report was prepared by Alex Kububa and Carl Buik following a request by the Government of Seychelles to UNCTAD. The review consisted of preparatory research, interviews with key stakeholders in Seychelles and subsequent correspondence.

A draft of this report was commented on by the Fair Trading Commission and UNCTAD in December 2012 prior to its finalization and submission in January 2013. The reviewers examined the legislation for internal coherence and compared them to other national laws and authorities. Stakeholders alerted the reviewers to their assessments of the laws and the Commission's performance and to country-relevant conditions.

Part One Socioeconomic background

Seychelles consists of an archipelago of about 115 islands in the Indian Ocean northeast of the island of Madagascar off the coast of the African continent. The population of Seychelles is approximately 89,188 (2011 estimate)², and its capital and largest city is Victoria.

Seychelles is one of the highest achieving territories in Africa in terms of gross domestic product (GDP) per capita (US\$9,440.095 at real exchange rates and US\$17,560.062 at purchasing power parity (PPP), 2008 estimate).³ According to The Heritage Foundation's economic freedom research, the GDP of Seychelles (PPP) in 2012 was US\$2.1 billion, with an annual growth of 6.2 per cent, and inflation (CPI) was -2.4 per cent.⁴

Historically, the economy of Seychelles was based on plantations with cinnamon, vanilla and copra as the chief exports. In 1971, with the opening of the international airport on the island of Mahé, tourism became the dominant industry. In Seychelles, the marine ecosystem and the low-lying coastal belts are the backbone of the islands' socioeconomic development. As such, industrial fishing, notably tuna fishing, is an important foreign exchange earner.

Having gained independence from the United Kingdom of Great Britain and Northern Ireland in 1976, Seychelles became a one-party socialist State. The Government of Seychelles has moved to reduce the dependence on tourism by promoting the development of farming, fishing and small-scale manufacturing. However, despite attempts to improve its agricultural base and emphasize locally manufactured products and indigenous materials, Seychelles continues to import 90 per cent of what it consumes.

Imports of all kinds used to be controlled by Seychelles Marketing Board (SMB), a government parastatal that used to operate all the major supermarkets and was the distributor and licensor of most other imports.⁵ However, the breakup of the SMB began in 2006 as a result of the liberalization of domestic trade under the International Monetary Fund (IMF) structural adjustment programme. As noted by the Director General of the Trade Division of the Ministry of Finance, Trade and Investment during the fact-finding visit to Seychelles, this dissolution was one of the triggers for the establishment of a competition authority to regulate competition among privatized companies.

¹ All findings detailed in this Voluntary Peer Review were current at the time of the fact-finding visit to Seychelles.

² HighBeam Research, available at <http://www.infoplease.com/ipa/A0107955.html>.

³ Wikipedia, 2014, available at http://en.wikipedia.org/wiki/Economy_of_Seychelles.

⁴ Ibid.

⁵ Ibid.

In an attempt to reduce this vulnerability, approximately 30 parastatal companies were created covering all sectors of the economy in the mid-1980s. As a result, State-owned and parastatal enterprises have come to account for more than half of the GDP of Seychelles and two thirds of formal employment.⁶

In addition to the ongoing emphasis on developing the tourism and building/real estate markets, the Government of Seychelles has renewed its commitment to developing its financial services sector. The passage of a revised Mutual Fund Act 2007, Securities Act 2007, and Insurance Act 2007 are meant to be the catalyst to move Seychelles from just another offshore jurisdiction to a full-fledged Offshore Financial Centre (OFC).⁷ Furthermore, boasting of its good quality telecommunications system, its privatization of the Port of Victoria in 1994, and new regulations to encourage the private sector, specifically the legal environment for investment, Seychelles is promoting itself as an international business centre.⁸

The Government of Seychelles has detailed its economic development targets in successive five-year plans.⁹ The plan for 1985–1989 emphasized tourism, agriculture and fisheries. It proposed to improve the balance of payments by achieving 60 per cent self-sufficiency in food and by stimulating tourism. Improved productivity, increased exports and a lowering of the unemployment level were additional aims. The 1990–1994 plan stressed the need to attract foreign investment and the need for greater food self-sufficiency. Seychelles has recently prepared the new Seychelles Sustainable Development Strategy (SSDS) 2011–2020, and a new National Development Plan will be prepared over the course of 2012.¹⁰

The Seychelles 2017 Strategy lays out key elements towards the economic development of the country. In the foreword to the Strategy document, the President's keynote statement states: "Seychelles' strategy for 2017 provides a template for sustained growth through a strategic positioning of Government as facilitator. Wealth creation which will benefit the whole population is at the heart of this approach."

Part Two Current legislation on competition and consumer protection

The FTC was established under the Fair Trading Commission Act 2009 and primarily administers the Fair Competition Act 2009 and the Consumer Protection Act 2010. The Commission may also enforce any written laws relating to consumer protection and fair competition and other written law that it has jurisdiction to administer.

⁶ Available at <http://unfccc.int/resource/ccsites/seychell/backgrnd/index.htm>.

⁷ Ibid.

⁸ Available at <http://motherearthtravel.com/seychelles/history.htm>.

⁹ Photis Coutsoukis, Seychelles Economic Development, available at http://www.photius.com/countries/seychelles/economy/seychelles_economy_economic_development.html.

¹⁰ African Economic Outlook, Seychelles, available at <http://www.afrianeconomicoutlook.org/en/countries/east-africa/seychelles>.

I. FAIR TRADING COMMISSION ACT

The preamble to the Fair Trading Commission Act 2009 of Seychelles (FTC Act 2009) states: "An Act to provide for the establishment of a Fair Trading Commission, to safeguard the interests of consumers, to monitor and investigate the conduct of business enterprises, to promote and maintain effective competition in the economy, and to provide for matters connected therewith." The establishment of a Fair Trading Commission (FTC) under the Act is therefore related not only to enforcement of the country's competition law but also to consumer protection law.

A. Preliminary

This part gives the short title of the Act, which is provided for in section 1 of the Act as the Fair Trading Commission Act 2009. Section 2 provides for the interpretation of up to ten terms used in the Act, including the terms board, commissioner and tribunal, for the common understanding of the provisions of the Act.

B. Fair Trading Commission

Section 3 of the Fair Trading Commission Act establishes the FTC as a body corporate. The import of establishing the FTC as a body corporate is that the Commission is capable of suing and being sued in its corporate name and of performing all acts that a body corporate may by law perform.

The functions of the FTC in section 4(1) of the Act are "to enforce any written laws relating to consumer protection, fair competition and other written law which it has jurisdiction to administer". In carrying out its functions, the Commission is required in section 4(2) of the Act to promote efficiency and competitiveness among business enterprises, and also to improve the standards of service, quality of goods distributed and services supplied by business enterprises. This formulation implies a pre-eminent role for the FTC as the national champion of competition and consumer protection policy and law.

The FTC has wide ranging powers under section 4(3) of the Act for the performance of its functions, including powers to:

- (a) Review commercial activities against consumer and business interests;
- (b) Prevent abuse of dominant positions, eliminate anti-competitive practices and prevent or control anti-competitive mergers;
- (c) Receive and evaluate consumer complaints;
- (d) Educate or assist consumers in resolving complaints;
- (e) Investigate restrictive business practices;
- (f) Monitor and determine standards of services.

Even though section 4(1) of the Fair Trading Commission Act implicitly gives the FTC primary responsibility over the enforcement of competition law in Seychelles as a regulator, the Government has also established a number of sector regulators, some of them with competition functions. Regulated sectors in Seychelles include the banking services sector, the communications services sector, the energy sector and the media services sector.

C. Staff of the Commission

The Chief Executive Officer of the FTC is appointed in terms of section 20 of the Fair Trading Commission Act by the President upon the advice of the Minister, and on terms and conditions as determined by the President. The functions of the Chief Executive Officer are provided for under section 21 of the Act as follows: "(a) responsible to the Commission for the administration of this Act, any written law relating to consumer protection, fair competition and other written law which it has jurisdiction to administer; and (b) responsible for the supervision of the staff and work of the Commission."

Besides the Chief Executive Officer, section 22 of the Act provides that the Commission should "employ such other members of staff as it considers necessary, on such terms and conditions as it considers fit". Section 23 of the Act further provides that "the members of staff employed under section 22 shall investigate such matters as are stipulated by the Chief Executive Officer and report their findings to him or her", thus confirming in the Chief Executive Officer's Secretariat the investigative functions of the Commission.

Section 24 of the Act gives the Commission powers of appointing or engaging persons having special or technical knowledge to assist it in the performance of its functions.

D. Finances of the Commission

Section 27 of the Fair Trading Commission Act provides that the funds of the FTC consist of “(a) moneys appropriated by the Appropriation Act and paid to the Commission; and (b) moneys lawfully charged by the Commission”, and that the Commission may apply the funds “(a) in payment of: (i) expenses incurred by the Commission in the performance of its functions; and (ii) such remuneration and allowances due to the Commissioners, the staff of the Commission and any experts retained by the Commission; and (b) to create any reserves determined by the Commission”.

E. Complaints to, investigations by and procedures before Commission

Part V of the Fair Trading Commission Act more or less replicates, with the inclusion of consumer protection complaints, the provisions of the Fair Competition Act related to the submission of restrictive business practices complaints, investigation of the complaints, and procedures followed by the Commission.

Section 32(2) of the Act, however, provides that “the Commission may decide not to investigate a complaint against an enterprise where in response to a complaint made directly to an enterprise, the complainant, in the opinion of the Commission, has obtained reasonable redress”. A decision not to investigate a complaint if the complainant has obtained reasonable redress may not be appropriate for competition complaints, most of which not only affect the direct complainants but other industry players as well. It has now been generally accepted that the role of competition law enforcement is not to protect individual competitors but to promote the whole process of competition. Therefore, competition authorities should be obliged to investigate competition complaints for the purposes of promoting competition in the market by preventing the abuse of dominant positions, or eliminating anti-competitive practices, unless “the complaint is trivial, frivolous or vexa-

tious” or “is not made in good faith” as provided for in section 32(1) of the Fair Trading Commission Act.

Even in a consumer case, if the complaint reveals a systemic problem, it should be pursued in the public interest. It would be a mistake for a consumer protection agency to narrow its approach to only obtaining a resolution for those few consumers who take the time and effort to complain. A more effective and efficient agency should always encourage its staff to “think big, think market-wide”. Furthermore, resolved cases build precedent and inform both businesses of their obligations and consumers of the protection delivered by active enforcement.

Box 1 Recommendation

It is therefore recommended that the provisions of section 32(2) of the Fair Trading Commission Act be deleted from the Act.

The investigative powers of the Commission are provided for under section 33 of the Act. Section 33(1) provides that “for the purpose of the performance of its functions under this Act or any written law that the Commission has jurisdiction to administer, the Commission shall have power: (a) to hold inquiries; (b) to administer oaths; (c) to summon and examine witnesses; (d) to compel the production of such books, records, papers and documents as it may consider necessary or proper for any proceeding, investigation or hearing held by it; (e) to examine any document produced; (f) to require that any document submitted to the Commission be verified by affidavit; (g) to seize documents; (h) to adjourn investigations; (i) to make test purchases; (j) to inspect goods; and (k) to do all necessary and proper acts in the lawful exercise of its powers or the performance of its functions”.

The Commission also has powers in terms of section 33(2) of the Act to hear oral evidence from a person who “(a) in its opinion will be able to furnish any information required by it; or (b) will be affected by an investigation or hearing”. The Commission also has powers in terms of section 33(4) to issue a summons “for the attendance of a witness or other persons or for the production of documents for the purpose of an investigation”.

Section 34 of the Act provides the Commission with search and seizure powers. Section 34(1) provides that “where during an investigation, the Commission has reasonable cause to suspect that: (a) an offence has been committed under this Act, any written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer; and (b) any book, document or article relating to the offence is being kept or concealed in a building or place; the Commission shall apply to a magistrate for a search warrant to search and seize that book, document or article”.

F. Hearings before the Commission

Section 38 of the Fair Trading Commission Act provides that “the Commission shall have exclusive jurisdiction to hear and determine matters under any written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer”. Again, this formulation implies a pre-eminent role for the FTC over competition and consumer protection matters.

Section 39(1) of the Act gives the Commission powers to conduct hearings into competition and consumer protection complaints. However, section 39(2) provides that “at a hearing before the Board in respect of a breach of any written law relating to consumer protection, fair competition or other written law which the Commission has jurisdiction to administer, the complainant is entitled to be heard in person or represented”. While these provisions are in line with the principles of natural justice that the Commission is obliged under section 41(2) of the Act to have regard to in formulating and issuing procedural rules that govern the conduct of hearings before it, the rules of natural justice include the need to take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter. In any competition case, and in many consumer protection cases as well, complainants are not the only ones whose interests are likely to be affected by the outcome of the investigation, but the respondents and other interested stakeholders are as well. The respondents and other interested parties should also be entitled to be heard in person or represented at the Commission’s hearings.

Box 2 Recommendation

It is therefore recommended that section 39(2) of the Fair Trading Commission Act be amended to entitle respondents and other interested parties in a competition or consumer protection case to also be heard at the Commission’s hearings.

G. Appeal Tribunal

Section 44 of the Fair Trading Commission Act establishes the Appeal Tribunal as a tribunal of record. Paragraph 2 of the schedule to the Act provides that the Tribunal consists of a Chairperson, who should be an attorney at law, and three other members who should have knowledge and experience in economics, business or consumer affairs. It also provides for the appointment of a secretary to the Tribunal.

Members of the Tribunal are appointed by the Minister responsible for trade in terms of paragraph 3 of the schedule to the Act, and hold office “for such term as is specified in the member’s instrument of appointment”. Paragraph 10 of the schedule to the Act provides that “a member of the Tribunal may hold that office concurrently with any other office”. These provisions recognize the situation in Seychelles, and in most other developing countries, which do not favour the establishment of a full-time specialist Tribunal because of resource constraints, in terms of both skills and finances.

Paragraph 15(1) of the schedule to the Act obliges the Tribunal to have regard to any direction concerning the policies of the Government given to it in writing by the Minister, but paragraph 15(2) provides that “the Minister shall not give a direction to the Tribunal in respect of an appeal before the Tribunal or a direction that would derogate from the duty of the Tribunal to act judicially”. The giving of governmental policy directions to the Tribunal should not be seen as unwarranted interference in the independence of the Tribunal, as long as the directions do not encroach on the Tribunal’s decision-making autonomy on specific cases. The implementation of competition policy must be in conformity with that of other socio-economic policies of the Government.

Paragraph 21 of the schedule to the Act provides that the Tribunal should decide on an appeal by

reference to the grounds of appeal set out in the notice of appeal and that, in disposing of an appeal, the Tribunal may do one or more of the following: “(a) confirm the determination appealed against; (b) quash that determination; (c) vary that determination; (d) remit the matter to the Commission for reconsideration and determination in accordance with the directions, if any, given to it by the Tribunal; (e) give the Commission directions for the purpose of giving effect to its decision.”

H. Appeal against a Tribunal decision

Section 45(1) of the Fair Trading Commission Act provides that a party aggrieved by a decision of the Tribunal may appeal against the decision to the Supreme Court of Seychelles. Section 46(1) provides that “on appeal, the Supreme Court may: (a) affirm, reverse, amend, alter an order or direction of the Tribunal; (b) remit the matter to be further determined by the Tribunal with its opinion on the matter; or (c) make such orders as it thinks fit”.

It is important to note that appeals against the decisions of the Tribunal cannot be used to unnecessarily delay the execution of the order or direction given. In this regard, section 47 of the Act provides that “an appeal shall not operate as a stay of an order or direction given by the Tribunal, except an order imposing a financial penalty on an enterprise”. However, the exception in respect of not operating as a stay of an order is worth noting as, to date, fines have been the primary sanction imposed by the Board of Commissioners.

I. Miscellaneous

The Fair Trading Commission Act gives the FTC some exemptions from liability. In this regard, section 48 provides that “any person performing functions under this Act shall be deemed to be a public officer for the purposes of the Public Officers (Protection) Act and of sections 372 and 373 of the Penal Code”.

However, in written representations to the consultants, the Senior Legal Officer in the Legal Department of the FTC stated: “other elements such as immunity of employees of the Commission are referred to in the Public Officers (Protection) Act. However, it would be beneficial if an immunity

clause for the staff of the Commission [were] included in the FTC Act.” Since the force of the Public Officers (Protection) Act is provided for, and enshrined, in the Fair Trading Commission Act, which covers the staff of the Commission engaged in both competition and consumer protection operations and activities, having a specific immunity clause for staff included in the FTC Act might be an unnecessary duplication, and could actually weaken the enforcement strength of the Public Officers (Protection) Act on staff of the Commission.

Sections 49 to 54 of the Act provide for the imposition of fines and penalties for: (a) obstruction of investigations by the Commission; (b) obstruction of execution of search warrants given to the Commission; (c) destruction or alteration of records that are required to be produced to the Commission; (d) giving of false or misleading information to the Commission; and (e) failure to comply with Commission directions or orders.

In most cases, the penalty is a fine not exceeding SR 100,000 or imprisonment for a term not exceeding two years or both. However, if the person is other than an individual in a case of destruction of records and failure to comply with Commission orders, the fine may be up to SR 400,000. Furthermore, section 54(1) of the Act provides that in the case of a continuing offence by an enterprise regarding non-compliance with an order of the Commission, a further fine of SR 10,000 “for each day or part thereof during which the offence continues” shall be imposed.

Section 54(2) of the Act further provides that “where it is proved that an enterprise has failed to obey an order of the Commission made under this Act, every director and officer of the enterprise is liable on conviction to a fine not exceeding [SR 100,000] or to imprisonment for a term not exceeding two years or to both, unless that individual proves that all necessary and proper means in his or her power were taken to obey and carry out the order of the Commission”.

Even though it is noted that the Secretariat has not reported any unresolved problems in respect of obstruction or failure to comply with Commission orders and that, to date, the Board has not imposed any fines or other penalties for failure

to comply with orders, the above penalties and fines under the Act were found not to be deterrent enough by the Parliamentary Committee on Finance and Public Accounts in consultations held during the fact-finding visit to Seychelles. Similar views were also expressed by the Attorney General and at the National Assembly of Seychelles.

Box 3 Recommendation

It is therefore recommended that fines provided for under the Fair Trading Commission Act for breach of the Act be made more deterrent. In some competition and consumer protection jurisdictions in the region, such as that of Zambia, fines of up to 10 per cent of the offending enterprises' annual turnovers are imposed.

Section 55(1) provides that any person is liable in damages for any loss caused to any other person by engaging in conduct that constitutes "(a) a contravention of any of the obligations or prohibitions imposed by this Act; (b) the inducing by threats, promises or otherwise, of the contravention of any provision; (c) being knowingly concerned in or party to any contravention referred to in paragraph (a); or (d) conspiring with any other person to contravene any provision referred to in paragraph (a)". The statute of limitations on the above is provided for in section 55(2), which states that "an action under subsection (1) may be submitted before the Commission at any time within three years of the date that the cause of action arose".

II. FAIR COMPETITION ACT

The Fair Competition Act 2009 of Seychelles came into operation on 5 April 2010. Like most other competition legislation worldwide, the Fair Competition Act covers the three major competition concerns of anti-competitive agreements (of both a horizontal and vertical nature), abuse of dominance or monopolization and anti-competitive mergers.

The preamble to the Act states that it is "an Act to promote, maintain and encourage competition, to prohibit the prevention, restriction or distortion of competition, and abuse of dominant positions in trade, to ensure that enterprises, irrespective of size, have the opportunity to participate equitably in the marketplace and provide for matters connected therewith". The import of the preamble is

that it clearly gives the objectives and purpose of the law in accordance with the economic development dictates of Seychelles as announced by the Government in various statements.

The process of drafting the Act was largely based on scrutiny of the competition legislation of Barbados, as it is a small island State as well as a Commonwealth country, similar to Seychelles. However, Seychelles is a member of COMESA and COMESA requires the competition legislation of its member States to conform to and be harmonized with the COMESA competition regulations.

A. Preliminary

The preliminary provisions of the Act cover sections dealing with the short title and commencement, interpretation and application of the Act.

In the case of the definitions section of the Fair Competition Act, it is presumed that most, if not all, of the definitions used are from established decisional practice in Seychelles. A number of the defined terms are also in line with international best practices in competition legislation, such as the commonly used terms acquire, agreement, enterprise, merger and restrictive business practice.

Some specific terms are defined in the preliminary catalogue of common definitions in section 2 of the Act, and not in the sections of the Act where they are actually used. Terms that should be defined in the respective sections of the Act where they are actually used include exclusive dealing, merger, restrictive business practice and tied selling.

The definition of the term merger in the Act is rather restrictive since it does not cover some common types of mergers and business combinations. The term is defined as "the acquisition or establishment, direct or indirect, by one or more enterprises, whether by purchase of shares or assets, lease of assets, amalgamation or combination or otherwise, of control over the whole or a part of the business of an immediate competitor, supplier, consumer or other enterprise". While the definition clearly includes horizontal mergers (i.e. those between firms that produce and sell the same products) and vertical mergers (i.e. those between firms operating at different stages of pro-

duction), it does not appear to cover conglomerate mergers (i.e. those between firms in unrelated businesses).

Experience in developing countries has shown that transactions involving conglomerate mergers may also raise serious competition concerns. Conglomerate mergers may grant the merged entity market power, allowing it to foreclose competitors in separate but related markets.¹¹ In Zimbabwe, for example, the 2004 acquisition of a small soft beverages company by Delta Corporation, a large conglomerate company, resulted in complaints by other soft beverages companies that Delta Corporation had used its financial power to buy from the sole local supplier of all the concentrates used in the production of the beverages, thus denying the competing companies supplies of the concentrates, or forcing them to import the concentrates at higher cost.¹²

Box 4 Recommendation

It is therefore recommended that the term merger in the Fair Competition Act be amended to unequivocally include all three types of mergers (i.e. horizontal, vertical and conglomerate), as well as other business combinations.

The term enterprise is defined in the Act as “any person, firm, partnership, corporation, company, association or other juridical person engaged in commercial activities for gain or reward, and includes its branches, subsidiaries, affiliates or other entities directly or indirectly controlled by it”.

The definition of an association might not be relevant in the application of the Fair Competition Act. The definition of the term enterprise in the Act is very broad and includes individuals and judicial persons. Therefore, if an association is a registered company it is included, but if it is not, then the individuals are still included under the term enterprise in the Act. However, it seems that there is no prohibition on aiding and abetting a contravention, and perhaps there should be such a prohibition, in order to include those who are constructive in the creation and maintenance of concerted actions without actually being participants.

¹¹ UNCTAD Model Law on Competition, United Nations, New York and Geneva, 2010.

¹² Report on Study on Socioeconomic Impact of Implementation of Competition Policy and Law in Zimbabwe, part I, Competition and Tariff Commission, Harare, 2006.

The definitions section of the Fair Competition Act does not, however, include definitions of some common competition terms, such as assets, confidential information, dominant position, essential facility, excessive price, horizontal agreement, negative clearance, regulator, relevant market, undertaking and vertical agreement, some of which are referred to in relevant sections of the Act. The Legal Department of the Commission’s Secretariat also noted that the term undertaking should be defined in the Act. The term undertaking is defined in different ways in competition legislation in the region.

Box 5 Recommendation

It is therefore recommended that a new offence of aiding or abetting a contravention of the Fair Competition Act and Consumer Protection Act be created.

The definition of terms in the interpretation sections of the Fair Competition Act and the Consumer Protection Act are not consistent. Some terms are defined in one Act and not in the other, and where they are defined in both Acts, the definitions are not always the same.

Where terms are inconsistently defined there is potential for confusion for business, consumers, FTC staff and Commissioners that may result in unnecessary costs and delays in resolving matters. Problematic definitions identified are as follows:

- (a) Business. This term is defined in section 2 of the Fair Competition Act as “(a) the carrying on of any commercial activity for gain or reward; and (b) includes: (i) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in goods for gain or reward; or (ii) acquiring, supplying and otherwise dealing in services for gain or reward”. However, the term is defined in the Consumer Protection Act as “(a) carrying on of any commercial activity for gain or reward; and (b) includes a trade or profession and activities of a profession or trade association or of a public body”;
- (b) Consumer. This term is defined in the Consumer Protection Act as “a person: (a) who acquires or offers to acquire goods otherwise for the purpose of resale but does not include a person who acquires goods for the

Box 6 Recommendation

It is therefore recommended that the above common competition terms be defined in the Fair Competition Act. The following appropriate definitions of the terms are suggested in the UNCTAD Model Law on Competition or by some other competition legislation in the region, such as those of Namibia, South Africa, Zambia and COMESA:

- (a) **Assets:** In relation to an enterprise, includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and know-how;
- (b) **Confidential information:** Trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others;
- (c) **Dominant position:** Situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market and to adjust prices or output without effective constraint from competitors or potential competitors;
- (d) **Essential facility:** An infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers;
- (e) **Excessive price:** A price for a good or service which bears no reasonable relation to the economic value of that good or service or is higher than the economic value of the good or service;
- (f) **Horizontal agreement:** An agreement between enterprises, each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market;
- (g) **Negative clearance:** Certification by the Commission that an otherwise anti-competitive conduct may be allowed under conditions specified by the Commission;
- (h) **Regulator:** A regulatory body or agency or a government department that exercises functions of prudential, technical or economic regulation on the basis of statutory powers;
- (i) **Relevant market:** The general conditions under which sellers and buyers exchange goods and services, implying the definition of the boundaries that identify groups of sellers and of buyers of goods and services within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services and all nearby competitors to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount;
- (j) **Undertaking:** A commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission;
- (k) **Vertical agreement:** An agreement between enterprises, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

purpose of using them in the production or manufacture of any other goods or articles for sale; (b) to whom a service is rendered". The term is, however, defined in the Fair Competition Act as "any direct or indirect users of a product or service supplied by an enterprise in the course of business, and includes: (a) another enterprise that uses the product or service thus supplied as an input to its own business; (b) a wholesaler, a retailer and a final consumer". In some other competition legislation in the region the term consumer only refers to final end users of the goods or services in question and excludes a person who

purchases goods or services for the purpose of using them in the production and manufacture of any other goods for sale or the provision of another service for remuneration, as defined in the Consumer Protection Act;¹³

- (c) **Goods.** The definition of this term in the Consumer Protection Act includes "substances, growing crops and things comprised in land by virtue of being attached to land, and any ship,

¹³ Examples of such legislation include the Competition and Fair Trading Act (Cap. 48:09) of Malawi, the new Competition and Consumer Protection Act 2010 (No. 24 of 2010) of Zambia and the COMESA competition regulations.

aircraft or vehicle”, while in the Fair Competition Act the definition includes “all chattels other than money, securities or choses in action”. The definition of goods in the Fair Competition Act has wording similar to that in the Fair Competition Act 1993 of Jamaica and creates the particular problem that it may mean that the entire financial services sector of Seychelles is exempt from the Act;

(d) Service. This term is defined in the Consumer Protection Act as “a service of any description, whether industrial, trade, professional or otherwise” and (i) includes the sale of goods where the goods are sold in conjunction with the rendering of a service; and (ii) is construed in accordance with subsection (3), i.e. does not include a reference to the rendering of any services under a contract of employment. The same term is, however, defined in the Fair Competition Act simply as “a service of any description, whether industrial, trade, professional or otherwise”.

Section 3 of the Fair Competition Act provides for the application of the Act. Section 3(1) of the Act provides that “this Act shall apply to every economic activity within, or having an effect within, Seychelles”. While the provisions do not give the Act extraterritorial application and jurisdiction, they give the FTC the necessary powers of addressing competition concerns arising from practices originating from outside Seychelles but which have effects in Seychelles. Such powers are

necessary in dealing with, say, transnational mergers that are concluded outside Seychelles but affect economic activity in Seychelles through the principal partners’ local subsidiaries or agents.

Section 3(2) of the Act provides that “this Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles which is open to participation by other enterprises”. The application of the competition law to the State if it or its agents engages in commercial activity is good practice, since competition law is, or should be, a general law of general application. However, since the application of the Act to commercial activities of the State only refers to markets which are open to participation by other enterprises, this effectively excludes markets that are dominated by statutory monopolies. For Seychelles, which still has a number of State-owned enterprises (SOEs), some of which are in monopoly positions, such exclusion exempts a large number of enterprises from the application of the competition law.

It was, however, submitted during the fact-finding visit to Seychelles that not many statutory monopolies exist in the country following the privatization of most SOEs. The Seychelles Chamber of Commerce and Industry, represented by its Vice-Chair and Secretary-General, advised that SOEs are no longer a major threat to private companies

Box 7 Recommendation

It is therefore recommended that the inconsistencies in definitions in the Fair Competition Act and Consumer Protection Act be avoided, with the more comprehensive definition in one Act being adopted for the other, unless it distorts the meaning in that Act. In particular, the following definitions should be addressed:

- (a) The term consumer should be redefined in the Consumer Protection Act along the lines of the definition in the Fair Competition Act since there is also need for the intermediate users of inputs to be protected as consumers against both anti-competitive and unfair trade practices of suppliers;
- (b) The definition of the term goods in the Fair Competition Act should follow that in the Consumer Protection Act since it excludes the financial services sector. Alternatively, the term may be defined in both Acts in the same way as in the COMESA competition regulations, as follows: “goods, when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints”;
- (c) The term service should be redefined in the Fair Competition Act along the lines of the definition in the Consumer Protection Act, but with the inclusion of the word financial, to read “a service of any description, whether industrial, trade, financial, professional or otherwise”, since it is important to explicitly refer to financial services in both competition and consumer protection legislation considering the growing impact, complexity and importance of financial services in the Seychelles economy, as well as for consumers.

since none of them is now in a monopoly position, including the Seychelles Trading Company (STC), which used to monopolize the importation of goods into Seychelles, and the Seychelles Public Transport Corporation (SPTC). The Seychelles Investment Board (SIB) also confirmed that most of the SOEs have been privatized and no longer have statutory monopolies. For example, STC no longer has a statutory monopoly and competes with private sector companies. Most of the SOEs that still have statutory monopolies operate in security or strategic sectors, such as the petroleum sector.

However, the fact remains that there are still some statutory monopolies in Seychelles, as confirmed by SIB. Such monopolies should not be exempted from the application of the Act to guard against their abuse of those positions. As observed by the Legal Department of the Commission's Secretariat, the comprehensive competition policy being formulated may provide for the opening up of the sectors that are dominated by statutory monopolies, but there is still a need to remove the exemption of any such sectors from the Act.

Box 8 Recommendation

It is therefore recommended that section 3(2) of the Fair Competition Act be amended by deletion of the phrase "which is open to participation by other enterprises", to read "this Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles".

B. Fair Trading Commission

The Commission's functions are wide ranging, and are all directed at promoting competition in the economy of Seychelles. The Commission not only has the function of investigating anti-competitive practices, but also has the function of preventing such practices. It further has the function of educating consumers on their competition rights and obligations.

It is also noted that the FTC may carry out investigations into anti-competitive practices and consumer concerns on its own initiative or at the request of other persons or enterprises. This is common practice worldwide that does not limit a competition authority's source of competition and consumer complaints. However, the provision

that the Commission should only carry out investigations at the request of persons or enterprises that have a direct interest in the matter may in fact limit the Commission's source of complaints. While the intention is to allow only those persons or enterprises that have locus standi to request a Commission investigation, the provision effectively rules out Commission investigations from anonymous complainants or informers, who might not want to indicate their interest in the matter for fear of being identified.¹⁴ Anonymous complainants or informers have been found to be very useful sources of complaints in cartel cases.

Box 9 Recommendation

It is therefore recommended that section 5(1)(b) of the Fair Competition Act be amended by deletion of the phrase "that has an interest in a matter", to read "carry out on its own initiative or at the request of any person, such investigations in relation to the conduct of trade: (i) as will enable it to prevent the use of business practices in contravention of this Act; or (ii) as it may consider necessary or desirable in connection with any matters falling within the provisions of this Act", so as not to limit the sources of the Commission's competition complaints.

The FTC has wide powers under section 6(1) of the Act for the effective performance of its functions. These include powers to enter into contracts, conduct hearings, issue orders and directions, impose remedies or financial penalties, impose fines and cooperate with authorities in other countries entrusted with competition functions.

C. Restrictive business practices

Part III of the Fair Competition Act on restrictive business practices has six subparts on abuse of a dominant position, agreements preventing, restricting or distorting competition, resale price maintenance, control of merger situations, anti-competitive business conduct and authorizations.

¹⁴ In law, locus standi means the right to bring an action, to be heard in court or to address the court on a matter before it. Locus standi is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case (available at <http://definitions.uslegal.com/1/locus-standi>).

1. Abuse of a dominant position

Section 7(1) of the Act prohibits abuse of a dominant position “if it may adversely or unfairly affect trade within Seychelles”. The term trade is defined in section 2 of the Act as “any trade, business, industry, profession or occupation relating to the supply or acquisition of goods or services”.

In terms of section 7(2) of the Act “an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors”. While this test of dominance is more or less in line with the UNCTAD Model Law on Competition¹⁵, it is subjective and gives wide discretion to competition authorities in determining dominance.

While an abuse of dominance threshold is not specifically provided for in the Act, the administrative guideline being followed by the Commission is a 40 per cent market share threshold, similar to the statutory merger notification threshold.¹⁶ However, the 40 per cent market share threshold has no basis in research on the actual situation in Seychelles.

In any case, market share is only one of the many factors that are involved in assessing dominance.¹⁷ While a large market share gives the presumption of dominance, other relevant factors in the determination of market power include entry barriers, countervailing power and import competition.

Box 10 Recommendation

It is therefore recommended that the Fair Competition Act specifically provide under section 7(2) a dominance threshold based on market share to avoid the subjective determination of dominance. In this regard, the utility of the 40 per cent market share threshold that is currently being used by the FTC as an administrative guideline may be assessed with a view to formalizing it in the Act.

¹⁵ UNCTAD Model Law on Competition, United Nations, New York and Geneva, 2010.

¹⁶ FTC Guidelines on Abuse of Dominance.

¹⁷ As concluded at the breakout session of the Unilateral Conduct Working Group of the International Competition Network (ICN) during the Tenth ICN Annual Conference, held at The Hague, Netherlands, 17–20 May 2011.

Section 7(3) of the Act lists the conduct that constitutes abuse as restricting the entry of any enterprise into a contestable market, preventing or deterring any enterprise from engaging in competitive conduct, eliminating or removing any enterprise from any market, imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory, limiting production, markets or technical development, applying dissimilar conditions to equivalent transactions with other trading parties and making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations that have no connection with the subject of such agreements, as well as exclusive dealing, market restriction and tied selling.

However, while the list of abusive conduct in section 7(3) of the Fair Competition Act is clearly not exhaustive, it omits some common abusive conduct. For example, denying access to an essential facility is omitted in the Act as an abusive practice of a dominant or monopoly enterprise. For Seychelles, which has a number of privatized SOEs that used to be in monopoly positions, the abusive conduct of denying access to essential facilities to other emerging competitors would be a serious anti-competitive practice.

Box 11 Recommendation

It is therefore recommended that, while the list of conduct that constitutes abuse by firms in dominant positions cannot be exhaustive, certain abuses that are widespread in Seychelles be added to the list under section 7(3) of the Fair Competition Act. Examples of such abuses include denial of access to essential facilities.

Section 7(4) of the Act introduces the desired rule of reason consideration in dominance cases.¹⁸ In the terms of the section “an enterprise is not to be treated as abusing a dominant position: (a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic pro-

¹⁸ Rule of reason is a legal approach by competition authorities or courts whereby an attempt is made to evaluate the pro-competitive and efficiency features of a restrictive business practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited (Glossary of Industrial Organization Economics, Competition Law and Policy Terms, OECD, Paris, 1991).

gress, and consumers were allowed a fair share of the resulting benefit; (b) if the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or (c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights: (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology”.

However, while the general treatment under competition policy and law of intellectual property rights (IPRs) such as copyrights, patents and trademarks is provided for under abuse of dominance, providing such rights as one of the exceptions of abusing a dominant position under section 7(4) of the Act seems misplaced, since in much other competition legislation IPRs are exempted from the application of competition law, with the proviso stated in section 7(4) of the Act, under the application provisions, together with collective bargaining agreements.

2. Agreements preventing, restricting or distorting competition

Section 11(1) of the Fair Competition Act provides that “agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited unless they are excluded in accordance with the provisions of this subpart”.

In terms of section 11(2) of the Act, the prohibition under section 11(1) applies to agreements, practices, undertakings or decisions that “(a) directly or indirectly fix purchase or selling prices, or determine any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) provide for the artificial dividing up of markets or sources of supply; (d) affect tenders to be submitted in response to a request for bids, including: (i) not to submit a bid in response to a call or request for bids or tenders; or (ii) as bidders they submit, in response to a call or request, bids or tenders

that are arrived at by agreement between or among themselves, unless enterprises are not able to submit their bids individually; (e) apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or (f) make the conclusion of agreements subject to acceptance by parties other than the offerer of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of such agreements”.

The above provisions do not distinguish between horizontal and vertical agreements and this might cause confusion and enforcement problems, since the treatment of such agreements under competition law and policy is different. Most horizontal agreements are inherently harmful to competition and are therefore per se prohibited, while some others are considered using the rule of reason approach since they may have efficient elements and even be pro-competitive. On the other hand, most vertical agreements are considered using the rule of reason approach.

Among horizontal agreements, there is also a distinction between hard-core cartels and other types of anti-competitive agreements. Hard-core cartels are “anti-competitive agreements between competitors with no other purpose or effect than to raise prices or reduce output”.¹⁹ The four types of horizontal agreements that generally fall within the definition of hard-core cartels are price fixing, market sharing, bid rigging, and output restriction. Group boycotts by businesses may also fall within an expanded list of hard-core cartels.²⁰ It is noted in the UNCTAD Model Law on Competition that as opposed to hard-core cartels, other types of agreements between competitors may produce some benefits. For example, joint marketing that enables products to reach customers more quickly and efficiently may produce some efficiency gains. However, as also stated in the Model Law, these types of agreements may also harm competition by reducing the ability or incentive of participating firms to compete independently or by facilitating anti-competitive agreements.

¹⁹ Ibid.

²⁰ Ibid.

It is widely accepted that hard-core cartels are always anti-competitive and that they may be reasonably presumed to be illegal without further inquiry or are per se prohibited. Other horizontal agreements and most vertical agreements are considered using the rule of reason approach because they might have pro-competitive or efficiency features.

Box 12 Recommendation

It is therefore recommended that the provisions on anti-competitive agreements be divided, in order to deal separately with horizontal and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be per se prohibited, and other agreements, which should be considered using the rule of reason approach. Therefore, since the anti-competitive business conduct provided for under subpart V of part III of the Act refers to the hard-core cartel activities of price fixing, production limitation and bid rigging, these should be provided for under the subpart dealing with horizontal agreements. Resale price maintenance under subpart III of the Act should be provided for under the subpart dealing with vertical agreements, but still per se prohibited because of the severity of the practice in Seychelles and the fact that it constitutes vertical price fixing.

It is also noted that section 11(3) of the Act provides that the prohibition of agreements between enterprises, etc. under section 11(1) “applies only if the agreement, practice, undertaking or decision, is or is intended to be, implemented in Seychelles”. Since the Act does not distinguish between horizontal agreements, particularly hard-core cartels, and vertical agreements, these provisions might cause enforcement problems in dealing with international cartels that are implemented in other countries but ultimately affect the economy of Seychelles.

Submissions were made by the public procurement officials of the Ministry of Finance, Trade and Investment during the fact-finding visit to Seychelles that there is an omission in the Fair Competition Act that make it very difficult to detect and prove collusion in government tenders. The omission is that the Act does not recognize interlocking directorships in the facilitation of collusion between enterprises.

Section 11(4) of the Act recognizes that certain agreements should not be prohibited because of their pro-competitive and/or efficiency features,

or have been authorized by the Commission. This should only apply to those agreements that are not hard-core cartels, which should be per se prohibited as explained above. However, as has already been analysed above, agreements referred to under this subpart of the Act do not distinguish between the more harmful horizontal agreements, including hard-core cartel arrangements, and vertical agreements. The distinction between such anti-competitive agreements should be made in the Act itself and not left to guidelines as suggested by the Legal Department of the Commission’s Secretariat. Also, in virtually all other jurisdictions, hard-core cartel arrangements are not subject to authorizations by competition authorities.

Section 12 of the Act deals with agreements containing exclusionary provisions. Such agreements usually fall under the category of vertical agreements, and it is therefore suggested that they be provided for under the section(s) dealing with all other vertical agreements.

3. Resale price maintenance

The provisions on resale price maintenance, sections 16 to 20 of the Act, are comprehensive and cover the necessary features and treatment of this serious anti-competitive practice. Resale price maintenance is a form of vertical price fixing and is per se prohibited in many countries.²¹

The UNCTAD Model Law on Competition lists resale price maintenance as one of the common vertical agreements that raise competition concerns and notes that the practice may also constitute abusive behaviour by a dominant firm.²² There is nothing wrong in having separate provisions on resale price maintenance, as in the Fair Competition Act of Seychelles. The UNCTAD Model Law on Competition states: “Competition laws can contain general provisions concerning only anti-competitive horizontal agreements, leaving vertical agreements to be covered by a number of individual provisions dealing, for example, with resale price maintenance, exclusive dealing, tying and bundling, etc.”²³

²¹ Glossary of Industrial Organization Economics, Competition Law and Policy Terms, OECD, Paris, 1991.

²² UNCTAD Model Law on Competition, United Nations, New York and Geneva, 2010.

²³ Ibid.

It is nevertheless suggested, as recommended above, that the individual provisions dealing with resale price maintenance in the Act be placed in a part of the Act covering vertical agreements for better guidance for competition law enforcers.

4. Control of merger situations

Section 21 of the Act prohibits mergers that are not permitted by the Commission. In this regard, it is provided that “all mergers involving an enterprise that: (a) by itself controls; or (b) together with any other enterprise with which it intends to effect the merger is likely to control, 40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this subpart”.

The above provisions also provide for the merger notification threshold of 40 per cent control of a market. Section 2(2) of the Act provides that every reference in the Act to “market’ is a reference to a market for goods or services supplied in Seychelles”.

Merger notification thresholds may be based on the merging parties’ annual sales or turnover, total assets or both (size-of-the-transaction test). Alternatively, they may be based on the parties’ share of the relevant market (market-share test).

On balance, it is suggested that the size-of-the-transaction method be used for determining merger notification thresholds, and not the market-share method that is provided for under section 21 of the Fair Competition Act. Details of the methods used in the determination of merger notification thresholds may be made in guidelines, as suggested by the Legal Department of the Commission’s Secretariat, but the methods should be enshrined in the Act itself.

Section 22 of the Act provides for pre-merger notification to the Commission. Pre-merger notification provides competition authorities with the opportunity to stop a merger if it will result in a substantial lessening of competition in a relevant market, since it is much easier to stop a merger in advance rather than to try to undo an already established merger.²⁴ In a pre-merger notification situation, the competition authority is therefore

not as constrained in terms of the most suitable remedies, and the costs to the merging firms for the implementation of the remedies are minimized. It may also be argued that political pressure in favour of a merger is not as high in a pre-merger notification situation since there are not as many stakeholders in the transaction at that stage. In a pre-merger notification situation, information on the merger is also easily gathered and available from the merging parties as they seek to have the transaction approved.

There are basically two stages of merger examination. The first stage is to determine whether the merger raises any competitive concerns. This determination may be achieved without a full analysis, and most competition authorities take no further action if no serious competition concerns are found at this stage. The second stage begins when the possibility of competitive harm is identified and a more complete examination is required. Again, should it be concluded at any point during this stage that there is no basis for concern, the investigation should be closed, not only in order to avoid unnecessary delay in completing what could be a pro-competitive transaction, but also to conserve the scarce resources of the competition authority.

The merger control provisions in subpart IV of part III of the Fair Competition Act are not comprehensive enough, and only cover basic issues such as merger application or notification and permission for mergers. There is a convergence of views among competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control. Some of these elements and issues are listed as questions as follows:²⁵

- (a) Which transactions should be characterized as mergers? How should the acquisition of minority shareholdings and of assets be dealt with? Will joint ventures be considered as a matter of merger control or under the legal provisions that prohibit cartels?
- (b) How should the jurisdictional test be framed for determining those mergers that may be investigated? Should the test be based on turnover, the value of assets acquired, market share or some other criterion?

²⁴ Mark A A Warner, *International Aspects of Competition Policy – Possible Directions for the FTAA*, in *World Competition: Law and Economics Review*, Vol. 22 No.1, March 1999.

²⁵ Richard Whish, *Competition Law (Fourth Edition)*, Butterworths, London, 2001, 732–733.

- (c) To what extent should a system of merger control apply to transactions concluded outside of a country but that have effects within it?
- (d) Should mergers be subject to a system of mandatory pre-notification or should the parties decide whether to notify? In the latter case, in what circumstances and for how long after a merger has been completed should a competition authority be allowed to review a case?
- (e) What should be the time period within which a merger investigation must be completed?
- (f) What should be the substantive test for reviewing mergers? Should a review be based solely on competition criteria or should any other issues of a public interest nature also be taken into account?
- (g) How should the specific issues of efficiency and failing firms be dealt with?
- (h) What mechanism should be put in place for the negotiation of remedies that would overcome any problems identified by the competition authority?
- (i) Who should make decisions in merger cases?
- (j) What system of judicial review or appeals should be put in place to test the findings of the decision maker in merger cases? How quickly will any judicial review or appeal be completed?

However, it is noted that the merger control provisions of the Act do not specifically provide for the charging of merger notification fees. Merger notification fees are now becoming an important source of funding for competition authorities, even those in developed countries such as the United States of America. The importance to countries in developing and transition economies for such fees as part of their operating funds is even greater. The competition activities of most, if not all, such countries are grossly underfunded.

It should also be noted that merger notification fees not only greatly assist in meeting the high costs of merger review and examination, but also discourage the conclusion and chance notification of evidently anti-competitive mergers or

those that are purely for “empire building” with little or no efficiency benefits.

Box 13 Recommendation

It is therefore recommended that the merger control provisions of the Fair Competition Act cover all of the above basic elements or issues of merger control. In particular, provision should be made for size-of-the-transaction merger notification thresholds (i.e. based on merging parties’ annual sales or turnover, total assets or both) and the charging of merger notification fees.

5. Anti-competitive business conduct

Proscribed anti-competitive business conduct under subpart V of the Fair Competition Act includes the hard-core cartel practices of price fixing, production limitation and bid rigging. Section 25(1) of the Act describes the following acts of price fixing: “(a) By agreement or promise, intimidation or threat or any like means, attempt to influence an increase, the maintenance or a reduction of the price at which any other enterprise supplies or offers to supply, or advertises for goods or services; or (b) refusal to supply goods or services to, or otherwise discriminate against any other enterprise engaged in business because of the low pricing policy of that enterprise or for any other reason.”

Section 25(2) states that the prohibition against price fixing does not apply to enterprises that are affiliated with each other. Section 25(3) provides that the publication of advertisements by a supplier of goods other than a retailer of resale prices of the goods constitutes price fixing, “unless the price is so expressed as to make it clear to any person which becomes aware of the advertisement that the goods may be sold at a lower price”.

It is noteworthy that price fixing under the Fair Competition Act relates to both unilateral conduct and collusive action.

Section 26(1) of the Act prohibits collusive action restraining competition through production limitation. Arrangements related to the introduction or maintenance of quality or other standards are, however, exempted from the prohibition, under section 26(2).

Section 27(1) of the Act outlaws collusive bid rigging, but limits such conduct to situations where two or more persons “enter into an agreement whereby: (a) one or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders; or (b) as bidders or tenderers they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves”. Situations of bid rigging, or collusive tendering, should not be exhaustive, since big-rigging comes in many different and innovative forms.

6. Authorizations

Subpart VI of the Fair Competition Act provides for authorizations of anti-competitive practices. In this regard, section 28(1) of the Act provides that “notwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorization to do so”. Section 28(2) further provides that “the Commission upon receipt of an application under subsection (1) may grant an authorization, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit and is reasonable in the circumstances”.

Section 28(1) does not make clear which anti-competitive agreements or practices are subject to authorization by the Commission. In most cases, and in accordance with international best practices, horizontal agreements of a hard-core cartel nature, and other per se prohibited conduct and practices, are not subject to authorization.

Public benefit, referred to in section 28(2), is also not defined, such that it gives the competition authority wide discretion in considering applications for authorization, which might be abused. In some other competition legislation, public interest factors that must be taken into account are specifically provided for and include the promotion of technical or economic progress and transfer of skills, the promotion of employment and the enhancement of competitiveness or advancement or protection of the interests of small and

medium-sized businesses. Guidelines may further clarify this highly controversial concept of public benefit that is provided for in the Act.

Box 14 Recommendation

It is therefore recommended that per se prohibited anti-competitive agreements and practices not be subject to authorization under the Fair Competition Act. It is also recommended that public benefit be clearly defined in the Act.

D. Investigation by and hearings before the Commission

Section 32 of the Act states that the Commission may initiate a complaint against an alleged restrictive business practice and section 33(1) provides that any person may submit to the Commission a complaint against, or information concerning, an alleged restrictive business practice. The Commission is obliged, under section 34, to investigate complaints against or allegations of restrictive business practices, as well as proposed mergers.

The Commission’s investigative powers under section 34(2) of the Act facilitate the undertaking of dawn raids, and include entering and searching premises, and inspecting and removing for copying any documents.

Section 35(1) of the Act provides for the discontinuation of the Commission’s investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) provides, however, that “where the Commission discontinues an investigation under subsection (1) it shall: (a) within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and (b) submit a report of the discontinuation to the Minister within three months of such discontinuation”.

The requirement that the Commission report its decisions to discontinue competition investigations to the Minister limits its independence and reduces its decision-making autonomy.

Box 15 Recommendation

It is therefore recommended that the provision in section 35(2)(b) of the Fair Competition Act be deleted from the Act.

E. Assessment of restrictive business practices

Section 40(1) of the Act provides that the Commission, before deciding on any remedial action to be taken on adverse or unfair effects on competition of a restrictive business practice or merger, should consider any offsetting public benefits of the practice or merger. Section 40(2) provides that “a benefit shall be considered for the purposes of subsection (1) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains of: (a) the safety of goods and services; (b) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; (c) the development and use of new and improved goods and services and in means of production and distribution; or (d) the promotion of technological and economic progress”. The Act

also provides that the benefits should be shared by consumers and businesses in general.

F. Determination of cases by the Commission and penalties and remedies

Commission determinations on and remedies provided for restrictive business practices and mergers, under part VI of the Fair Competition Act, are standard and universal and of both a structural and behavioural nature, as summarized in table 1.

Structural remedies are generally preferred. They are more effective in the long term, and do not require continuing oversight or regulation by the competition authority. Most competition authorities, particularly those in developing countries, do not have the necessary resources to effectively monitor behavioural remedies.

Table 1 Remedies for restrictive business practices provided for in the Fair Competition Act

Restrictive business practice	Section of Fair Competition Act	Remedies provided for
Abuse of dominant position	41(1)	Where the Commission determines that any conduct falls within the scope of subpart I of part III (i.e. abuse of dominant position), it shall prepare a report indicating the conduct that constituted the abuse and: (a) Shall notify the enterprise of its finding accompanied by a copy of the report; (b) Shall direct the enterprise to cease the abusive conduct within a specified period; (c) May require the enterprise to take such further action as in its opinion is necessary.
Agreement preventing, restricting or distorting competition	42(2)	The offending enterprise, within such time as may be specified by the Commission, is required to: (a) Terminate or amend an agreement; (b) Cease or amend a practice or course of conduct in relation to prices; (c) Supply goods or services or grant access to facilities; (d) Separate or divest itself of any enterprise or assets; (e) Provide the Commission with specified information on a continuing basis.
Anti-competitive merger	44(1)	Where a proposed merger is likely to result in unfair competition, the Commission may: (a) Direct the enterprises within an agreed period to divest interests or part of their combined businesses or operations, if it is satisfied that such divestment would make the merger less likely to lessen competition or to adversely affect the interests of consumers or the economy; (b) Direct the enterprises to desist from completion or implementation of the merger in so far as it relates to the market in Seychelles; (c) Direct the enterprises to adopt or desist from such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.
Agreement on resale price maintenance, price fixing, production limitation and bid rigging	45(1) and (2)	Where the Commission determines that an agreement under subpart III (resale price maintenance) or subpart V (price fixing, production limitation and bid rigging) of part III is unlawful or anti-competitive, respectively, it shall prepare a report of its findings and shall notify the enterprise or enterprises of its findings, accompanied by a copy of the report, shall declare the agreement null and direct the enterprise to rescind it and may require the enterprise to take such further action as in its opinion is necessary. The Commission shall also direct the enterprise to cease a business conduct where it determines that the conduct, under subpart V of part III, is anti-competitive.

In place of, or in addition to, the above remedies, the Commission may, in terms of section 46(1) of the Act, impose a financial penalty on an enterprise. Section 46(2) of the Act, however, provides that “where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of five years”.

The Commission may also in terms of section 47(1) of the Act take interim measures where it has reasonable grounds to suspect that as a consequence of the restrictive business practice under investigation irreparable damage to a particular person may occur before the conclusion of the investigation. These are very important provisions, particularly in abuse of dominance cases that prevent unwarranted market exits.

G. Appeals

Section 50 of the Fair Competition Act states that “a party dissatisfied with an order or direction of the Commission may appeal to the Tribunal against, or with respect to, the order or direction”. Section 52(1) of the Act provides that a person dissatisfied with an order or direction of the Tribunal may appeal to the Supreme Court.

H. Miscellaneous

The miscellaneous provisions of part VIII of the Fair Competition Act provide for the enforcement of the Commission’s directions, undertakings or orders. In this regard, section 53 of the Act provides that “a person who fails or refuses to comply with a final direction, order or undertaking of the Commission or order or direction of the Tribunal commits an offence and is liable on conviction: (a) where the person is an individual, to a fine not exceeding [SR 100,000] or to imprisonment for a term not exceeding two years or to both; or (b) where the person is a person other than an individual to a fine not exceeding [SR 400,000]”.

The imposition of fines and imprisonments on conviction as provided for above is of significance as it means that the Commission on its own does not have powers to impose fines and imprisonments but has to consult the courts.

III. CONSUMER PROTECTION ACT

The Consumer Protection Act was approved on 25 November 2010. It is the Seychelles national consumer protection legislation, replacing the earlier Consumer Protection Act 1997. The Act includes all of the elements usually encompassed by national consumer protection laws.

A. Preliminary

Part I consists of the sections specifying the short title of the Act and dealing with interpretation. The definitions of key terms raise no serious concerns. However, there are potentially problematic inconsistencies between the definitions provided in the Consumer Protection Act as compared with those in the Fair Competition Act, and the inconsistencies between what is defined and what is not in the two Acts.

B. Fair Trading Commission

The Consumer Protection Act objectives of the FTC are set out in section 3 of the Act as follows: “Achieving and maintaining a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally. Reducing any disadvantages experienced by consumers, in accessing any supply of goods or services, by reason of their illiteracy, vision impairment or limited fluency in a particular language. Promoting fair business practices. Protecting consumers from: (a) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (b) misleading, unfair, deceptive or fraudulent conduct. Improving consumer awareness and information, and encouraging responsible and informed consumer choice and behaviour. Promoting consumer confidence, empowerment and the development of a culture of consumer responsibility through education and advocacy. Providing for an accessible, efficient, harmonized, and effective system of redress for consumers.”

It is noted that the objectives make no mention of consumer safety, which is surprising given that part VI of the Act addresses this important area of consumer concern.

Also noteworthy among the listed functions is the ability of the FTC to implement a range of

Box 16 Recommendation

It is therefore recommended that the Consumer Protection Act be amended to include a reference to consumer safety in the objectives list in section 3.

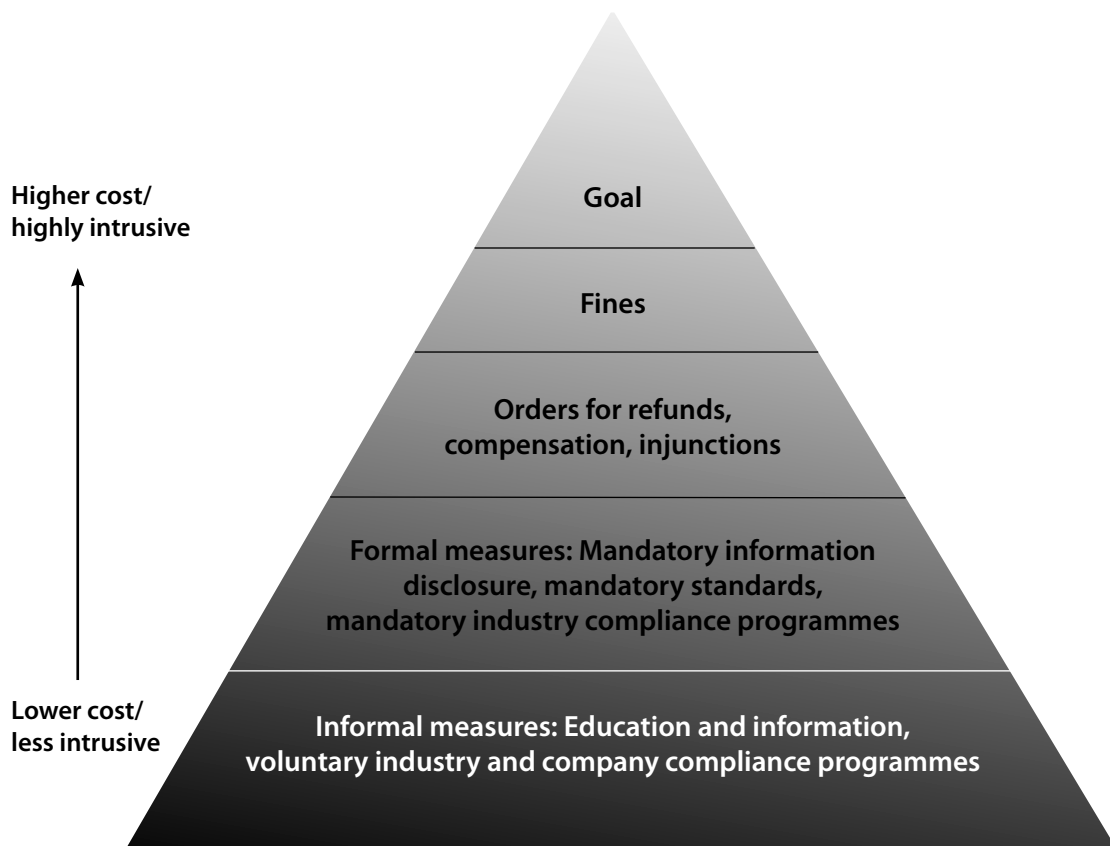
resolutions for contraventions, reflecting an implicit adoption of the compliance pyramid regulatory model. The compliance pyramid illustrates the effect of resolving more compliance issues at a lower cost while reserving the strongest and most costly interventions for the most detrimental conduct and culpable market participants. Figure 1 shows a compliance pyramid adapted from The United Nations Guidelines: Making them work in developing countries by Robin Brown.

More efficient authorities will seek to resolve compliance problems using the quickest and least costly processes available to them. For example, the educational activities and business self-regu-

lation of the FTC will cost less and be more timely than prosecutions seeking goal sentences.

The hierarchy of responses is illustrated in the enforcement pyramid, with lower cost and less-intrusive options shown at the base and higher cost and more-intrusive options shown towards the top. However, the success of lower cost resolutions is likely to be much greater if businesses know that more intrusive options are available to the FTC and that the FTC is willing to use them where it believes that options from lower down the pyramid are unlikely to work. Broadly, the more options available to the FTC and the more the FTC demonstrates that it is willing to employ options from nearer the top of the pyramid, the more likely it is that the most efficient and effective process may be employed for any compliance problem. This may be the solution to the National Assembly's criticisms of the FTC and its legislation. The FTC has a fairly standard but modest range of responses open to it, including goal sentences.

Figure 1 Compliance pyramid regulatory model



However, the Board has not yet imposed items from, or even signalled a willingness to employ options from nearer the top of the pyramid. It is hardly surprising, therefore, that there may be a perception that there is no clout. If the pyramid model is accepted as having validity, then it is not surprising that the Secretariat's well-qualified staff members are working efficiently and diligently and yet are still perceived to be making insufficient difference to competition and consumer protection compliance.

Box 17 Recommendation

It is therefore recommended that the Secretariat explicitly adopt the concept of the pyramid of enforcement responses and continue its current practice of attempting to resolve most complaints through negotiations and warnings.

It is also recommended that the Secretariat use more serious contraventions, or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low-level contraventions will be resolved quickly and at low cost.

Section 7(2)(b) of the Act obliges the FTC to report to the Minister on the reasons why an investigation was discontinued within three months of each decision. The Chief Executive Officer has advised that notifications of discontinuance of investigations are sent to the Board. The following questions may be asked with regard to the next steps:

- (a) Can the Board nevertheless determine the case in accordance with section 33(3) of the Fair Trading Commission Act?
- (b) Can the complainant take the matter to the Tribunal (once it has been established) and ask for either a decision on the information available to the Board or a direction to the FTC that it reopen the investigation?

These questions reveal the problem that the legislation does not distinguish between the Secretariat and the Board. There is a real concern that the investigative body, the Secretariat, should be separate from the determinative body, the Board. However, as drafted, it seems that the Board could direct the Secretariat to reopen an investigation.

The same issue arises in respect of the Board advising the Secretariat as to whether certain elements of a case are missing before the case goes before

the Board. From an operational and procedural perspective this should not occur, but the current drafting leaves such a development as a real possibility, should the Board be so inclined.

Section 8 also imposes a related reporting requirement that raises concerns. The first issue is the terminology used. As has been noted elsewhere, the term commission is ambiguous. In section 8 Commission seems to mean the Board, as no other meaning would make sense. The second issue is whether it is appropriate for the Chief Executive Officer to report in this way to the Board. Given that the Board is established as a deliberative body and is not expressly provided with any administrative functions, it does not seem appropriate that all decisions to discontinue investigations should be reported to it. Investigations may be discontinued for many reasons, including compelling evidence that a conduct did not occur, insufficient evidence of a contravention, priorities for resource allocation, low probability of a meaningful outcome, lack of resources, etc. All of these would mean that there would be no matter to take to the Board. These are clearly matters for the Secretariat rather than the deliberative body, the Board.

Section 9 requires the Commission (read Board) to convene a hearing upon receipt of a report submitted pursuant to section 8. Given that the cases concerned are discontinuances, it seems unnecessary to mandate hearings. It would seem reasonable that any consideration of discontinuances could be appended to regular Board meetings as a standing agenda item. Section 9 would become redundant if the section 8 reporting requirement was repealed.

Box 18 Recommendation

It is therefore recommended that the issue of discontinuance reporting be one of the issues considered when clarifying the respective roles of the Board and Secretariat.

C. Unfair contract terms

Part III prohibits what are termed unfair contract terms. These provisions reflect the fact that in many situations, consumers' apparent choices in the market are non-existent, as they are not permitted to negotiate the terms of contracts. While a significant proportion of unfair contracts are likely to be found in mass markets where standard form

contracts are the norm, they may also be encountered wherever there is a significant power imbalance between traders and consumers, for example where there is a monopoly or oligopoly, demand is inelastic or consumers are impoverished or less well educated.

However, consistent with the reliance on well-functioning markets to maximize consumer welfare, it is important to ensure that unfair contract provisions do not unnecessarily and unreasonably impinge upon the right to the freedom of contracts. Provisions similar to those in part III are increasingly common in consumer protection laws and these provisions reflect common drafting and good practice in modern consumer protection regulation. It is likely that compliance will be enhanced if a guideline is available to businesses, explaining the provisions and providing illustrative examples of at-risk contract terms.

Box 19 Recommendation

It is therefore recommended that the Secretariat publish a guideline explaining the unfair contract term provisions.

D. Unfair trade practices

1. Disclosure and information

Sections 19–26 are intended to ensure that consumers are provided with certain essential information about the goods and services on offer so that they may make more informed purchasing decisions. This essential information includes price in section 20, full cost in section 26 and such trade descriptions as are prescribed by the Minister. A non-exhaustive list of information that may be prescribed is provided in section 22. It is not clear how traders and consumers might efficiently identify which trade descriptions have been prescribed. Similarly, in section 24, it is not clear how traders might efficiently ascertain which goods must have expiry dates and how the expiry dates for particular products are determined.

In addition to the requirement to display prescribed trade descriptions, there is also an obligation for traders not to display or supply goods where the retailer “knows or could reasonably de-

Box 20 Recommendation

It is therefore recommended that the FTC website include a page either listing any applicable trade descriptions prescribed by the Minister and required expiry dates, or providing links to other government sites where that information may be obtained.

termine, or has reason to suspect” that the trade descriptions on the goods are misleading. This obligation is justified because almost inevitably traders will be in a better position than consumers to determine whether or not descriptions are misleading. Reflecting the dual conditions of a high level of imported goods and a significant number of disadvantaged consumers, there is also a general requirement in section 19 that information be provided in plain and understandable language. Compliance with this general requirement is assisted by section 19(2), which sets out a practical description of plain language.

The requirement in section 25 to provide a sales record disclosing specified information has particular merit because this requirement is likely to have the effect of eliminating many trader and consumer misunderstandings, as well as facilitating proof of the basic elements of a transaction. Where traders use electronic cash registers or offer electronic credit facilities, meeting this obligation is straightforward. However, for those traders, particularly micro businesses, that do not use electronic devices, this requirement may be problematic.

There is a cost of compliance with these provisions that must be borne by manufacturers or retailers. Depending upon the relative elasticity of supply and demand, all or some of the costs of compliance will be passed on to consumers. Consequently, consumer protection legislation must balance the costs and benefits of each disclosure requirement. Interestingly, none of the business representatives interviewed expressed concern about the mandatory disclosure requirements.

NATCOF executives and the FTC Secretariat both identified failures to comply with these disclosure requirements as being disconcertingly prevalent, particularly in grocery retailing. Complaints received by the FTC do not reflect these observations, as shown in the percentage of the following complaints among all complaints received:

- (a) Failure to display expiry dates: 0 per cent;
- (b) Failure to provide a sales receipt: 1 per cent;
- (c) Product labelling and trade descriptions: 0 per cent;
- (d) Information to be in plain and understandable language: 1 per cent.

It would be interesting to explore this apparent inconsistency.

Box 21 Recommendation

It is therefore recommended that the FTC consider the potential of enlisting the cooperation of NATCOF in an ongoing monitoring programme focusing on the display of expiry dates, failure to label in an appropriate language and failure to provide receipts, with a view to contributing to FTC enforcement actions.

2. Fair and responsible marketing

Sections 27 and 29 prohibit the quasi-fraudulent conduct of bait advertising and referral selling. These are standard prohibitions in almost all consumer laws. Although this conduct most probably exists in Seychelles, none of the interviewed stakeholders referred to this type of conduct or the relevant provisions and the Secretariat's complaints data do not show them to be a cause of frequent complaint.

Section 28 provides for the Minister to make regulations in respect of distance selling. To date, the Minister has not made any such regulations. None of the interviewed stakeholders referred to problems with trader to consumer distance selling or the relevant provisions and the Secretariat's complaints data do not show them to be a cause of frequent complaint. However, given the ubiquity of Internet access and the relative ease of small-scale importation into Seychelles, it is likely that issues associated with distance selling will become a more common topic of complaint in the future.

3. Fair and honest dealing

The provisions on fair and honest dealing take two different approaches. Sections 30–32 (misleading or deceptive conduct and false representations) and sections 35–37 (offering gifts and prizes with the intention of not delivering, dishonestly ac-

cepting payment and pyramid selling) might be described as the universal core prohibitions of almost all consumer protection laws. They are relatively straightforward in concept and drafting. In the world of consumer protection enforcement, these prohibitions are usually the least problematic to prove because the elements are clear and easily understood by both traders and consumers. If the evidence is available, it is usually obtainable and relatively unambiguous.

On the other hand, the prohibitions on inequitable conduct (sometimes cast as unconscionable conduct, a term used in the section objectives but not in the substantive provisions) are often more difficult for traders and consumers to understand because they are not defined in absolutes but in relative terms, where conduct is measured against a range of criteria which may be more or less relevant to particular transactional circumstances. The inclusion of the prohibitions on inequitable conduct in both consumer transactions and business transactions is an acknowledgement that small enterprises often have as much difficulty protecting themselves against unscrupulous traders as do consumers. These provisions are not a protection against the consequences of poor judgment or bad luck, but are protections in very limited circumstances where there is a significant power and information imbalance between the contracting parties and the conduct by the more powerful party is reprehensible, as distinct from being merely "tough". It is noted that this protection for SMEs has been achieved without the need to expand the definition of the term consumer.

4. Right to choose

Section 38 is a long and detailed section setting out consumers' rights in the event of receiving unsolicited goods and the related processes to ensure that while on the one hand consumers are not put to expense because they have received unsolicited goods, while on the other providing basic protection of traders' legitimate rights. On the basis of experience in many other countries, it appears to be a necessary and uncontroversial provision, but elicited no comment from the Secretariat or stakeholders. The summary of complaint records does not show any complaints concerning unsolicited goods.

E. Fair value, good quality and safety

Section 40 sets out mandatory standards for the performance of services. The list of requirements is modest but adequate and uncontroversial. The remedies are limited but functional and in most cases sufficient for remedy of any defect or provision of a proportional refund. The stand-alone use of the word portion (meaning a part considered in relation to the whole) in section 40(2)(b) raises the question as to whether the Secretariat could advise, or the Board order, a full refund in appropriate cases, for example where no service, or only an inconsequential element of a contracted service, has been provided.

Box 22 Recommendation

It is therefore recommended that section 40(2)(b) of the Consumer Protection Act be amended to read “refund to the consumer a reasonable portion or the whole of the price paid for the service performed and goods supplied, having regard to the extent of the failure”.

Significantly the choice of refund is at the discretion of the consumer. This may appear to be a controversial empowerment and was criticized by a business representative stakeholder. It is certain that had the provision been drafted to give the discretion to businesses, consumer representatives would be expressing concerns. The current drafting is to be preferred because it shifts the balance of discretion to the party harmed by the contravention rather than granting it to the party that has failed to meet one or more mandated standards. Consequently, it puts some added pressure on businesses to comply. The compliance incentive is increased by section 41, which provides for damages due to a failure to perform services to a required standard.

Complementing section 40, which relates to services, is section 42, which creates warranties in respect of unsuitable, defective and unsafe goods. With one notable exception, the warranties are similar to those in many other national consumer laws, including fitness for purpose, in good working order or not defective (sometimes called by the less useful term “merchantable quality”) and useable or durable for a reasonable period of time having regard to use. The exception is the some-

what vague and potentially uncertain warranty in section 42 that goods must be of “good quality”. Determining what constitutes good quality is a more subjective matter than the other warranties and both traders and consumer anticipate that the quality of goods will vary over time and often in response to price. If overly enforced, there is potential for this warranty to reduce the market availability of lesser quality, lower priced goods, which may be the only option for low-income consumers.

Section 43 provides a six-month warranty on parts used in repairs. While an absolute six-month period may seem a high threshold, in practice this warranty is tempered by the requirement that ordinary wear and tear must be taken into account.

Section 44 provides a comprehensive regime for warning consumers of the fact and nature of risks inherent in products and their use. To avoid consumer confusion and trader uncertainty and higher than necessary compliance costs, it will be necessary to harmonize the advocacy, awareness and enforcement activities associated with this provision with other relating regulations or particular types of risk, such as chemical, electrical, medical, etc. It will also be important to monitor how traders meet their compliance obligations. If the provision is to have ongoing utility, it is essential that warnings be clear and succinct, avoiding the common scenario whereby consumers remain ignorant of the relevant risks because of the oversupply of marginally useful information.

It should be noted that failures to meet the required standards for the performance of services in section 40 and goods in section 42 do not merely give rise to rights that may be privately enforced, as is the case in common law, contract law and some national consumer protection laws. Failures to meet the required standards constitute contraventions of the Act and the FTC is empowered to take action in response. This is significant because it gives the provisions authority, simply because they are less likely to be contravened if there is public enforcement and because consumers who have been harmed by contraventions are more likely to receive a remedy. A number of stakeholders, including NATCOF, stated that the failure to meet standards of services and goods of the types addressed here constitute a frequent and serious problem for consumers in Seychelles.

Conduct addressed in part V is a major area of complaints to the FTC. The complaints summary for 2011 showed the following:

- (a) Warranties for unsuitable, defective and unsafe products accounted for 23 per cent of the total complaints received;
- (b) Standards of performance of services accounted for 14 per cent of the total complaints received;
- (c) Liabilities for damages due to failure to perform services to required standards accounted for 2 per cent of the total complaints received;
- (d) Warranties on repaired goods accounted for 1 per cent of the total complaints received.

F. Consumer safety

Sections 49–59 provide a comprehensive regime for establishing a general safety requirement, the means of determining the requirement in particular cases, the means of investigating potential contraventions and resolutions to contraventions. While the general layout of the regime is logical, the detail of individual sections is complex, making awareness training for businesses more difficult than it will be for other parts and certainly more difficult than is desirable.

Several elements of the consumer safety provisions are noted as follows:

- (a) The exception provided in section 50(4)(a) allows for a potential gap in product safety coverage since it states that supplying an unsafe product is not a contravention if “the person reasonably believed that the goods would not be used or consumed in Seychelles”. The following questions are raised: (i) Is the potential harm to Seychellois outweighed by other policy considerations such as the cost to business and less competitive exports? (ii) Are there any significant exports that would be adversely affected? (iii) Is it defensible to include this defence when the primary area of consumer complaint is unsafe or poor quality imported goods? Repealing section 50(4)(a) would contribute to simplifying the part and increase the product safety coverage in Seychelles;

- (b) Section 50(4)(b)(ii) provides a defence “if the person neither knew nor had reasonable ground for believing that the goods failed to comply with the general safety requirement”. This might be described as a defence of ignorance because traders would be in a safer position if they did not make an enquiry or did not have in place a product safety compliance programme than if they did. An alternative that would encourage compliance without creating strict liability would be to recast the defence along the lines of “if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement”;
- (c) Section 50(5)(a) makes clear that the mere fact that the goods in question were not actually acquired for a person’s private use or consumption does not absolve a trader from the obligation to meet the general safety requirement. This provision is a valuable aid to enforcement because it removes a technical defence in situations where the particular goods were purchased by an investigating officer of the FTC or by a business complainant;
- (d) Section 50(5)(b) is a difficult provision to understand but seems to exclude from the definition of “in the course of carrying on a retail business” goods that have not previously been supplied in Seychelles. The logic of this exclusion is not apparent;

Box 23 Recommendation

It is therefore recommended that section 50(4)(a) be repealed, that section 50(4)(b)(ii) be amended to replace the words “the person reasonably believed that the goods would not be used or consumed in Seychelles” with wording similar to “if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement” and that section 50(5)(b) be repealed.

- (e) A hierarchical progression of regulatory responses is provided that gives the FTC both flexibility in action to match varying degrees of harm or potential harm from unsafe products (fines, section 58 on voluntary recalls, section 52 on prohibition and warning notices and section 54 on compulsory recall of goods) and the ability to undertake quick

decisive action when serious contraventions are detected in the market (section 57 on powers of the commission and section 53 on notice to produce information). To date, no prohibition and warning notices pursuant to section 52 have been issued, no notices to produce information pursuant to section 53 have been issued, no notices pursuant to section 57 have been issued, no voluntary recalls have been notified pursuant to section 58, probably because no voluntary recalls have been undertaken, and seven notices for product recalls have been issued pursuant to section 54. Five of these were in respect of substandard electrical cables with false descriptions and two were in respect of a toy cap gun and capsule that could cause harm to children using the toy, and in each case the notice was complied with;

- (f) Sections 53 and 57 are clearly intended to aid investigations by empowering the FTC to obtain information that would otherwise not be obtainable. Such powers are commonplace in both consumer protection and competition laws. It is reasonable that there should be some limits to restrict the otherwise unfettered ability of the FTC or others to make use of information obtained pursuant to these powers. For example, in some jurisdictions the information cannot be used in only civil and not criminal cases. However, section 57(6) seems to severely limit the use of such information to the point where it is questionable whether the power is at all useful, stating that it “shall not be admissible in evidence against that person (a) in any proceeding instituted by that person; or (b) in any other proceedings, except proceedings against that person for a contravention of a provision of this section”. It would seem that such information cannot be used by the FTC in any case it may undertake, except in respect of an action for failure to adequately respond to a notice issued pursuant to section 57. It is not apparent why (a) is required given the wide application of (b). Overall, it is difficult to understand why the FTC might exercise its powers under section 57.

In a small economy such as Seychelles, where business anonymity is impossible and reputations

are likely to be relatively more important, it is not altogether surprising that, as a consumer protection authority, the FTC has not found it necessary to use its powers under section 57. However, it is surprising that this power has not yet been used in respect of competition investigations since such powers are heavily relied upon in most jurisdictions.

G. Industry codes

The role of industry codes in consumer protection worldwide is mixed. On the one hand, there is the real potential that industry codes could deliver problem-specific, efficient and effective consumer protection at a low cost to government and business. On the other hand, there are often concerns that industry codes are nothing more than a euphemism for self-regulation. Whether industry codes will deliver efficient and effective consumer outcomes will depend upon the circumstances of each code, including the dynamics of the industry, the particular consumer problems being encountered and the form and substance of any supporting regulation. Section 61 provides the basic prohibition that a participant in an industry shall not contravene an applicable industry code. Section 62 empowers the Minister to prescribe industry codes, to declare an industry code and to “make such provision as the Commission recommends fit for the registering of persons bound or otherwise affected by an industry code”.

Understandable concerns that consumers may have about mandated industry codes delivering pro-consumer outcomes may be mitigated by the significant safeguards in regulations. Importantly, the process for establishing an industry code includes a consultation process during which the Commission seeks public comment and consults with industry and “relevant accredited consumer protection groups”. It is not clear what is meant by “relevant accredited consumer protection groups”. Interestingly, a code recommended to the Minister may differ from an existing industry code (section 63(2)). The Commission is charged in section 64 with monitoring and reporting on mandated industry codes, which should preclude any concerns that they may be a case of “set and forget”.

To date, the FTC has not recommended any industry codes to the Minister and the Minister has not mandated any codes.

H. Penalties and remedies

Commonly accepted objectives of sanctions (penalties and remedies) provided by consumer protection laws and imposed by authorities include stopping the contravening conduct, undoing the harm as far as is possible, reclaiming ill-gotten gains, encouraging future compliance by the contravener, encouraging market-wide compliance and punishing the contravener.

Penalties, usually in the form of a fine, are the most commonly provided and imposed sanction. Unless they are token or disproportionately low compared to the ill-gotten gain, penalties are readily recognized as a punishment. Section 67 confers on the Commission the power to order penalties in respect of a contravention of any prohibition in the Act, although this is not absolutely clear since section 67 states that “any requirement or prohibition contained in sections the Commission may order the person”.

The maximum penalties are set at SR 100,000 (equivalent to approximately US\$7,740) for an individual and SR 400,000 (equivalent to approximately US\$30,970) in the case of a person other than an individual, i.e. a legal person or a company. By way of comparison, the maximum penalties under the Australian Consumer Law are approximately US\$220,000 for individuals and US\$1.10 million for body corporates. Adjusting for the difference in GDP per person between Seychelles and Australia, this still has the notional comparative that Australian maximum fines are approximately US\$135,000 for natural persons and US\$674,000 for body corporates. While it is not suggested that the Australian level of fines is the optimum level or has any relevant precedent value, it does raise the question as to whether the level of fines in the Consumer Protection Act is likely to encourage long-term compliance.

The setting of appropriate penalties in particular cases is usually guided by precedent. However, in the case of the Consumer Protection Act, section 67 sets out factors that should be considered when determining an appropriate penalty. This list is appropriate and quite comprehensive of relevant factors. It is important that consumers, business and the Government understand how and when the Board considers these and other relevant factors in each case. Predictable and rationally based

sanctions will encourage compliance and give confidence to the Government and consumers that the law is being applied appropriately in each circumstance. Reported determinations show that the largest fine imposed by the Board to date is SR 60,200 or 15 per cent of SR 400,000, the maximum fine for corporations provided for in the Act.

To date, the records of the Board’s decisions have not explained the reasoning for fines imposed, and observers may wonder why higher penalties have not been imposed when the law provides for it.

It is also important that the maximum fines for the contravention of consumer protection provisions:

- (a) Provide scope for the Board to impose meaningful penalties in gross cases where consumer detriment is substantial and where the ill-gotten gains are substantial and not recoverable or where the conduct is particularly reprehensive, for example in the case of repeat offences, offences against vulnerable groups, etc.;
- (b) Maintain a level of comparison with the fines available in respect of contraventions of the Fair Competition Act. For example, if the fines for anti-competitive conduct are increased over time and those for consumer protection contraventions are not, the lagging consumer protection penalties risk sending a signal that consumer protection has less value than competition concerns and that compliance with these obligations is less necessary.

As a response to the criticism that the FTC and Consumer Protection Act lack clout, it has been suggested that the Act be amended to specify a formula for the imposition of fines. While superficially attractive as a solution, the sentencing flexibility lost with the use of a formula seems an undesirable trade-off because of the wide variability in the circumstances involving, and resulting from, contraventions of consumer protection provisions. Rather, wide discretion should be given the Board to match sanctions to the case in question. The disinclination of the Board to impose fines to the maximum now available or to provide sentencing explanations in its decisions should be otherwise addressed.

Box 24 Recommendation

It is therefore recommended that:

- (a) The maximum fines be increased to a level at which they provide the Board with penalty options to provide a significant deterrent for the worst contraventions and reflect the quite significant financial incentives sometimes linked to unlawful conduct in a commercial environment;
- (b) Section 67 be amended to read: "67(1) Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person—

- (a) In the case of an individual, to pay a penalty of a sum not exceeding SR 1 million; or

- (b) In the case of a person other than an individual, to pay a penalty of a sum not exceeding SR 4 million.

Penalties for breaches of provisions of this Act (2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penalty of a sum not exceeding SR 1 million";

- (c) the Commission routinely consider each of the factors listed in section 67 and any other factors it considers relevant when imposing sanctions, and its reasoning be referred to in its written determinations.

Section 68 provides that, in addition to a penalty imposed under section 67, the Commission:

- (a) Shall where applicable, direct the person to cease the conduct constituting the contravention within a specified period;
- (b) May require the person to take such further action as in its opinion is necessary.

An order under section 68(a) is similar to an injunction and is therefore clearly directed towards stopping the conduct. The overarching nature of section 68(b) seems to grant the Board power to "responsibly challenge its imagination". Perhaps this power could be directed towards undoing the harm caused by contraventions, reclaiming ill-gotten gains, encouraging future compliance by contraveners and encouraging market-wide compliance.

Potentially some or all of the following may come within the ambit of section 68(b) orders:

- (a) Payment of contributions to consumer and/or business educational campaigns;
- (b) Implementation of corporate compliance programmes;
- (c) Restriction of the activities of contraveners, for example by prohibiting their participation in certain types of business or in certain capacities, such as director or manager;
- (d) A form of corporate probation;

- (e) A form of corporate community service;

- (f) Corrective advertising.

Ultimately, the scope and usefulness of section 68(b) in delivering the various objectives of sanctions will need to be tested both by the Board and the courts. This process could certainly be beneficially focused and accelerated if the Secretariat engaged with stakeholders in respect of the need to meet objectives, in addition to punishment, terminating the conduct and compensation.

Importantly, section 70 establishes that a person who fails or refuses to comply with an order, direction or undertaking of the Commission or Tribunal commits an offence. In this case, while the maximum fines are modest, there is provision for a term of imprisonment not exceeding two years. The provision of a potential prison term provides a powerful compliance incentive not only for individuals but also for corporations, since the possibility of the imprisonment of executives is a serious threat for corporations.

Box 25 Recommendation

It is therefore recommended that consideration be given to amending the Consumer Protection Act to provide a wider range of sanctions and remedies and that the Board consider the expanded use of section 68(b) where it believes appropriate.

I. Enforcement

The first section of this part is both the simplest and the most significant; it vests the Commission with the power to enforce the Consumer Protection Act in accordance with this part and further provides the Commission with a range of enforcement responses, including: compliance notices (section 72), interim orders (section 74), other orders (section 76) and the ability of the Commission to accept undertakings (section 75). The time limitation on making other orders – any time within five years from the time when the matter giving rise to an application occurred – is very adequate.

To date, 78 compliance notices pursuant to section 72 have been issued. All were in the retail sector for supply-expired goods and goods without understandable language or not providing a receipt. No interim orders pursuant to section 74 have been issued. The Secretariat has been accepting undertakings on appropriate cases as a matter of routine, although no statistics on this are collected and published. No other orders pursuant to section 76 have been made.

To date, only three matters, all consumer protection cases, have been appealed to the Tribunal, and these all involved the same party.

In the early days of a competition law, consumer protection law or indeed any regulator with enforcement responsibilities, one may expect legal challenges that test the laws and their application by the authority. To date, there have been only two such challenges. The first challenge, which alleges abuse of power, intention to close down a business and malicious intent on the part of an investigator, is still before the Supreme Court, adjourned sine die (without date) and is unlikely to be of any useful precedent value. The second is an appeal against the Board's decision to hear a case *ex parte*.

J. Miscellaneous

This final part of the Act is short in length but nevertheless very important. Section 77 provides for appeals by parties who are dissatisfied with an order or direction of the Commission. Unfortunately, since the appeal is to be lodged with the Tribunal and the Tribunal does not yet exist, this provision is effectively inoperable.

As noted earlier, the Consumer Protection Act is not the only consumer protection regulation in Seychelles. Consequently, it is appropriate that the FTC form working relationships with other relevant regulators to ensure the effective and efficient implementation of their respective responsibilities and the implicit consumer protection policy. The objective of these relationships would be to ensure a quicker and more effective resolution of consumer problems and the minimization of regulatory costs through the avoidance of duplication. Commission interaction with other regulators is discussed in the section on relations with sector regulators this report.

Section 79 of the Act confers upon the Commission responsibility for the promotion of awareness in consumer matters. As noted elsewhere in this report, this responsibility is an integral component of a strategic approach to the long-term minimization of consumer problems.

Finally, section 80 of the Act confers upon the Minister the power to make regulations in respect of a wide range of matters relevant to the Consumer Protection Act.

1. Other consumer protection legislation

While other existing legislation makes mention of the general aim to protect consumers and includes specific service quality provisions, for example the Broadcasting and Telecommunications Act, none includes provisions similar to parts III–IX of the Consumer Protection Act. However, some legislation is currently being drafted to include consumer protection provisions, for example the Electronic Communications Bill and amendments to the Food Act and Seychelles Media Commission Act.

The move to include consumer protection provisions in wider legislation is laudable. It is likely that many consumer protection problems are product- or industry-specific in occurrence, so that where there is a specific regulator, it should be well placed to facilitate better outcomes for consumers. Close liaison and issue-specific cooperation between authorities will be essential for:

- (a) Increased confidence among consumers that their interests are being prioritized and effectively managed by Government;

- (b) Reduced compliance uncertainties and costs for businesses;
- (c) More effective and efficient advocacy and education and intelligence gathering by consumer protection authorities.

Sector-specific regulators must certainly guard against the risk of capture by the industry they regulate. Close liaison and cooperation with the general consumer protection regulator can mitigate this risk.

Perhaps somewhat controversially, the reviewers differentiate between the proliferation of competition and consumer protection provisions and their respective enforcement responsibilities. In summary:

- (a) There are likely to be greater economy-wide effects from contraventions of the competition provisions than from contraventions of the consumer protection provisions;
- (b) Many of the competition provisions are complex and their interpretations will be developed through a consistent history of both administrative application and adjudicative precedent. By contrast, most of the consumer protection provisions are not complex;
- (c) Many consumer problems are amenable to resolution by negotiation between the parties and by directions of the relevant authority, for example the clarification of technical, performance or disclosure standards. This is not the case with most anti-competitive conduct;
- (d) Many consumer protection problems are public in their occurrence or in their resolution. This is not the case with most anti-competitive conduct, which is secretive following the enactment of a competition law. If a problem is detected and dealt with by one regulator, the general regulator may not even be aware of the matter.

Consequently, the following may be noted:

- (a) There is a strong argument that the delivery of effective competition policy and law requires the general competition authority, the FTC, to have an overarching responsibility. This is particularly important in areas such as mergers and hard-core cartels;

- (b) While there is a need for all authorities with consumer protection responsibilities to liaise and cooperate, there is not a strong argument for the general authority to have an overarching responsibility.

In considering recommendations in respect of amendments to the Consumer Protection Act, it is important to note that the Act was only enacted in 2010, that not all of the provisions of the Act have been utilized in the course of investigations or before the Board and that the Board has not imposed sanctions to the maximum provided by the Act.

2. Coverage of the Consumer Protection Act

The reviewers conclude that while the coverage of the Consumer Protection Act is superior to many consumer laws in the developing world, it is not comprehensive. Seychellois are entitled to expect that their consumer protection regime will deliver a comprehensive regime of compliance, detection, investigation, determination and sanctions. Consideration should be given to widening the scope of protection provided by the Consumer Protection Act to include provisions specifically giving consumers the right to restrict unwanted direct marketing and provisions relating to:

- (a) Consumers' right to select suppliers;
- (b) Expiry and renewal of fixed-term agreements;
- (c) Pre-authorization of repair or maintenance services;
- (d) Consumers' rights to a cooling-off period after direct marketing, to cancel advance reservations, bookings or orders, to choose or examine goods, to return goods and with respect to the delivery of goods or supply of services;
- (e) Disclosure of reconditioned or grey-market goods;
- (f) Disclosure by intermediaries;
- (g) Identification of deliverers, installers and others;
- (h) Negative-opinion marketing;
- (i) Catalogue marketing;

- (j) Trade coupons and similar promotions;
- (k) Customer loyalty programmes;
- (l) Promotional competitions;
- (m) Alternative work schemes;
- (n) Agreements with persons lacking legal capacity;
- (o) Overselling and overbooking.

The Consumer Protection Act of South Africa provides an excellent model for consideration.

It is acknowledged that the problems and issues addressed by these types of provisions are not currently the subject of significant complaints to the FTC. Lack of reporting is not evidence that the problems are not affecting Seychellois. It could be the case that consumers simply accept the status quo and are not convinced that there is any point in reporting these concerns or that other problems are of greater concern. In any case, determination of this issue was beyond the scope of this consultancy.

Amending the Act to include these additional protections will certainly move Seychelles legislation further away from harmonization with the consumer provisions of the COMESA competition regulations. This is a cost that would need to be balanced against the potential benefits to Seychellois. Harmonization is an obligation of COMESA membership, but should not mean the maintenance of the lowest common denominator when it comes to consumer protection. Rather, it places an onus on ensuring that compliance with national laws is not at odds with harmonization and greater freedom in intraregional trade.

The reviewers propose that amendments to expand the coverage of the Consumer Protection Act through insertion of new contraventions should be considered a longer term goal and a lower priority compared with the recommendations directed towards more effective and efficient enforcement of the current provisions. The FTC should provide the Department of Trade in the Ministry of Finance, Trade and Investment and the Attorney General's Office with periodic advice on emerging areas of consumer problems that are not adequately addressed by existing provisions and operational problems arising from the current drafting of the Act.

3. Potential new short-term expansion of the Commission's consumer protection role

The reviewers understand that Seychelles Government intends to make significant changes to the taxation regime, including the introduction of a value-added-tax (VAT). Major changes in tax regimes, whatever their policy objectives, are seldom popular, if only because those who benefit are usually restrained, while those who will pay more are usually vocal in their criticism. Debate about and ultimate success of a new tax regime is made more difficult if businesses take the opportunity to increase prices beyond the effect of the new taxes or fail to fully pass on decreases, while justifying increases based on, or blaming them on, the imposition of the new tax.

In Australia, the introduction of a new GST was accompanied by new powers for the Australian Competition and Consumer Commission (ACCC) to combat price exploitation. The result was that the GST introduction was less controversial and price changes only reflected the actual net effects of the tax changes. This was a widely acknowledged win for all stakeholders, Government, business, consumers and the ACCC.

This new and temporary role should not be confused with price setting. Businesses remained free to make their own individual decisions as to what prices they charged before and after the introduction of the new tax. Rather, they were prohibited from unjustifiably blaming their decision to increase prices on the new tax. Because the responsibilities were additional to the historic role of the ACCC, additional funding was provided by the Government.

Box 26 Recommendation

It is therefore recommended that urgent consideration be given to amending the Consumer Protection Act to give the FTC specific powers in relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.

Part Three Institutional framework

I. Institutions

There are two main institutions, the FTC and the Appeal Tribunal.

A. Fair Trading Commission

The FTC is an autonomous statutory body established under the Fair Trading Commission Act 2009 to administer and enforce the Fair Competition Act 2009 and the Consumer Protection Act 2010. The Commission is a quasi-judicial body with both adjudicative and investigative functions. In practice, but not specifically provided for in any of the Acts that the FTC administers, the Commission has two operating branches. The Board of Commissioners is the adjudicative branch and governing body and the Secretariat is the investigative and administrative branch.

The separation of the Commission's adjudicative and investigative functions under the Fair Trading Commission Act is not clear and may cause enforcement problems in the future. The Act does not clearly define when and what sort of actions should be taken by the Secretariat (i.e. the Chief Executive Officer and staff of the Commission) and by the Board of Commissioners as the term commission refers to both the Board and staff. The term commission is defined under the Act as "the Fair Trading Commission established under section 3(1)" and this section merely states that the Fair Trading Commission is established as a body corporate. While the term commission in the Act therefore refers to both the staff and members (i.e. Commissioners) of the Commission, the Board of Commissioners is separately defined in the Act; in terms of section 2 of the Act, the Board is defined as "the Board of Commissioners appointed under section 5(1)(a)" and Commissioner is defined as "a member of the Board".

The statutory functions of the Commission in terms of section 4(1) of the Fair Trading Commission Act include both adjudicative and investigative functions, which are not apportioned between the Commission's Secretariat and Board of Commissioners. It may, however, be inferred from section 23 of the Act that the Secretariat is the investigative branch of the Commission, through

the provision that "the members of staff employed under section 22 shall investigate such matters as are stipulated by the Chief Executive Officer and report their findings to him or her". Furthermore, it has become established practice in Seychelles that the Secretariat investigates competition and consumer complaints and submits reports on its findings to the Board of Commissioners.

However, unclear statutory separation of the Commission's adjudicative and investigative functions has grave legal implications. In Jamaica, for example, the constitutional validity of the country's Fair Trading Commission was successfully contested in 2001 before the Court of Appeal, rendering the competition authority practically inoperative and many core provisions of the Fair Competition Act unenforceable. The fundamental issue in this instance was the lack of separation of the adjudicative functions from the investigative functions under the Act. The Court of Appeal found the lack of separation of the adjudicative and investigative functions contrary to the principles of natural justice. The Jamaican competition authority had no option but to revert to moral suasion and voluntary compliance to fulfil its mandate.

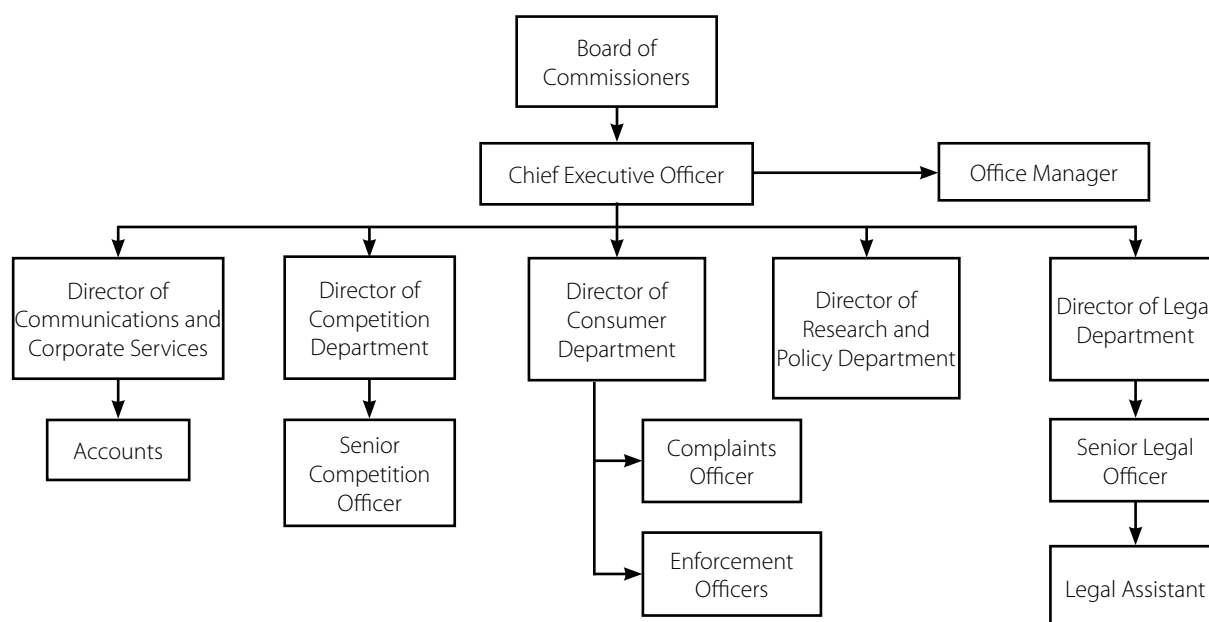
Box 27 Recommendation

It is therefore recommended that there be a clear separation of the Commission's adjudicative and investigative functions under the Fair Trading Commission Act, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners adjudicative functions, with well-defined responsibilities and spheres of operation.

The current organizational structure of the Commission, as provided by the Commission, is shown in figure 2.

1. Board of Commissioners

The Board of Commissioners was appointed in terms of section 5 of the Fair Trading Commission Act for a three-year term of office that expires in November 2012. The Chief Executive Officer of the Commission is an ex officio member of the Board. In terms of section 5(2) of the Act, appointed

Figure 2 Organizational Structure of the Fair Trading Commission

members of the Board should be “persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce”. The statutory composition of the Board is five members.

The Commissioners, meeting together, act as the strategic decision-making body for the FTC as an institution. They also take decisions on all investigations of restrictive practices under the Fair Competition Act and the Consumer Protection Act, conducting hearings with the parties concerned and, where necessary, imposing directions or agreeing to undertakings.²⁶

The Act does not specify how many times the Board should meet, only that it “may meet at such times as the Chairperson may determine”. In practice, however, the Board meets twice a month on average, once for administrative matters and once for consumer and competition cases.

Consultations with both the Secretariat and the Board of Commissioners during the fact-finding visit to Seychelles identified quorum concerns over the composition of the Board. As already stated, the Board is composed of five Commis-

sioners who are appointed on a part-time basis, and Board decisions are taken on the basis of majority voting. Section 15 of the Fair Trading Commission Act stipulates that three Commissioners should constitute a quorum for any meeting of the Board. The disclosure of interest provisions of section 11 of the Act mean that in the event of a conflict of interest, Board members need to abstain from voting, after disclosing the interest. The previous Board of Commissioners had three members who had direct interests in the banking services sector, and felt obliged to recuse themselves from any competition and consumer protection decision involving those in that sector, or any of their major customers, thus affecting the Board’s decision-making quorum. The Board was thus rendered powerless to decide on any case affecting the banking and financial services sector.

The appointment of members to the Board of Commissioners for terms of only three years was also raised as a concern by both the Secretariat and Board of Commissioners during the fact-finding visit to Seychelles. It was submitted that the period is far too brief to enable members to fully understand the intricacies of competition and consumer protection law and policy, enabling them to effectively contribute to decision-making on such matters. In this regard, it was noted that

²⁶ FTC, available at http://www.ftc.sc/index.php?option=com_content&view=article&id=21&Itemid=90.

none of the present members of the Board had previous experience in competition or consumer protection law before joining the Commission, with the only effective training given to them in these fields being a course on competition law enforcement, which was an induction course for the Commissioners on institutional and organizational aspects of competition law enforcement, and intermediate training on investigative procedures and case handling for investigative officers and case handlers of the FTC. The course was organized by UNCTAD and undertaken in March 2012, despite the fact that the terms of office of the Commissioners would end in November 2012.

More competition and consumer protection adjudication courses are required for the Board of Commissioners, given the Board's limited knowledge and experience in this field, and the fact that there are an increasing number of cases, particularly consumer protection cases. Consideration could also be given to assigning a regional or international competition and consumer protection expert for a period of three to six months to assist in the training of the Board of Commissioners and in the implementation of the required changes in the Board's procedures.

The appointment of the Chief Executive Officer of the Commission as an ex officio member of the Board of Commissioners is also a cause for concern. The Chief Executive Officer heads the Commission's Secretariat, essentially the Commission's investigative branch, while the Board is the Commission's adjudicative branch. Natural justice principles dictate that there should be a clear separation

of the competition authority's adjudicative and investigative functions, otherwise the Commission's decisions on competition or consumer protection cases may successfully be appealed against in law courts, as occurred in Jamaica.

It is noted that the Massimiliano Gangi report welcomed the ex officio Board membership of the Chief Executive Officer, since this would build a strong link between the Board and the staff.²⁷ The Chief Executive Officer may still provide a connection between the Board with the staff without necessarily being a member of the Board, as the Officer would, in any case, be required to be the technical resource persons at Board meetings on the operations and activities of the Commission.

It is also noted that the Board of Commissioners, in consultations held during the fact-finding visit to Seychelles, advised that the Chief Executive Officer only participates in the Board's deliberations and decision-making on administrative matters, and not in the determination of competition and consumer cases, which are considered at separate meetings. The Board further advised that the Chief Executive Officer does not discuss with the Board investigations into competition and consumer complaints before the submission of reports on investigations to the Board. The above precautions are only administrative, however, and are not enshrined in the Act.

²⁷ Massimiliano Gangi, Team Leader, Technical Assistance to Seychelles Ministry of Finance in implementing the Fair Trading Commission of Seychelles, Project Management Unit of the ACP TradeCom Facility, Brussels, December 2010.

Box 28 Recommendation

It is therefore recommended that membership on the Board of Commissioners be increased from five to eight members to ease quorum problems on the Board. For the same reason, members of the Board should be drawn from diverse economic backgrounds, to avoid one sector dominating its membership. The recent Board appointments are therefore in the right direction.

It is also recommended that the terms of office of Board members be increased to a maximum of five years, to enable the members to fully contribute to the operations of the Commission with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should, however, be staggered to avoid a sudden and total departure of experience and knowledge.

It is further recommended that technical assistance and capacity-building be given to the Board of Commissioners in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of three to six months to assist in the training of Board members and implementation of the required changes in the Board's procedures.

Box 29 Recommendation

It is therefore recommended that the ex officio membership of the Commission's Chief Executive Officer on the Board of Commissioners under section 5(1) of the Fair Trading Commission Act be removed, to avoid conflict of interest problems in the Board's determination of competition and consumer protection cases. Alternatively, a separate Board could be established to only consider and adjudicate on competition and consumer protection cases, on which the Chief Executive Officer would not be a member.

The question of commissioner fees was also raised by the Commissioners during the fact-finding visit to Seychelles. It was submitted that members are given a fixed Board fee that is not adequate for the work involved, which includes hearings and extensive reading before meetings. It was found that members of the Board of Commissioners of the FTC presently receive relatively higher monthly fees than the average fee of members of most other boards of statutory bodies. The current Board fee of the Chairperson of the FTC is SR 12,000 per month, while the fee of other members of the Board is SR 5,000 per month. Average board fees for most other statutory bodies are SR 3,000 per month for chairpersons and SR 1,500 per month for other members.

The current fees consist of only a single component, a monthly fee paid regardless of the number of days of work required in that month. There is no allowance for time spent preparing for meetings (often referred to as reading time), which may be significant if there are several cases to be determined at a particular meeting or if there are any substantial competition cases to be heard. Currently, it is likely that the workload of the Commissioners is relatively evenly shared, as all are routinely asked to attend each meeting and because of quorum requirements.

The responsibilities and work requirements of boards of competition authorities in the region are, however, higher than those of boards of other parastatal organizations in terms of preparation for meetings, including reading extensive volumes of documents and actual participation in meetings, including lengthy hearings into competition cases. The opportunity costs of part-time board members that attend meetings and hearings are also very high, given the fact that they have full-time jobs elsewhere.

The above observations raise two issues:

- (a) Whether the current level of fees is appropriate given the level of skill and experience required of Commissioners, the nature of the duties undertaken by the Commissioners and the fees paid to the members of other statutory boards with deliberative responsibilities;
- (b) Whether the current single-component fee structure is appropriate given that it is almost certain that the workload of the Commissioners will increase and that if more Commissioners are appointed to reduce quorum-forming difficulties then it is likely that not all Commissioners will undertake the same workload.

Box 30 Recommendation

It is therefore recommended that in addition to a fixed monthly fee, members of the Commission's Board of Commissioners also be paid sitting fees for attending and participating in Commission meetings, including hearings.

2. Secretariat

The Secretariat of the Commission is headed by the Chief Executive Officer, and consists of five Departments: the Communications and Corporate Services Department, the Consumer Affairs Department, the Competition Department, the Research and Policy Department and the Legal Department.

- (a) The Communications and Corporate Services Department's major areas of responsibility are in awareness and sensitization on competition and consumer protection laws. The Department also undertakes regular administrative work, such as financial and human resources management. The operational Departments of Competition and Consumer Affairs have also been given advocacy and awareness functions;
- (b) The Competition Department's main responsibilities are to enforce the Fair Competition Act and undertake investigations based on complaints of restrictive business practices;

- (c) The Consumer Affairs Department enforces the Consumer Protection Act;
- (d) The Research and Policy Department undertakes market studies and assists in the economic analyses of competition cases. It has designed a database on both competition and consumer cases and is working on a comprehensive competition policy;
- (e) The Legal Department is mainly a vetting department. In this regard, it is linked to all the other departments of the Commission and vets all the cases investigated by the Competition and Consumer Affairs Departments. It also undertakes legal drafting work and is involved in the drafting of Memorandums of Understanding (MoUs) with other organizations.

The Commission's Secretariat is understaffed in certain areas. At the time of the fact-finding visit to Seychelles, the Secretariat had a small staff complement of 17. The staff complement has since risen to 20 employees, with the appointment of an additional Competition Analyst in the Competition Department and two additional officials in the Consumer Affairs Department, an Enforcement Officer and a Consumer Analyst.

It would be fair to state that all young competition and consumer protection authorities could usefully acquire more staff than their current complements, particularly with a view to evaluating complaints more quickly and with a stronger strategic focus. More staff would mean that investigations could be undertaken more quickly and thoroughly and that staff working on more complex cases (or cases at a more advanced phase, such as presenting matters for determination) would have fewer distractions from their remaining caseloads. As important as the total number of staff members are how staff members are allocated and the strategies in place to manage the workload in such a way as to match staff numbers.

Specific institutional arrangement issues raised by the Chief Executive Officer included whether the Commission's lawyers and economists should operate in one or separate departments, how the research unit might facilitate the work of the competition and consumer protection departments in a timely fashion and whether the combination of communications and awareness functions in one department was appropriate.

All of the above institutional issues may be addressed by adequately resourcing the departments in terms of staff and by giving each department functions that are specific, but supportive of the activities of the other departments.

The Competition Department has only three members, the Director and two Competition Analysts, yet it is expected to handle all of the common competition concerns outlined in the Fair Competition Act, abuse of dominance or monopolization, anti-competitive agreements of both a horizontal and vertical nature) and anti-competitive mergers, all of which require different approaches of a highly specialized nature that require the accumulation of skills. The current complement of staff assigned to competition does not appear to be sufficient to undertake a major case, or if such a case was undertaken, to simultaneously undertake any other competition investigations. It is noted that the Competition Department is assisted in its investigations by the Research and Policy Department and the Legal Department, both of which are also understaffed and have officials not specifically trained in handling competition cases.

While closer integration of support staff (i.e. staff other than those undertaking investigatory functions) and additional legal resources would be very helpful and necessary, this would not address the basic lack of capacity. The current complement of support staff assigned to competition does not appear to be sufficient to provide the timely and case-specific advice and research functions demanded by current workloads. This situation will be exacerbated if workloads increase.

What is required is to augment the staff establishment of the Competition Department to enable it to have enough staff members that individually specialize in the three common competition concerns of monopolization, anti-competitive agreements and anti-competitive mergers. The effective handling of competition cases also requires the services of economists and lawyers. The Department should therefore have a mixture of economists and lawyers as case officers.

The current complement of staff assigned to consumer protection work appears to be handling the current workload of complaints, investigations and presentations to the Board, albeit with a possible trade-off in respect of not prioritizing more strategic activities, such as a programme to address the apparently systematic problems in the retail sector. It is noted that the National Consumer Forum (NATCOF) expressed concern that some consumer complaints are taking too long to resolve, but did not identify any specific cases. While the reviewers did not examine case files to determine whether this was a reasonable complaint or simply a difference in expectations, it is clear that the progress of each investigation is closely monitored by both the Director and the Chief Executive Officer. It is noted that the Board has made no adverse comments on the timeliness of matters brought before it. The reviewers concluded that timeliness of case resolutions is not a systemic problem.

NATCOF clearly has significant further potential to provide the FTC with grass roots intelligence and cooperation in undertaking market surveys and monitoring. This potential is likely to be more forthcoming if the current concerns of NATCOF are more fully addressed.

In some jurisdictions, for example in the United Kingdom of Great Britain and Northern Ireland with its Enterprise Act 2002, designated consumer protection organizations are given a special status to submit complaints on behalf of consumers that are then fast tracked through the authority's investigative process. Potential advantages of this system are that the authority receives better quality complaints, because they have already been subject to some prioritization and preliminary data obtained, and that an effective consumer organization is rewarded with a more responsible role and is better able to understand the required processes of the authority.

Box 31 Recommendation

It is therefore recommended that both the concept of providing for a designated super complainant and the practicality of designating NATCOF as a super complainant be explored.

The Research and Policy Department and the Legal Department have staff complements of one and three respectively. The member of the Research and Policy Department also assists the Competition Department in competition investigations, but should ideally concentrate purely on research work, which should include the undertaking of studies into competition in various industries and economic sectors of Seychelles and the analysis of concentration levels in the industries and sectors for the Commission's proactive intervention. Many studies are also required in the consumer field, such as on frequent and prevalent consumer concerns. It is therefore not surprising that the Commission's research unit is unable to undertake timely research and studies to complement and support the work of the Competition and Consumer Affairs Departments.

The Legal Department also assists the Competition Department in the investigation of competition cases and assists the Consumer Affairs Department in that Department's investigations. It is therefore not surprising that the Department considers that it is overloaded and that there is an element of duplication of work between the Department and the other two Departments that is causing frustration among staff. The recruitment of lawyers as case officers in the Competition Department, to work together with that Department's economists, should relieve the Legal Department from competition investigation obligations and enable it to concentrate on its core business, which is to give legal advice to the Commission as a whole, draft legal notices, review the provisions of the competition and consumer protection legislation, prepare cases for law courts, etc. Filling the vacant position of Director of the Legal Department, while maintaining the number of staff providing legal support, will clearly assist the situation.

The Communications and Corporate Services Department has only three staff members, who perform a multitude of somewhat unrelated functions, including visibility and awareness, sensitization of competition and consumer protection laws, and regular office administrative work. It is highly unlikely that the current three staff members of the Department possess all the necessary skills among them for the effective undertaking of the Department's multiple functions, which are all important functions for the smooth operation of the Commission.

Box 32 Recommendation

It is therefore recommended that the Competition Department of the Commission's Secretariat have a mixture of economists and lawyers as case officers, with the immediate recruitment of an economist and a lawyer to augment the understaffed department.

It is also recommended that the vacant posts in the Secretariat, particularly that of Director in the Legal Department, be filled as a matter of urgency.

It was observed, however, that there is an element of duplication of work between the Commission's Departments, which might lead to staff frustration and reduced opportunities to build experience and specialization. The need was identified for closer integration of the work undertaken by the Communications and Corporate Services Department and the Legal Department, which act more in the manner of support Departments, with that of the more operational Competition Department and Consumer Affairs Department.

The following generalized conclusions may be reached on the FTC Secretariat's staffing situation:

- (a) The number of consumer protection-related complaints is far greater than the number of competition-related complaints, and this will certainly remain the case.
- (b) Competition investigations are more complex and take longer than consumer protection cases, and therefore require more staff hours per investigation.
- (c) To meet short-term demand for resources, there is some ability to move staff between addressing competition and consumer complaints, particularly at the junior investigator level, for example to interview witnesses, prepare background information, undertake raids, etc.
- (d) There may be some ability to determine how many complaints pass through to preliminary or substantive investigation, for example, by encouraging the appropriate resolution of consumer complaints at a pre-investigation or pre-Board level (i.e. lower down the resolution pyramid). The ability to do this may be affected by government and community expectations.

- (e) Allocation and management of support staff can make a significant difference in how much may be achieved by higher-level or specialized staff.

B. Appeal Tribunal

The Appeal Tribunal established under the Fair Trading Commission Act is an important institution in the enforcement of competition and consumer protection laws in Seychelles. However, the Tribunal had still not been established at the time of the fact-finding visit to Seychelles. The Chief Executive Officer of the FTC advised that the chairperson of the Tribunal must be a senior-level lawyer and that a suitable candidate had not yet been found.

While no case involving competition decisions of the FTC has been appealed, three appeals in cases involving consumer protection decisions have been made, and these are held in abeyance pending the establishment of the Tribunal. In respect of the individual cases, it might reasonably be said that "justice delayed is justice denied". However, it is also clear that certain parties might contemplate lodging an appeal because there is no immediate prospect of that appeal being heard and thus any penalty or order of the Board would be rendered ineffective. Furthermore, precedents inform business, consumers and FTC staff on the interpretation of provisions and on the evaluation of evidence and likely imposition of penalties, orders and remedies. In doing so, they promote both compliance and more effective and efficient administration by the FTC.

The Attorney General, in consultations held during the fact-finding visit to Seychelles, stated that the absence of the Tribunal provided for in the Fair Competition Act to hear appeals against the decisions of the Commission is a serious legal omission, and that appellants may win cases against the Commission on technicalities because of the absence of the Tribunal. The Attorney General confirmed that it had not been possible to establish the Tribunal due to the provision that its chairperson must be a senior-level lawyer, and that a suitable candidate had not yet been found as not many lawyers in Seychelles would wish to be appointed to the Tribunal rather than maintaining a more lucrative private practice.

The same observation was made by the Chief Justice of the Supreme Court of Seychelles, who advised that the Revenue Commission had similar problems with provisions in its enabling Act on the establishment of a Tribunal that were never implemented. The establishment of the new institution was problematic due to the limited number of eligible lawyers available in Seychelles.

However, both the Attorney General and the Chief Justice queried the need to have a special tribunal for competition and consumer protection cases. The Attorney General stated that it might not be viable for a small economy such as Seychelles to have a specialized tribunal concentrating solely on competition and consumer protection matters and that what is needed is a multi-disciplined body that would justify the work it handled. The Chief Justice stated that given the resources available in Seychelles, the question may be asked whether the country requires a tribunal on competition and consumer protection or whether appeals on competition and consumer protection decisions may be made directly to the Supreme Court. The Chief Justice noted that while doing so could shorten the appellant process, it would also increase the workload of the already overstretched Supreme Court, which has only six judges. The Chief Justice also advised that a commercial list under the Supreme Court was established in April 2012, which is presently handled by the Chief Justice. The commercial list had handled two cases to date, and the planned case handling time was six months. If competition and consumer protection appeals were channelled to the Supreme Court's commercial list, the list could assume the burden.

Both suggestions made by the Attorney General and Chief Justice on having alternate appeal bodies on competition and consumer protection decisions of the FTC have merit. The Attorney General's suggestion of a multi-disciplined appeal body is similar to the arrangement in Zimbabwe, which is working quite well. In Zimbabwe, appeals against the decisions of the competition authority are made to the Administrative Court, which hears appeal cases on the decisions of public administration bodies, such as regulatory authorities, municipalities, etc. Given the current limited number of appeals against the Commission's competition

and consumer protection decisions, the commercial list of the Supreme Court could adequately handle such appeals. The Supreme Court is also an appropriate appeal body for consumer cases. In Seychelles, court cases of values below SR 350,000 are considered by the Magistrates Court, while those above SR 350,000 are considered by the Supreme Court. As advised by the Chief Executive Officer of the FTC during the fact-finding visit to Seychelles, the FTC has handled consumer cases valued at up to SR 600,000.

A factor relevant to the consideration of an appropriate appeal function is the cost of bringing an action, as doing so before a higher court such as the Supreme Court may be significantly more expensive than doing so before administrative boards or inferior courts. This consideration is more significant in consumer protection cases where all parties, both consumers and many traders, have relatively modest incomes and assets, and where the amount of harm and values of the relevant transactions are likely to be relatively modest when compared to typical competition cases.

Box 33 Recommendation

It is therefore recommended that the Appeal Tribunal, as provided for in all three Acts under the administration of the FTC (i.e. the Fair Trading Commission Act, the Fair Competition Act and the Consumer Protection Act), be established without further delay.

C. Budget and financial resources

The Commission's sources of income are limited to governmental subventions. Though the Act empowers the Minister to prescribe fees for services rendered by the Commission, and the Commission has already requested the Minister to prescribe merger notification fees, no such fees have yet been prescribed. The use of the funds is also specified in the Act.

The annual budget of the Commission is very small, less than US\$1 million. The Chief Executive Officer of the FTC advised during the fact-finding visit to Seychelles that in 2012 the Commission was appropriated a sum of SR 8.05 million by the Government for its operations, and that it had submitted a bid for SR 10 million for the 2013 financial year.

Box 34 Budget of the Fair Trading Commission

The World Bank, in a 2002 report on building institutions for markets, stated that “the competition authority should be independent of a government ministry and should have its own budget”. This has been reiterated by the Cuts Centre, which stated in 2003 that “a combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence”. Funding through the Government may also be used by the Government to organize other types of interference in the law enforcement process. In some cases, the Government may threaten to withhold or limit funding if the authority is too strict towards politically connected firms.

Budgetary independence refers to the role of the Government in the determination of the size and use of the authority’s budget, including staffing of the authority and salary levels. A competition authority that independently decides on the sources, size and use of its budget is better able to withstand political interference to ensure that competent staff is hired. If the budget is too limited, the authority will not be able to attract highly qualified staff and pay market-rate salaries.

The fact that the Commission is classified as a public body under group 2 indicates a lack of financial independence. At present, the Commission is fully budget-dependent and must negotiate with the Ministry of Finance for its budget needs. The Commission is under close scrutiny by the Ministry of Finance for all expenditures. The size and use of its budget, including staffing and salary levels, are determined by the Government.

In a June 2011 policy paper on the independence of the Fair Trading Commission that the FTC submitted to the then Minister of Finance, Trade and Investment and current Vice-President, the Commission deprecated its lack of budgetary independence and the level of its government grant. The views expressed in this regard are reproduced in box 34.

During the fact-finding visit to Seychelles, the Chief Executive Officer of the FTC clarified that public organizations in Seychelles are classified for funding purposes into the following three groups:

- (a) Group 1: Government;
- (b) Group 2: statutory bodies;
- (c) Group 3: semi-autonomous bodies.

Group 2 public organizations, including the FTC, have some flexibility in employment and do not have to follow group 1 wage and salary grids.

The Commission therefore recommended that the classification by the Ministry of Finance of the Commission as a regulatory body under group 2 of the Ministry of Finance classification strategies of budget-dependent public bodies be reviewed and that the Commission be classified as an independent institution such as the Central Bank and SIBA.

While the Government should be the major funder of the Commission’s operations, since the Commission is a statutory body with non-

commercial functions of a regulatory nature, the situation in most developing countries is that the resources of governments are meagre and spread over many requirements. Competition authorities in developing countries are therefore mostly underfunded and rely heavily on service fees and charges. In Zimbabwe, for example, fees and levies constituted 68 per cent of the competition authority’s budget during the 2011 financial year, while the government grant constituted only 30 per cent.²⁸ In Zambia, the competition authority may charge merger notification fees of up to US\$600,000 per transaction.²⁹

In Seychelles, the FTC might augment its government grant under the Fair Competition Act by charging merger notification fees, authorization fees and fees for providing advisory opinions on restrictive business practices.

A challenge facing all competition and consumer protection authorities is that any significant ability to raise funds off budget will attract criticism. Anticipated criticism includes the following:

- (a) Resources are allocated to activities due to their income-earning contribution rather than for other reasons;

²⁸ Annual Report, Competition and Tariff Commission, Zimbabwe, 2011.

²⁹ Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania, Zambia and Zimbabwe, United Nations, New York and Geneva, 2012.

- (b) Essential activities are not undertaken because they do not contribute to FTC income;
- (c) The FTC is not acting with competitive neutrality, for example, by providing advisory opinions at fees less than those charged by independent lawyers or economists;
- (d) The FTC gives more favourable treatment to those who have contributed to income, for example, by paying for advisory opinions.

These criticisms should be anticipated when planning and delivering FTC activities. If criticisms are received, the relevant activities should be reviewed and modified as appropriate. To some extent, the fact that it is the Minister and not the FTC who sets relevant fees will help to deflect criticisms from the FTC. However, the potential for receiving valid criticism should be considered by the FTC when it recommends merger thresholds or fee levels to the Minister. Providing full public disclosure of income in the annual

report may also reduce suspicion that anything inappropriate is occurring.

D. Case handling

Since commencing operations in 2010, the FTC has handled over 290 cases, of which 274 were on consumer protection and 16 on competition.

1. Competition cases

The Commission has handled 17 competition cases to date, of which three are currently under investigation, as shown in table 2.

In terms of part III of the Fair Competition Act, competition cases handled by the Commission are divided into five categories: abuse of dominant position (subpart I), anti-competitive agreements (subpart II), resale price maintenance (subpart III), mergers (subpart IV) and anti-competitive business conduct (subpart V). Table 3 shows the trends in cases handled by the Commission since 2010.

Table 2 Competition cases handled by the Fair Trading Commission

Year	Reference number	Case	Source of complaint	Status
2010	FCA01	FTC versus Land Marine Limited (abuse of dominance in port services)	FTC	resolved
	FCA02	D Savy versus Inter Island Boat (abuse of dominance)	business	pending
	FCA03	FTC versus STC (resale price maintenance)	FTC	closed
	FCA04	FTC versus L'Air Dezil (merger)	FTC	closed
2011	FCA05	FTC versus STC (franchising)	FTC	closed
	FCA06	Airtel versus Cable (IOIG) (exclusivity)	business	closed
	FCA07	Morin versus UCPS (dissimilar conditions to similar transactions)	business	resolved
2012	FCA08	Classive versus SPTC (abuse of dominance)	business	active
	FCA09	FTC versus Dan Import (resale price maintenance)	FTC	resolved
	FCA10	L Bossy versus STC (predatory pricing)	business	resolved
	FCA11	P Dodin versus Seypec (resale price maintenance)	business	resolved
	FCA12	Le Chevalier Restaurants versus Seychelles Breweries (withholding supplies)	business	resolved
	FCA13	D Madeleine versus Department of Transport (unfair setting of taxi fares and quotas)	business	resolved
	FCA14	Intelvision	FTC and consumers	closed
	FCA15	FTC versus Retailers' Association (price fixing)	FTC and consumers	active
	FCA16	FTC versus G S Pillay (agreements)	FTC	active
	FCA17	GIBB versus Seychelles Pension Fund (unfair practice in tendering process)	business	resolved

Table 3 Categories of competition cases

Category	2010	2011	2012 (to October)	Total
Abuse of a dominant position	2	0	4	6
Anti-competitive agreement	0	3	1	4
Resale price maintenance	1	0	2	3
Merger	1	0	0	1
Anti-competitive business conduct	0	0	2	2
Total	4	3	9	16

To date, abuse of dominant position cases have led the number of competition cases handled by the Commission (38 per cent), followed by anti-competitive agreements (25 per cent) and resale price maintenance (19 per cent).

It is interesting to note that the FTC has examined only one merger transaction to date, which was subsequently withdrawn by the merging parties, according to the Director for Competition in the Commission's Secretariat. The Commission was, however, not involved in the examination of the acquisition of a 40 per cent shareholding in Air Seychelles by ATL of Abu Dhabi since that transaction was handled at a higher level of Government. The Commission's Director for Competition stated that there might be many mergers occurring in Seychelles that the FTC is not aware of since the existence of the Commission as a competition authority is not well known in the business community, with many recognizing it solely as a consumer body.

The Principal Secretary in the Ministry of Finance, Trade and Investment stated during the fact-finding visit that merger control should not be rushed in Seychelles due to limited activity in that area, and the smallness of the country's economy.

Merger control is a necessary requirement in any economy, regardless of its size, since mergers may reduce the number of competitors in a market, increasing market concentration, which may give rise to the creation or enhancement of market power and the exercise of that power. The coordinated effects of mergers also increase the risks of collusion among market players. In fact, mergers have been seen as formalizing collusive arrange-

ments between competitors. It has been found that it is easier to deal with the anti-competitive effects of mergers ex ante than it is to control the resultant market power and collusion ex post.

Furthermore, while merger activity may be low in Seychelles at present, the indications are that activity will increase in the near future. Seychelles 2017 Strategy that the Government is pursuing calls for, inter alia, "generating the maximum level of local participation (in Seychellois economy)... and fostering strategic national and international partnerships". Mergers and acquisitions, both between local companies and between local and foreign companies, will therefore play an important role in the execution of the Strategy.

It is also interesting to note that most of the competition cases handled by the Commission to date have been concluded either by closure, presumably due to the absence of serious competition concerns, lack of evidence or lack of jurisdiction or by resolution, through consent agreements and undertakings. From stakeholder submissions made during the fact-finding visit to Seychelles, it appears that none of the companies investigated by the Commission for competition infringement has been penalized, thus giving the erroneous impression that the Commission does not have effective punitive powers.

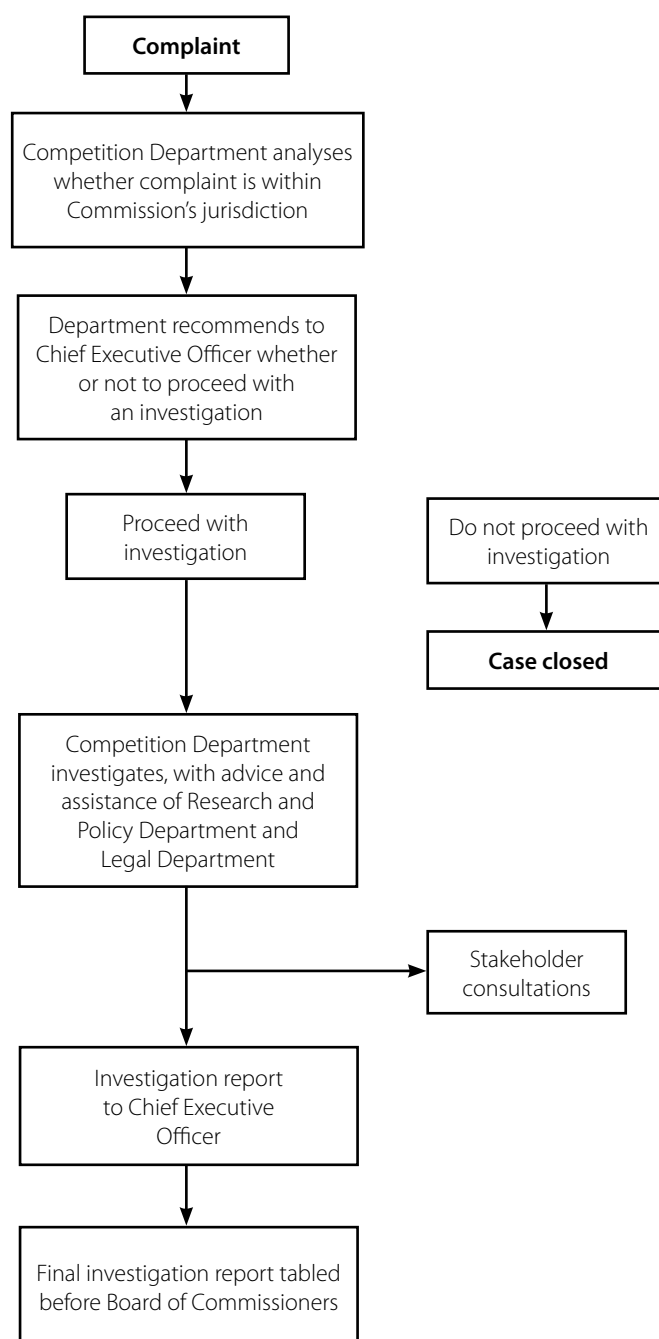
It is further interesting to note that about half of the competition cases investigated to date by the FTC were initiated by the Commission, thus giving credence to the view expressed by the Commission's Director for Competition that the existence of the Commission as a competition authority is little known by the business community.

The handling of competition cases by the FTC is a highly consultative process. According to the Commission's Director for Competition, the process begins with the lodging of a complaint, and the Competition Department then decides whether it is within the Commission's jurisdiction. A report on the analysis is made to the Commission's Chief Executive Officer with recommendations on whether or not to proceed with an investigation. If the decision is to proceed with an investigation, the Competition Department does so with the advice and assistance of the Research

and Policy Department and the Legal Department. Stakeholder consultations are held, and the comments of the Legal Department on the findings are incorporated in the investigation report. The final investigation report is submitted to the Chief Executive Officer for tabling before the Board of Commissioners.

The above case-handling procedure, which is depicted in figure 3, is in accordance with the relevant provisions of the Fair Competition Act (part IV, sections 32–36). It is also worth noting that the Board of Commissioners is obliged, in terms of section 37(1) of the Act, to convene a hearing upon receipt of an investigation report from the Chief Executive Officer.

Figure 3 Case-handling procedure of the Fair Trading Commission



2. Consumer protection cases: Information about conduct with consumer protection concerns

Most information about marketplace conduct of concern to consumers is brought to the Commission's attention by complainants. The Secretariat prepares an annual summary of complaints received. The major problems reported by consumers have been as follows:

- (a) Warranties for unsuitable, defective and unsafe products, 23 per cent;
- (b) Standards of performance of services, 14 per cent.

Interestingly, problem areas referred to by some stakeholders as being major areas of concern did not feature in the complaints data, including the following:

- (a) Expiry dates, 0 per cent;
- (b) Sales records, 1 per cent;
- (c) Information must be in plain and understandable language, 1 per cent.

Likewise, areas of complaint that are the main means of many national consumer protection authorities did not rate high in the complaints data, including the following:

- (a) Misleading and deceptive conduct (all), 1 per cent;
- (b) Unfair terms, 1 per cent;
- (c) Product labelling and trade descriptions, 0 per cent.

Unfortunately, the classification and presentation of data on the subject of complaints was not particularly useful, as 46 per cent of complaints had the subject listed as "unidentified" and 10 per cent were recorded as "multiple sections".

Overwhelmingly, complaints are received from complainants visiting the Commission's Victoria office. A minority of complaints are submitted by mail and even fewer by e-mail. Information about conduct of concern to consumers is also brought to the Commission's attention by informal referrals from stakeholders, the observations of individual FTC officers and through FTC monitoring activities.

During the last full year (2011), 264 consumer complaints were received. Of these, 17 complaints (6 per cent) were found not likely to involve contraventions of the Consumer Protection Act, 155 complaints (59 per cent) were resolved to the satisfaction of the complainant, 14 complaints (5 per cent) progressed to substantive investigations that were determined by the Board and 78 complaints (30 per cent) were still being investigated at the end of the reporting year.

Remarkably, of the 155 relevant complaints that were resolved to the satisfaction of the complainant during the year, 92 per cent were resolved without the delay and cost of proceeding to a determination of the Board. This is an enviable record of efficient and effective resolution of individual complaints.

All complaints are initially recorded and assessed by a designated complaints officer. On initial screening, that officer may decide that:

- (a) The complaint does not suggest a contravention of the Consumer Protection Act. In this case the complainant is advised accordingly;
- (b) The complaint suggests a likely contravention, the conduct was not serious and the harm was relatively minor. In this case the officer may suggest that the complainant attempt a negotiated resolution with the trader;
- (c) The complaint suggests a likely contravention, the conduct was not minor and/or the harm is relatively significant. In this case the officer refers the complaint to the Director of Consumer Protection for assessment with a view to undertaking an initial investigation.

It was noted that FTC staff have a programme of visits to areas of Mahé outside of Victoria and to the other inhabited islands.

3. Consumer protection cases: Initial investigations

The Director of Consumer Protection may make, or instruct a staff member to make, initial enquiries of a trader subject to a complaint or to obtain publically available information. However, the close level of interaction between the Director

and the Chief Executive Officer mean that the decision to make initial enquiries is essentially a joint one between the Director and the Chief Executive Officer.

Upon receipt, complaints are recorded and subject to an initial screening by an enforcement officer, the Director of the Consumer Department. The Chief Executive Officer reviews each complaint. An officer of the Consumer Department will then either attempt a mediation approach or pursue the investigation further with a view to providing it to the Board for a determination.

4. Consumer protection cases: Substantive investigations

On the basis of the initial assessment and initial enquires, the Director and Chief Executive Officer will decide whether to undertake a more substantial investigation with a view to taking the matter before the Board. This may also occur if a negotiated resolution is not obtained from the trader. Again, there are no formal criteria for further investigation. In the process of obtaining evidence staff may interview traders (including the subject of a complaint), consumers (including the complainant) and obtain information or evidence from various government agencies and departments, including the Standards Authority and Customs.

It is not currently known whether the Commission's powers to obtain evidence have been used in consumer protection investigations, and if so, how often.

To date, the origin of all consumer protection investigations has been consumer complaints. There has been no analysis of complaints to identify systemic problems, although this is probably due to the fact that the total number of complaints is low enough that they may be presented in a simple spreadsheet.

The FTC does not issue media releases during investigations.

5. Consumer protection cases: Cases taken to the Board

To date, all of the cases considered by the Board have been consumer protection matters.

Papers for the Board are prepared by the Director and staff members in collaboration with an officer from the Legal Department and at the direction of the Chief Executive Officer. The Chief Executive Officer approves all documents presented to the Board and these are provided to the Commissioners prior to a meeting.

Cases are presented to the Board by the Director and/or an officer from the Legal Department. The Chief Executive Officer, the Director of Consumer Protection, the assigned Legal Officer for the case and the relevant case officer(s) attend Board meetings and may be required to give evidence. The Commissioners stated that they were satisfied with the quality and timeliness of the papers they received from the Secretariat.

The FTC routinely issues a media release following a Board determination. Media releases are prepared by the Director of Consumer Protection and/or the Director of Communications. The Chief Executive Officer reviews and approves all media releases prior to issuance.

The Commission's website provides information on the determinations in nine cases, five from 2011 and four from 2012.

The publication of these determinations on the website provides a desirable level of transparency on the work of the Secretariat by showing the types and range of matters investigated and the reasoning of the Board when determining cases. Over time this will build an important set of precedents that will facilitate business compliance as businesses and their advisers see the integrity of the determinative process and the consequences of contraventions. These determinations will also inform consumers and consumer representatives about the range of protections provided by the Consumer Protection Act, the evidence required by the Board and the types of penalties imposed and orders made by the Board.

It is difficult to draw too many inferences about the Secretariat's case selection criteria and investigatory priorities from such a limited number of Board determinations.

It is noted that:

- (a) None of the determinations makes any adverse comments on the merits of matters

- brought to the Board, the quality of the submissions presented by the Secretariat or the conduct of investigatory officers;
- (b) Where a finding is made against the respondents they are routinely advised of their rights of appeal;
- (c) It is not clear in all cases where an FTC officer has directed a trader to take action to resolve an apparent contravention whether the direction was informal or in the form of a compliance notice;
- (d) It is not clear whether any failure to comply with a compliance notice attracted an additional penalty;
- (e) Not all of the determinations list each of the provisions relevant in cases;
- (f) In some determinations the respondent was informed that interest would accrue on unpaid costs or penalties. While this is a sensible and reasonable order, the authority to do so was not apparent in the record of the determination;
- (g) In one case (Global Internet Café) the matter was closed and marked as withdrawn because the complainant and the respondent had settled. While this may have been the appropriate determination in this particular matter, it raises the issue of whether the Secretariat is investigating complaints on behalf of each individual complainant or in the public interest. It may be either or both, depending upon the case. This leaves open the question of whether the withdrawal of a complaint is sufficient reason to close a case, where the Secretariat believes that a determination should be made in the public interest, for example, where the conduct is particularly reprehensible and deserving of a penalty, or is illustrative of widespread contraventions in the market, and findings of fact or the imposition of penalties would aid compliance efforts;
- (h) The penalties imposed are considerably below the maximum available penalty. Except in one case (Airtel) it is clear from the determinations that the relatively low penalties imposed are simply a reflection of the relatively minor nature of the contraventions. It may be that some of the criticisms about the lack of clout may be fuelled by the nature of the cases considered by the Board to date, rather than the level of fines imposed;
- (i) There are no reported determinations of alleged contraventions of expiry dates, plain language and poor quality goods. These three are problem areas that are frequently reported in developing countries and are, according to some stakeholders interviewed, commonly encountered in Seychelles;
- (j) There was only one case alleging unsafe goods (Aarjay) and this concerned the supply of material to a building site rather than consumer products sold by retailers. Product safety problems that are frequently reported in developing countries are, according to some stakeholders interviewed, commonly encountered in Seychelles;
- (k) There was only one case alleging misleading representations (Airtel). In this case, the fine was SR 50,000 (US\$3,800). No reasoning for the level of penalty was recorded other than that "all the evidence adduced to the Board" had been considered. Interestingly, this fine was significantly less than the fine imposed on Aarjay, where there was no evidence of a system contravention. It is not clear from the determination whether the Board had before it evidence-based estimates of how many subscribers had been affected by the overcharging (although a figure of 38,000 is referred to), over what period and at what additional aggregate cost to consumers. Surprisingly, no estimate of the ill-gotten gain is referred to. An assumption, possibly inaccurate, is that if each of 38,000 customers was overcharged for SMSs by 15 cents (i.e. 55 cents rather than 40, a 138 per cent markup), Airtel would have made a profit from the conduct (after paying the fine) if each customer only sent nine SMSs during the relevant period.
- The Secretariat advised that during 2011, 17 cases were presented to the Board. Subsequently, 11 determinations were made in 2011 and one in 2012. A further case was settled between the

parties prior to a determination being made. During 2012, 15 cases were sent to the Board. Seven determinations were made. These figures indicate that the Board is not progressing through cases to determination in a timely manner, given that members are provided with papers before the hearings and that all matters have been relatively straightforward consumer protection cases and none has been on competition matters. As noted elsewhere, the problem of frequently declared conflicts of interest is a partial explanation. Recommendations to increase the number of Board members, to increase the quantum of fees and to pay a sitting fee may also assist in this regard. It is suggested that the Chief Executive Officer work with the Board members to identify the causes of delay.

E. Relations with sector regulators

Seychelles has a number of sector regulators. Most were established before the Fair Trading Commission and therefore have a number of competition functions. Regulation is in such sectors as financial services (the Central Bank of Seychelles and Seychelles Investment Board), communications (Communication Division of the Department of Information Communications Technology), energy (Seychelles Energy Commission), media services (Seychelles Media Commission) and fishing (Seychelles Fishing Authority).

In its September 2012 research note on the best operational framework between the Fair Trading Commission and sector regulators, the Commission observed that “the establishment of the Fair Trading Commission mandated to enforce the Competition and Consumer Protection Acts, which cover all sectors of the economy, has created some level of confusion and conflict with regard to certain sector regulators’ role and mandate vis-à-vis competition and consumer related issues”.

The jurisdictional conflict between competition authorities and sector regulators over competition matters occurs worldwide, and has been discussed and debated upon in various international forums, notably ICN, OECD and UNCTAD.

UNCTAD undertook a study on the interface between competition authorities and sector regulators for the Intergovernmental Group of Experts

on Competition Law and Policy.³⁰ It was noted that despite potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation may be a source of friction. Any friction is heightened by the blurring of the distinction between economic and technical regulation and competition enforcement, which are common regulatory tasks. The common regulatory tasks as identified by OECD are as follows:³¹

- (a) Competition protection: controlling anti-competitive conduct and mergers;
- (b) Access regulation: ensuring non-discriminatory access to necessary inputs, particularly network infrastructure;
- (c) Economic regulation: adopting measures to control monopoly pricing;
- (d) Technical regulation: setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns.

While it might appear logical to confine sector regulators to economic and technical regulation and assign competition protection to competition authorities, the distinction between economic and technical regulation and competition regulation may often be blurred. In this regard, UNCTAD gives the example of telecommunications, in which technical decisions regarding spectrum use and accompanying decisions about licences affect the intensity of competition in the sector. Therefore, the determination of reasonable access conditions and their enforcement are an issue in which both competition authorities and industry regulators have some degree of competence.

It is further noted that jurisdictional conflicts occur as a result of ambiguities in the law as to whether sector regulation or competition law has precedence with regard to competition issues. In many instances, as is the case in Seychelles, sector

³⁰ UNCTAD, Best practices for defining respective competencies and Setting of cases which involve joint action by competition authorities and regulatory bodies, TD/RBP/CONF.6/13/Rev.1, TD/B/COM.2/CLP/44/Rev.2, 17 August 2006.

³¹ OECD, Relationship between Regulators and Competition Authorities, 1999.

regulators have preceded competition authorities and were thus given responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created after competition authorities, again as is the case in Seychelles, most countries choose to assign them competition responsibilities as a means of infusing and diffusing competition principles in the sector regulatory regime.

As noted by UNCTAD, different countries have chosen different approaches to ensure coordination and policy coherence between competition authorities and sector regulators. UNCTAD has classified the various coordination approaches taken by different countries into five types, as shown in table 4:

All Seychellois sector regulators consulted during the fact-finding visit to Seychelles indicated that they have, or should have, good working relationships with the FTC, as follows:

(a) The Communication Division of the Department of Information Communications Technology advised that it would like a good relationship with the FTC since there is a need to have a forum that facilitates the two regulators to work together and reach a compromise position when issues of competition in the regulated sector arise. A Memorandum of Understanding (MoU) with the FTC was therefore being negotiated. Under the MoU, the two regulators may refer some complaints to each other for investigation. The draft MoU also provides for the two regulators to seek advice from and give advice to each other. However, the Legal Department of the Commission's Secretariat advised that the Communication Division of the Department of Information Communications Tech-

nology declined to enter into an MoU or sign terms of reference with the FTC and stated that they would prefer meeting with the Commission on a case by case basis;

(b) The Central Bank of Seychelles also advised that it wishes to develop an MoU with the FTC. Under such an MoU, the competition aspects in the banking services sector would be handled by the FTC, while the technical aspects would be retained by the bank. However, given the current inability of the FTC to proceed with cases in the banking sector due to the vested interests of most Board members and quorum issues, this is not a matter that the FTC appear ready to handle in the immediate and near future;

(c) The Seychelles Media Commission advised that its enabling Act does not grant it any competition functions, but does grant some consumer protection functions, such as prohibiting misleading advertising. Even though the Commission has had little contact with the FTC, it is prepared to cooperate with the FTC in the promotion of competition in the media sector;

(d) The Seychelles Licensing Authority advised that it works closely with the FTC and that there is a constant exchange of information between the two regulators in areas that relate to their respective functions. The Authority is establishing direct Internet access to the FTC on its licensing operations.

The FTC has also established informal working arrangements with the Small Enterprise Promotion Agency (SENPA), Seychelles Chamber of Commerce and Industry (SCCI), the Customs Division of Seychelles Revenue Commission (SRC) and the Public Utilities Corporation (PUC).

Table 4 Approaches to coordination between competition authorities and sector regulators

Type	Approach
I	Combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively under the authority of the competition authority.
II	Combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions.
III	Combine technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority.
IV	Organize technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority.
V	Rely solely on competition law enforced by the competition authority.

The Senior Legal Officer in the Commission's Legal Department confirmed that the Commission has concluded and signed MoUs with the Seychelles Licensing Authority and the Standards Bureau, and that the Commission is currently negotiating MoUs with the Central Bank of Seychelles and the Communication Division of the Department of Information Communications Technology and NATCOF, with the only impediment being the sharing of concurrent jurisdiction on competition. The negotiations with the Central Bank and the Communication Division are bound to be difficult and protracted. From consultations held with the Central Bank during the fact-finding visit to Seychelles, it appears that the Central Bank will not wish to share jurisdiction with the FTC over mergers between banks. The Central Bank noted that it had not yet examined any merger transactions in the banking services sector, but that it had already drafted internal guidelines on the assessment of such mergers.

While it might be argued that mergers in the financial services sector are likely to be of a scope and complexity that the FTC is ill equipped to handle, other competition authorities in the region have managed to successfully handle such mergers, in close cooperation with the relevant sector regulators. In Zimbabwe, for example, the competition authority has primary responsibility over the examination of mergers, with Chapter 14:28 of the Competition Act providing that "where a statutory body established to regulate the activities of any person or class of persons authorizes a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in

terms of this Act for the final authorization of the merger". For mergers in the banking services sector, the competition authority shares jurisdiction with the Reserve Bank of Zimbabwe. In practice, the two authorities have agreed that the competition authority will assess the competitive effects of such mergers in terms of lessening competition in the relevant markets (which might extend beyond the financial services sector), while the central bank will consider technical issues such as exchange control implications and protection of depositors' funds.

The proposed Electronic Communications Bill to be administered by the Communication Division duplicates the provisions of the Fair Competition Act and Consumer Protection Act administered by the FTC. The Bill is intended to repeal and replace the Broadcasting and Telecommunications Act 2000 (Act 2 of 2000). In consultations with the Communication Division during the fact-finding visit to Seychelles, the Division advised that this is the second attempt at repealing the Broadcasting and Telecommunications Act. The first attempt was in 2009 when both the Fair Competition Act and the Consumer Protection Act were in the process of being finalized. The Division therefore decided to postpone the process of repealing the Broadcasting and Telecommunications Act so as to take into account the relevant provisions of the competition and consumer protection legislation.

The FTC has made representations on the fact that the Bill duplicates the Acts under its administration, and the relevant Ministry has accordingly responded, as depicted in table 5:

Table 5 Fair Trading Commission comments and Ministry response to the proposed Electronic Communications Bill

Fair Trading Commission comments	Ministry responses
<p>The Bill is in direct conflict with:</p> <p>(a) Section 4(1) of the Fair Trading Commission Act (FTC Act), which states: "The functions of the Commission are to enforce any written laws relating to consumer protection, fair competition and other written law which it has jurisdiction to administer";</p> <p>(b) Section 4(3) of the FTC Act which states that the Commission may "(c) receive and evaluate consumer complaints" and "(e) investigate whether enterprises are engaged in restrictive business practices; (f) monitor the standard of activities supplied by service providers to ensure compliance; (g) determine the standard of services applicable to service providers";</p> <p>(c) Section 38 of the FTC Act, which states: "The Commission shall have exclusive jurisdiction to hear and determine matters under any written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer."</p>	<p>The primary objectives of this EC Bill are to provide a regulatory framework for the electronic communications and broadcasting sectors and to provide the legal framework for regulation of these sectors; to make provision for the regulation of electronic communications services, electronic communications network services and broadcasting services; to provide for the granting of licences and licence obligations; to provide for the control of the radio frequency spectrum and numbering; and to provide for matters incidental thereto. In doing so, this Bill is also designed to protect competition in a market, and its primary responsibility of the Ministry to protect both competitors and consumers in electronic communications services and broadcasting services. However, this Bill is unique because it empowers the Ministry to consult other institutions for consideration of public interest concerns when deciding on various matters.</p> <p>Section 7(5) of the Bill states: "The Ministry and the competent authorities, particularly in the area of competition and consumer protection, shall jointly cooperate, whenever necessary, in matters of common interest."</p> <p>The provisions of fair competition and consumer protection are included in ICT acts, communications acts, EC acts and telecommunications acts, in many countries where sector specific regulators are mandated to oversee the competition and consumer protection even where general competition legislation is in place.</p>
<p>Part IX: Consumer protection</p> <p>(a) All consumer complaints should go through the FTC and FTC shall liaise with the DICT for their technical expertise in the sector when investigating consumer complaints;</p> <p>(b) FTC shall deal with consumer complaints in the electronic communications services and broadcasting services sector and shall carry out its enforcement as per the Consumer Protection Act (CP Act) which shall include the imposition of penalties and directives;</p> <p>(c) Any provision relating to consumer protection in the proposed Electronic Communications Bill must be in strict conformity with CP Act. The Bill must ensure that all providers are subject to the CP Act;</p> <p>(d) The creation of a General Customer Code is supported. However, this must be done in accordance with section 60 of the CP Act which makes provision for mandatory and voluntary industry codes. Such codes must be proposed to the Minister and must have a committee who shall draw up the general code.</p>	<p>(a)</p> <p>(i) In the electronic communications services, consumer complaints have many aspects and a wider coverage, such as quality of service standards, new service connections, service disconnection, fault repairs, billing, charging, call centre answering time, credit management, telephone directory inquiry, operator assistance services, contracts and agreements. In this regard, the Ministry has all the technical expertise to investigate such matters and even now the Ministry is dealing with such complaints under the existing B and T Act 2000;</p> <p>(ii) In the broadcasting services, the Media Commission has the authority to deal with complaints in respect of content issues, including jurisdiction to entertain, examine and pronounce its views on television or sound broadcasting. It may be noted that the Ministry has the mandate to investigate technical complaints such as failures, low signal strengths and coverage issues related to broadcasting services;</p> <p>(iii) In relation to radio frequency management, the Ministry is mandated to investigate radio frequency spectrum complaints, especially harmful interference.</p> <p>(b) The interpretation of consumer in the EC Bill is different to that in the Fair Competition Act, FTC Act and CP Act;</p> <p>(c) The provisions made to give effect to this section apply without limiting the generality of the Fair Competition Act, FTC Act, and CP Act, and its application to provisions of this Act in any way in accordance with section 79(2) of the proposed EC Bill;</p> <p>(d) A general consumer code will be drafted by the Ministry in line with international best practices. Section 60 of the CP Act provides only the interpretation of terms under industry codes.</p>

<p>Part IV: Fair competition</p> <p>(a) The Bill duplicates the role of the FTC. The FTC is mandated under section 5 of the Fair Competition Act to promote and maintain fair competition, carry out investigations and review commercial activities. Therefore, all investigative functions shall be carried out by the FTC and the FTC shall consult DICT for their technical expertise as a sector regulator;</p> <p>(b) No obligations may be imposed on an operator who has significant market power unless the operator is using this significant market power to restrict or prevent competition;</p> <p>(c) The proposed bill may make mention of the types of prohibited conduct under the FTC Act but should not have its own definitions of such conduct. The DICT may make use of Commission's guidelines, which detail the conduct and methods of analysis under the Fair Competition Act. To have more than one definition in different laws will create unnecessary confusion;</p> <p>(d) The Ministry may recommend to the FTC that market research be conducted in a specific sector. The FTC shall then engage the relevant sector regulator in order to gather information to conduct the market research.</p>	<p>(a) Many countries have a general competition authority as well as a sector-specific ICT regulator. Under the mandate of this Bill, the Ministry shall perform the functions and duties in relation to competition among operators in electronic communications or broadcasting markets in Seychelles. Wherever a conflict arises between the provisions of this Bill and the provisions of any other legislation regulating competition in electronic communications or broadcasting markets in Seychelles, including but not limited to the Fair Competition Act, the provisions of this Bill shall prevail;</p> <p>(b) The Ministry disagrees with this argument. Typically, in countries where general competition legislation is in place, ex ante remedies are imposed by the sector-specific regulator. The additional obligations are specified and imposed on dominant operators in order to open the market to competitive entry and activity and to prevent anti-competitive behaviour;</p> <p>(c) The point on mentioning the types of prohibited conduct having their own definitions under the EC Bill without contradicting the provisions in the FTC Act is noted. In regard to making use of Commission's guidelines, please refer to section 42(2) of the EC Bill;</p> <p>(d) Pursuant to section 40(2)(c) of the EC Bill, the Ministry will seek the advice of the FTC.</p>
<p>Part VIII: Tariffs</p> <p>(a) The principles of tariff regulation contain elements that will limit investment and innovation;</p> <p>(b) The DICT must ensure that it is transparent in its method of regulating tariffs. The concept of regulated and unregulated service is unattainable as the market must constantly be regulated to ensure that there is fair competition.</p>	<p>(a) There are 14 subsections under the principles of tariff regulation in section 70 of the Bill. The FTC has not mentioned the specific clauses that will limit investment and innovation;</p> <p>(b) Pursuant to section 42 of the EC Bill, the Ministry will determine whether or not a relevant market of an electronic communications service or broadcasting service is effectively competitive, after a market analysis. Pursuant to section 45 of this Bill, the Ministry will make an official announcement about markets whose tariffs must be approved by the Ministry prior to the service being offered to the public by operators. In a fully competitive environment, market forces are more effective than regulation in providing consumers with a wide choice of services at reasonable prices. Hence, the Ministry recognizes the vital role of protecting consumers by promoting the competitiveness of the ICT industry in Seychelles and proper legislative authorization has been made for strict price regulation only on regulated services.</p>

The above clearly shows that there is a wide divergence of views between the FTC and the Ministry for Information, Communications and Technology on competition jurisdiction in the communications sector, which will make it extremely difficult for the Commission and the Communication Division to reach consensus on a concurrent jurisdiction MoU. As explained earlier, there are compelling reasons why the national competition authority should be tasked with primary responsibility for promoting competition in the entire economy, albeit in close cooperation with sector regulators.

Apart from the issue of jurisdictional conflicts over competition matters, the Commission's negotiations with the Central Bank and the Communication Division may be protracted because none of the regulators is statutorily obliged to conclude

such agreements. Unlike the Seychelles Consumer Protection Act, which has specific provisions on relationships with regulatory and other authorities (particularly the provisions in section 78(1) that the Commission may "negotiate and enter into agreements with any regulatory authority which exercises jurisdiction over consumer matters within a particular industry or sector, so as to: (i) coordinate and harmonize the exercise of jurisdiction over such matters within that industry or sector; and (ii) to ensure the consistent application this Act"), the Fair Competition Act does not have provisions on relations with sector regulators with competition functions.

It is noted that section 6(1)(a) of the Fair Competition Act gives the Commission powers to "enter into such contracts as may be necessary or expedient for the purposes of performing its functions

under this Act". However, these provisions do not specifically refer to concurrent jurisdiction agreements with other sector regulators with competition functions, and also do not oblige the other sector regulators to conclude such agreements with the FTC.

The competition legislations of other countries in the region, such as Namibia, South Africa, and Zambia, have specific provisions that oblige the competition authorities and sector regulators to conclude and enter into concurrent jurisdiction over competition matters.

Credit should be given to the FTC for its endeavours to conclude and sign MoUs with sector regulators with competition functions. However, the MoU template used in the negotiations, which is based on the September 2010 research note on the best operational framework between the Fair Trading Commission and sector regulators, "combines the technical and economic regulation in a sector regulator and leaves the competition enforcement exclusively under the authority of the competition authority", which is similar to type I of the UNCTAD classification of coordination approaches taken by different countries to ensure coordination and policy coherence between sector regulators and competition authorities. The difficulty

with this approach is that it removes all economic regulation functions and responsibilities from the competition authority. Economic regulation includes adopting measures to control monopoly pricing, which is a major competition function under abuse of dominance or monopolization. The proposed procedures for merger application and complaints handling under the template also need to be revised, as they remove some basic powers and responsibilities from the competition authority, for example the power and responsibility of making final determinations on competition cases without referring such decisions to other bodies.

During consultations held with the Parliamentary Committee on Finance and Public Accounts of the National Assembly of Seychelles, the Committee stressed that the FTC should become the focal point of regulators to ensure coordinated operations of the country's regulators.

F. Strategic plans

In line with good corporate governance, the FTC has developed its Three-year Strategic Plan: 2012–2015 to guide and lead its operations. The following are the Commission's mission statement, vision and core values under the plan:

Box 35 Recommendation

It is therefore recommended that the FTC be given statutory supremacy over competition matters in Seychelles. Those sector regulators with competition functions should be obliged by statute to negotiate and conclude concurrent jurisdiction agreements with the FTC on the promotion of competition in their respective sectors. In this regard, the following provisions in the Competition Act 2003 (No. 2 of 2003) of Namibia are suggested for incorporation in the Fair Trading Commission Act:

"(1) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of [this Act] within a particular sector, the Commission and that authority—

- (a) must negotiate an agreement to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must—

- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
- (b) promote cooperation between the regulatory authority and the Commission; and
- (c) provide for the exchange of information and the protection of confidential information.

(3) An agreement referred to in subsection (1) must be published in the Gazette."

- (a) Mission Statement: To advocate in favour of sound competition and consumer protection policies to safeguard the interests of consumers and the competition process and implement these policies through advocacy, market studies and enforcement, in partnership with all stakeholders;
- (b) Vision: Championing market efficiency for consumers' socioeconomic welfare;
- (c) Core Values: Committed to the following core values and principles:
- (i) Integrity – behaving in an ethical, legal and transparent manner;
 - (ii) High performance/excellence – investing in the continuous professional development of staff;
 - (iii) Quality service – offering people-friendly services;
 - (iv) Consumer rights advocacy – empowering consumers to exercise their rights;
 - (v) Teamwork – working collaboratively within the FTC and maintaining good relations with our stakeholders;
 - (vi) Dynamism/innovativeness – responding to new challenges with creative solutions.
- The strategic issues under the Plan, of proactive advocacy, broad-based development and enactment of FTC regulations, continuous professional development of staff and engaging in policy development, are detailed in table 7 together with the goals.

Table 6 Three-year Strategic Plan: 2012–2015: Strategic issues and goals

Strategic issue	Goals
Proactive advocacy	<ol style="list-style-type: none"> 1. Public awareness of the Commission's mission; 2. Awareness for consumers of their rights and responsibilities; 3. Awareness for businesses of their obligations and liabilities; 4. Effective business conduct and practices throughout Seychelles. <p>To achieve goals 1 and 2, the FTC intends to set-up an advocacy section/unit. To achieve goal 3, the FTC intends to disseminate tailored information to businesses. To achieve goal 4, the FTC intends to undertake remedial reviews with relevant businesses following complaints and periodical market researches and implement advocacy programmes targeting relevant sectors.</p>
Broad-based development and enactment of FTC regulations	<ol style="list-style-type: none"> 1. Enactment of comprehensive regulations relating to competition and consumers; 2. Broad support for the enforcement of FTC regulations. <p>To achieve goal 1, the FTC intends to review and adapt international best practices, outsource the drafting of regulations and consult stakeholders. To achieve goal 2, the FTC intends to lobby Government to champion the regulations, consolidate the investigation and inspection unit, network with relevant stakeholders and conclude MoUs with strategic enforcement agencies.</p>
Continuous professional development of staff	<ol style="list-style-type: none"> 1. Have a staff training plan; 2. Realize a technically qualified staff team; 3. Foster a high-performing team. <p>To achieve goal 1, the FTC intends to develop a plan on comprehensive training needs and analysis. To achieve goal 2, the FTC intends to invest in local and international training programmes and partake in exchange programmes with international commissions. To achieve goal 3, the FTC intends to implement a comprehensive compensation scheme and institutionalize a performance management system.</p>
Engaging in policy development	<ol style="list-style-type: none"> 1. Active involvement of the FTC in policy development and analysis relating to business; 2. Increased influence of the FTC in national economic regulation. <p>To achieve goal 1, the FTC intends to lobby for the Commission's participation in policy development forums, undertake advocacy programmes to increase the visibility of the FTC and enter into strategic alliances with key partner agencies. To achieve goal 2, the FTC intends to secure MoUs with ministries responsible for economic regulation and recommend amendments to the Fair Trading Commission Act.</p>

The Commission's Three-year Strategic Plan addresses many of the issues that the reviewers identified during the fact-finding visit to Seychelles as needing to be addressed for the improved implementation of competition and consumer protection policies and laws in the country. The execution of most of the action items under the plan will, however, require more resources than are cur-

rently available to the Commission. It is therefore not surprising that some of the timelines in the plan have not been met.

In adopting the Three-year Strategic Plan, the FTC is, however, moving in the right direction and should be given all the necessary support by its stakeholders, in both the public and private sectors of the Seychelles economy.

Part Four Other relevant issues

The other pertinent issues impacting the effective implementation of competition policy and law in Seychelles that were identified by, or brought to the attention of, the reviewers during the fact-finding visit included the location and characteristics of the office building of the Commission, human resources and advocacy.

I. Office premises

The limitations of the Commission's present office premises were amply outlined in the Commission's draft annual report for the year ending December 2011, which has yet to be published. The submissions made in this regard are reproduced in box 36.

The Commission has, however, taken lease of new offices in an adjacent modern building, which was in the final stages of construction at the time of the fact-finding visit. The Chief Executive Officer of the FTC assured the reviewers that the new office premises that the Commission was due to occupy before the end of this year, solved all the problems associated with the present offices.

Of particular importance will be that all the Commission's operational departments will be housed under one roof, facilitating intra-office communications and the "cross-fertilization" of ideas.

II. Human resources

There are many factors determining whether the quality and quantity of human resources are optimal, and these include the health of national markets (in terms of the strength of competition processes and the application of pro-competition and pro-consumer regulations), the roles and responsibilities of the agency, the comprehensiveness and coherence of the legislation it must enforce, the expectation of stakeholders and the available operational budget.

The implementation of competition policy and law is relatively new in Seychelles, having effectively commenced only in 2009 (the same, however, cannot be said for consumer protection, since the National Consumer Forum (NATCOF) has been in existence and operational for over 18 years). Competition policy and law is also not taught at the

Box 36 Limitations of the Fair Trading Commission's office premises

The Commission moved into its present location on the third floor of the Orion Mall Complex in August 2010, after it had spent its first nine months sharing offices with the Energy Commission. In January 2011, it completed the refurbishment of Room 206 in the same complex to house its Consumer Protection Department.

The Commission's present location is spacious enough for its present number of staff. However, though centrally located and within easy reach of commuters and consumers, it is actually problematic. For instance, as it is in the centre of a mall, the Commission must put up with uncontrollable noise throughout the day from the volume of people and traffic going about their business within the vicinity.

Security at the building is limited to one post. This post does not enjoy a central location from which a proper monitoring of the entry and exit of members of the public may be conducted. This consequently exposes the Commission to theft and vandalism that cannot be traced. To date, the Commission has lost two laptop computers from offices that had been accidentally left unattended and access to which had been possible via the main door, which in turn had been left unlocked.

The building itself is not very appropriate for the Commission considering the Commission's mandate.

In the first instance, the building is a potential hazard. First, it is cracked. Second, it leaks but the landlady is not willing to engage in repair work in the areas that leak until Orion Complex Management first sees to the structural repair work. Third, the staircase is rather narrow, posing a potential impediment in the event of an emergency evacuation. Furthermore, the Commission is frequently harassed for the payment of service charges for substandard services, such as the escalator that is frequently out of order, or for the only lift to the building, also used by the other tenants to transport their merchandise and which sometimes leaves patrons waiting unnecessarily.

In the second instance, the Commission is spread out, and across the two opposite sides of the building, consequently obliging staff to waste time migrating from one office to another and unnecessarily wasting otherwise productive time.

University in Seychelles. The recruitment ground for the FTC is therefore very limited. It is noteworthy that most of the current senior staff members of the Commission were specifically recruited in relation to the necessary skills required by the Commission. The crucial post of Director (Legal) in the Commission has remained vacant throughout the year, indicative of the limited recruitment ground for lawyers. The dearth of lawyers in Seychelles was also raised by the Attorney General and the Chief Justice of the Supreme Court of Seychelles during the fact-finding visit to Seychelles.

The current staff is nevertheless adequately qualified, with qualifications in relevant fields such as economics, law, management and accounts. The FTC also has in place an effective staff development programme. For example, the Commission is financing post-graduate studies being undertaken by the Directors, as well as those being undertaken by the Accountant and the Office Manager.

The skill sets required among the staff of a competition and consumer protection agency are diverse. As the functions of the agency involve the enforcement of laws with an economic rationale, it is essential that most of the staff have qualifications in either law and economics or both. However, because the FTC is a regulatory agency, it is also essential that officers with particular skills in research and public relations are included in the staff complement. Formal qualifications are essential as an indicator of a given level of understanding and knowledge, and higher degrees are reasonably expected, to give evidence of a more sophisticated comprehension of a particular subject area.

As already pointed out above, the reviewers noted that the staff of the FTC are either suitably qualified or demonstrably committed to obtaining suitable and higher qualifications. This commitment is attributable to both the ambition of individual officers and to the support provided by the FTC. Staff who are studying are given one afternoon off per week to study, and all the fees are paid by the Commission, with the costs of attending course-associated seminars, etc. met by the Commission. This is an investment in the future qualifications and productivity of the staff of the FTC and the wider public service of Seychelles.

The reviewers concluded that the current range and levels of formal skills in the Commission are adequate and improving thanks to an established policy of promoting formal studies, and that all staff and the FTC will benefit as they gain more hands-on experience in the functions of the Commission. The passage of time is only one of the factors in gaining experience. Other operational policies, such as staff reassignments and rotations, assigning of responsibilities for interviews or presentations etc. downward may increase both the quality and quantity of experience. Necessarily, these actions must be balanced against the associated risks and, in the case of the FTC, the limited number of staff.

All investigators need to have superior investigative skills. It was not possible to evaluate the extent to which individual staff members of the FTC possessed effective investigator skills. Perhaps because of both the institutional youth of the Commission and its small number of staff, there is not yet in place a system for building and expanding investigator skills.

As important as formal qualifications are the attitudes and dedication of the staff. The reviewers have both managed well-qualified staffs that were misplaced in a competition and/or consumer protection agency because of their attitude or lack of dedication for the goals of the policy, law and agency. It was clear to the reviewers that the Chief Executive Officer of the FTC and the senior staff each have an admirable and necessary commitment to both the goals of the Commission and to the highest level of professionalism, and that they bring an enviable dedication to the discharge of their duties.

The Chief Executive Officer of the FTC submitted during the fact-finding visit to Seychelles that staff of the Commission are competitively remunerated vis-à-vis similar Seychellois organizations, and this was confirmed by the other staff members interviewed. Commission staff salaries are generally higher than salaries for equivalent positions in the general public service. As such, staff retention levels in the Commission are very high. Staff retention is often a difficult issue for young agencies, as experienced staff are attracted to the higher salaries and increased potential for promotion in senior government departments and other regulatory authorities, and more so to the private sector. The Commission's retention experience does not to match this common pattern.

However, all FTC staff members are on two-year renewable contracts of employment, regardless of their rank. None of the staff members interviewed seemed concerned about this. Some even welcomed the arrangement since it afforded them an opportunity to negotiate more competitive conditions of service. While fixed-term employment contracts for senior members of staff, such as the Chief Executive Officer and directors, are common in the region, they may not be suitable for lower level employees who require job security for self-development and motivational purposes.

In the reviewers' opinion, the staff effectiveness issues identified by the Chief Executive Officer have more to do with nuances of operational procedures and the personalities of staff, and their professional relationships with colleagues, than with the organizational structure. Relevant operational procedures include the identification of case officers for each investigation or project and agreed allocations of primary responsibility for particular tasks, such as drafting media releases, preparing and delivering presentations, etc. This is not to say that a different organizational structure may not be preferred. In light of the reviewers' comments, this is clearly a matter for the Chief Executive Officer rather than others.

The Chief Executive Officer of the FTC impressed the reviewers as a capable leader who demonstrates by example to staff a dedication to the goals of the organization and the relevant enabling legislation and a strategic vision of how the Commission should fulfil its roles and responsibilities while maintaining the highest ethical standards and sound administrative practices.

The reviewers were also impressed by the calibre of the Commission's staff. As one might expect with a new agency, the experience of the staff in competition and consumer protection is limited. However, the staff demonstrated an enthusiasm and dedication both to the immediate challenge of analysing complaints and to planning and investigations. It was also clear that at a personal level, most staff members are devoting considerable personal time and effort to increasing their knowledge of competition and consumer protection issues, particularly the economic and legal underpinnings of competition and consumer protection regulation.

III. Advocacy, education and awareness

Although the terms advocacy, education and awareness are often used interchangeably they do mean different things. Consequently, advocacy goals, strategies and activities differ substantially from education goals, strategies and activities, although there will be some overlap. Per the reviewers, advocacy is about taking the following types of action in support of the stated competition and consumer protection goals:

- (a) Convincing stakeholders (ministers, members of the National Assembly, government departments, fellow regulators, consumers and businesses) that the goals of both the Competition Act and the Consumer Protection Act are both desirable and attainable. The most important advocacy goal must be to facilitate a comprehensive acceptance that well-functioning markets will maximize consumer welfare and that effectively enforced consumer and consumer protection policies and laws provide essential support for well-functioning markets;
- (b) Convincing stakeholders that the FTC has the leadership to effectively and efficiently undertake each of its functions in support of well-functioning markets and appropriate levels of enforcement when markets fail to deliver acceptable outcomes for consumers;
- (c) Convincing stakeholders, particularly Ministers, government departments and fellow regulators, that the Commission's views and opinions are both valid and relevant to a broad range of economic and social issues. This is particularly important where there is significant government ownership or where there are established sector regulators or significant economic development initiatives.

Successful advocacy will ensure that the FTC is consulted when important economic initiatives are being discussed, help secure the FTC budget and more generally increase its power to persuade and influence. It will also increase the effectiveness of educational activities because it will increase the perceived relevance of both the laws and the FTC. Advocacy activities will need to have an educative element to ensure that the targets of

the advocacy understand the practical application of the laws.

Education, the imparting of factual knowledge, is in this case about the objectives and provisions of the competition and consumer legislation and the goals, functions and activities of the FTC. Education or awareness-raising activities will often include an element of advocacy, to put the facts in context and to arouse interest by and show relevance to stakeholders. Raising awareness often refers to the earliest attempts to educate when the relevant knowledge and interest is not high.

Both advocacy and education have their challenges, which are common to both competition and consumer protection. However, there are some significant differences and these will influence the Commission's strategies and the content of its activities. Generally, the goals and even the elements of consumer protection law are widely accepted by stakeholders and debate is more often on case-specific details. In the Seychelles context, an exception to this relates to warranties. What is evidently proving difficult is gaining acceptance that the competition process will work in consumer interests across the economy. Stakeholder after stakeholder dismissed an economy-wide effect on the grounds that Seychelles is too small. The goals and elements of competition are more difficult for some stakeholders to understand and accept. In part, this is because of the political and economic history of Seychelles and also because of the common view that Seychelles is too small.

The challenges with regard to educational strategies and activities are similarly divided. The provisions of the Consumer Protection Act are relatively straightforward and the implicit policy largely aligns with most people's experiences. Perhaps the biggest educational challenge is for the FTC, which must manage expectations that it can immediately detect and fix every consumer's problem to their satisfaction. The concepts and competition provisions of the Fair Trading Commission Act are more complex and therefore more difficult to explain, understand and accept. The level of stakeholder resistance to advocacy is likely to be greater with regard to competition, where the wrongdoing is not always immediately apparent, than with regard to consumer protection, where the rights and wrongs of a situation are more often readily apparent.

The FTC is still in its formative stages, having commenced operations only about two years ago. However, expectations for the FTC are high in both the public and private sectors of the Seychelles economy. Most of the stakeholders consulted during the fact-finding visit to Seychelles were of the opinion that the Commission is doing a good job. These stakeholders included the Department of Trade in the Ministry of Finance, Trade and Investment, Central Bank of Seychelles, Seychelles Public Transport Corporation, Seychelles Investment Board and Seychelles Licensing Authority.

Other stakeholders, however, felt that the Commission needs to do more to publicize itself. The Small Enterprises Promotion Agency advised that while competition law has had a beneficial effect in Seychelles, the FTC needs to establish better relations with the Agency on how best small and medium-sized enterprises (SMEs) may be helped under the country's competition and consumer protection legislation. The Seychelles Investment Board was of the opinion that while the FTC is doing all it can to enforce the country's competition law, the competition authority is, however, still not widely known, and "people want to know what they can get out of it". The Seychelles Chamber of Commerce and Industry, which advised that it was not consulted in the drafting of either the Fair Competition Act or the Consumer Protection Act, expressed a wish for its members to be educated on the functions of the FTC.

It was also evident from consultations held with the Parliamentary Committee on Finance and Public Accounts of the National Assembly of Seychelles, and from reports on debates in Parliament on the inadequacies of the FTC, that perceptions of the Commission's functions need to be corrected. This may be done through regular consultative meetings with Members of Parliament.

Consultations with senior staff of the FTC also revealed the perception that competition policy and law seem not to be high on the Government's priority agenda, and this is why the Commission is receiving less explicit Government support than believed necessary for comprehensive compliance and effective enforcement. However, the reviewers' consultations with the relevant Government authorities, particularly the Vice-President and the Ministry of Finance, Trade and Investment, showed that the Commission's operations have

Government support and goodwill. What might be required is active involvement by the Commission in government policy development and formulation, to avoid situations where new policies do not fully take into account competition and consumer protection issues. The Commission also advised that since its name, Fair Trading Commission, is a misnomer and misleads the general public as to the area of its operations, there is a need to rebrand the Commission as a competition authority. To that end, the Commission is now producing newspaper articles every week on its activities and operations.

It was clear from stakeholder consultations during the fact-finding visit to Seychelles that the FTC has been an active advocate and educator of competition and consumer protection law in Seychelles through its public education and awareness programmes. In its draft annual report for 2011, the Commission reported that it had launched a consumer awareness session on the Consumer Protection Act via presentations to schools, post-secondary institutions, workplaces, districts and the local consumer group, the National Consumer Forum (NATCOF). Specific restrictions of the Consumer Protection Act were also published in the *Nation* national newspaper and features on the restrictions were also aired during prime time on the national television network (SBC), both reaching a large percentage of the population.

The FTC has also established a website with various documents of an advocacy and awareness nature that may be downloaded, including on competition cases handled by the Commission.

In order to better equip its Communications and Corporate Services Department in the undertaking of advocacy, in 2011 the Commission's Director for Communications and Corporate Services undertook a week-long attachment at the South African Competition Commission for empowerment in advocacy. The aim was to engage in active learning from experienced professionals in the field. Questions addressed included the following: What is advocacy? Why should advocacy be conducted? How should advocacy be conducted? When should advocacy be conducted? Who should conduct advocacy?

It is noteworthy that the Commission's Three-year Strategic Plan: 2012–2015 prioritizes advocacy and

awareness, and includes a number of related goals to be met during the Plan period, including: holding fortnightly sessions with consumer groups on rights and responsibilities; creating an action plan for sensitizing Government; launching quarterly disseminations of information and educating citizens via mass media; conducting workshops and seminars targeting government agencies; holding regular meetings with sector regulators to address issues of public interest; launching monthly tailored sessions with various business groups; developing advocacy programmes for highly concentrated sectors; conducting quarterly awareness sessions with government bodies, private bodies, consumers and other relevant stakeholders; initiating bi-annual alerts on policy matters for government agencies; and launching an annual newsletter on the Commission's challenges and achievements.

Box 37 Recommendation

It is therefore recommended that the FTC undertake more advocacy and awareness activities, aimed at government ministries, legislature and judiciary, as well as business and consumer associations, to increase its visibility. In this regard, the Communications and Corporate Services Department of the Commission's Secretariat should be adequately resourced and equipped, and work closely with the operational Departments of Competition and Consumer Affairs. In the second instance, the Commission is spread out, and across the two opposite sides of the building, consequently obliging staff to waste time migrating from one office to another and unnecessarily wasting otherwise productive time.

IV. International cooperation

The FTC has been in existence only since 2009, yet it is actively cooperating with various other competition authorities and organizations in the region and internationally. In the region, the FTC cooperates with other national competition authorities under COMESA, particularly through its representation on the current Board of Commissioners of the COMESA Competition Commission. It also cooperates with competition authorities under SADC through its participation in the Competition and Consumer Policy and Law Committee (CCPOLC). Furthermore, the FTC is a member of the Southern and East African Competition Authority (SEACF) and the recently formed African Competition Forum (ACF).

Competition cooperation under COMESA provides wide opportunities for the FTC. Regional cooperation under COMESA is aimed at assisting those member States with no competition policies and laws, or competition authorities to implement and enforce the policies and laws, to formulate the policies and laws and establish the implementation and enforcement agencies, and is also aimed at developing young competition authorities, particularly in case handling. The work programme of the COMESA Competition Commission also includes capacity-building and the exchange of information among national competition authorities through workshops and seminars.

Under SADC, an ambitious project under the European Union TradeCom Facility on the design and development of a case management online resource database has recently been completed. Some of the key objectives of the database are to: act as a central repository of information on both ongoing and resolved competition and consumer protection cases; promote collaboration and cooperation on cross-border cases, for example making it easier to determine whether particular parties or cases are being investigated by different authorities, find repeat offenders, etc.; and provide easy access to case information and best practices in a user-friendly fashion with search capability. The database, at <http://www.sadc.int/competitioncases>, is hosted on the SADC platform and uses the SADC domain.

Box 38 Recommendation

It is therefore recommended that the FTC continue to cooperate with other competition and consumer protection authorities in the COMESA and SADC regions, particularly with regard to the use of and contribution to the SADC online resource database on competition and consumer protection cases.

At the multilateral level, the FTC has benefited, or stands to benefit, from the programmes of relevant international organizations such as the International Competition Network (ICN), the International Consumer Protection Enforcement Network (ICPEN), the Organization for Economic Cooperation and Development (OECD), UNCTAD and the World Trade Organization (WTO).

The FTC has greatly benefited from the UNCTAD Capacity-Building and Technical Assistance Programme. Besides the current project on an independent review of the competition and consumer protection legislation of Seychelles, which is the subject of this report, UNCTAD in March 2012 organized an induction course for the Commissioners on institutional and organizational aspects of competition law enforcement, and intermediate training on investigative procedures and case handling for investigative officers and case handlers of the FTC.³²

In its unpublished draft annual report for the year ending December 2011, the FTC also reported that discussions were underway with UNCTAD on a three-year technical assistance project covering the following:

- (a) Compilation of required guidelines and regulations in line with the Consumer Protection Act and the Fair Competition Act;
- (b) Provision of guidance on the manner in which to assess government policies and prepare policy papers for consumer and competition cases;
- (c) Provision of a long-term institutional framework for the Commission in relation to all sections;
- (d) In-house training of staff in the areas of complaint handling, investigative procedures, case compiling, report handling and Board hearings;
- (e) Acquisition of overseas attachments for senior staff in their relevant departments to accelerate and broaden their experience;
- (f) Organization of specific seminars for specific bodies in order to educate them on the Commission and the two Acts, such as Ministries, authorities and private bodies;
- (g) Preparation and conduct of an induction course applicable to all appointed Commissioners and future appointees to detail the role of a commissioner and the conduct of hearings, as well as how decisions should be made and presented in line with the relevant law.

³² Available at <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=48>.

While some of the above projected activities might have been overtaken by events, it is suggested that discussions with UNCTAD be pursued to completion.

The deliberations of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (IGE) have benefited many competition authorities worldwide, particularly those from developing countries, in the area of best practices in the implementation of competition policy and law. Similar to all other competition authorities in the region, the FTC would also greatly gain from regular and consistent attendance at and participation in meetings of the IGE.

Besides UNCTAD, the ICN has emerged as a leading international organization that promotes competition policy and law. The Network provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. The ICN works largely through five substantive working groups addressing advocacy, agency effectiveness, cartels, mergers and unilateral conduct. Working group members confer primarily via conference calls and e-mails, and hold periodic e-seminars and workshops. Annual conferences and workshops provide opportunities to discuss working group projects and their implications for enforcement.

The ICN does not exercise any rule-making functions. Once the ICN reaches consensus on recommendations or best practices arising from projects, individual competition authorities then decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

An ICN programme that would be of particular interest to the FTC is the Advocacy and Implementation Network Support Programme (AISUP) under which ICN members may seek advice about specific ICN work products or receive assistance on how ICN recommendations and other guidance documents might be implemented within their jurisdiction. Members request assistance through the AISUP, and the requesting agency is paired with expert staff from other ICN member agencies. The supporting agencies provide the requesting agency with a thorough explanation of relevant ICN work products and implementation advice, as appropriate. Requesting agencies are then free to implement the advice if they choose to do so. Any ICN member may request assistance to participate in the AISUP.

Within the region, the Zambian competition authority received assistance under the AISUP of the ICN in the review of the country's competition law, as well in cartel enforcement (leniency programme) and market studies. The authority was paired with the Bundeskartellamt of Germany and also receives technical assistance in case handling from the German competition authority on a regular and on-request basis.

Box 39 Recommendation

It is therefore recommended that the FTC continue and intensify its active participation in the programmes of relevant international organizations, such as ICN, ICPEN, OECD, UNCTAD, etc. The Commission will thereby not only benefit immensely from international best practices but will receive direct notification of the organizations' programmes, including conferences and workshops. In particular, the Commission should pursue to completion its discussions with UNCTAD on the three-year technical assistance project.

Part Five Findings and recommendations

The Fair Trading Commission Act is a fairly well-drafted legislation, and relatively few proposed revisions to the Act were identified from its review and the findings of the fact-finding visit to Seychelles. Even though the Fair Competition Act is comprehensive and contains all the basic elements of competition law, the arrangements of its various provisions on restrictive business practices is not coordinated and thus confusing.

The Consumer Protection Act is a comprehensive consumer protection law that includes provisions in respect of each of the major areas expected of a modern consumer law. The reviewers did not identify any significant deficiencies.

The most significant drafting deficiency identified was the lack of clarity in the term commission. Given the distinct functions and activities of the two branches of the FTC, the use of the generic term commission does not adequately distinguish between the determinative body referred to in the Act as the Board of Commissioners and the administrative and investigative body the reviewers have termed the Secretariat.

A significant observation is that there is no articulated consumer protection policy. The absence of a policy has not prevented the FTC and a number of other regulators from actively undertaking their consumer protection functions. However, in the absence of a policy it is more likely that the various stakeholders will pursue their own agendas without regard to the functions and activities of fellow regulators. It is also more likely that consumer protection will be seen simply as the resolution of individual consumer problems rather than as a significant building block of national develop-

ment in the way that competition law has been recognized. The reviewers were made aware of some informal liaisons between some of the regulators, but conclude that these efforts need to be expanded. This is particularly important in a small economy, where there must be less tolerance for duplication of effort or inefficient enforcement.

The FTC is a young agency with modest resources. On the basis of stakeholder interviews, interviews with the Chief Executive Officer, Commissioners and staff of the Secretariat, it is apparent that the FTC is a well-led regulatory agency that is functioning well. With one exception, the reviewers did not identify any significant deficiencies in the institutional arrangements, processes and procedures. The major institutional failing identified is the non-existence of the Appeal Tribunal. The immediate effect of the Appeal Tribunal not having been established is that if a party is dissatisfied with a determination of the Board, it may lodge an appeal, but that appeal cannot be heard. Therefore, a party who wishes to nullify the Board's determination can do so simply by lodging an appeal, knowing that it cannot be heard. This potential tends to bring the whole process into disrepute and may contribute to the view that the FTC and Consumer Protection Act have no clout. In the long term, the lack of a Tribunal denies testing of the Board's determinations and the establishment of precedent.

The recommendations are aimed at optimal enforcement by the FTC of the three principal Acts under its administration. The assumption is, therefore, that resource constraints will not adversely affect the effective implementation of the recommendations. As such, the overriding recommendation is that the Government of Seychelles will give the FTC all the necessary resources.

Tables 7 through 10 provide overviews of the recommendations on competition matters, consumer protection matters, Fair Competition Commission matters and other relevant matters.

Box 40 Recommendation

It is therefore recommended that a comprehensive consumer protection policy be developed in consultation with stakeholders and published.

Table 7 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Competition Act	The definition of the term merger in the Act is rather restrictive and does not cover some common types of mergers and business combinations, such as conglomerate mergers and joint ventures. While conglomerate mergers seem to be covered in the definition by the use of the term "other enterprises", the use of the ejusdem generis rule in the interpretation of the definition could effectively rule out the coverage of such mergers by the definition.	The term merger in the Fair Competition Act should be amended to include all three types of mergers (i.e. horizontal, vertical and conglomerate), as well as other business combinations.	Legislature
	Section 2 of the Fair Competition Act on definitions does not include definitions of some common competition terms such as assets, confidential information, dominant position, horizontal agreement, essential facility, excessive price, negative clearance, regulator, vertical agreement and undertaking (meaning a commitment or promise to the Commission), some of which are referred to in relevant sections of the Act.	Common competition terms should be defined in the Fair Competition Act.	Legislature
	The definition of the term goods in the Consumer Protection Act includes "substances, growing crops and things comprised in land by virtue of being attached to land, and any ship, aircraft or vehicle", while in the Fair Competition Act the definition includes "all chattels other than money, securities or choses in action". The definition of goods in the Fair Competition Act creates a particular problem in that it may mean that the entire financial services sector of Seychelles is exempt from the Act.	The definition of the term goods in the Fair Competition Act should follow that in the Consumer Protection Act.	Legislature
	The term service is defined in the Consumer Protection Act as "a service of any description, whether industrial, trade, professional or otherwise: and (a) includes the sale of goods where the goods are sold in conjunction with the rendering of a service; and (b) is construed in accordance with subsection (3)" (i.e. "does not include a reference to the rendering of any services under a contract of employment"). However, the same term, service, is defined in the Fair Competition Act simply as "a service of any description, whether industrial, trade, professional or otherwise".	The term service should be redefined in the Fair Competition Act along the lines of the definition in the Consumer Protection Act, but with the inclusion of the word financial.	Legislature
	Section 3(2) of the Fair Competition Act provides that "this Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles which is open to participation by other enterprises". The application of the competition law to the State if it or its agents engages in commercial activity is good practice since competition law is, or should be, general law of general application. However, since the application of the Act to commercial activities of the State only refers to markets which are open to participation by other enterprises, this effectively excludes markets that are dominated by statutory monopolies. For Seychelles, which still has a number of State-owned enterprises (SOEs), some of which are in monopoly positions, such exclusion exempts a large number of enterprises from the application of the competition law.	Section 3(2) of the Fair Competition Act should be amended by deletion of the phrase "which is open to participation by other enterprises" at the end of that section.	Legislature
	The provision of section 5(1) of the Fair Competition Act, that the Commission may only carry out investigations at the request of persons or enterprises that have a direct interest in the matter, may limit the Commission's source of complaints. While the intention is to allow only those persons or enterprises that have locus standi ³³ to request for a Commission investigation, the provision effectively rules out Commission investigations from anonymous complainants or informers, who may not wish to indicate their interest in the matter for fear of being identified. Anonymous complainants or informers have been found to be very useful sources of complaints in cartel cases.	Section 5(1)(b) of the Fair Competition Act should be amended by deletion of the phrase "that has an interest in a matter".	Legislature

³³ In law, locus standi means the right to bring an action, to be heard in court, or to address the court on a matter before it. Locus standi is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case (available at <http://definitions.uslegal.com/1/locus-standi>).

Table 7 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Competition Act	In terms of section 7(2) of the Fair Competition Act "an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors". This dominance test is rather subjective and gives wide discretion to the FTC in determining dominance. Some jurisdictions in the region use market share thresholds to determine dominance.	The Fair Competition Act should specifically provide under section 7(2) a dominance threshold based on market share, and that in this regard the utility of the 40 per cent market share threshold currently being used by the FTC as an administrative guideline may be assessed with a view to formalizing it in the Act.	Legislature, on technical advice of the FTC
	While the list of abusive conduct in section 7(3) of the Fair Competition Act is clearly not exhaustive, it omits some common abusive conduct. For example, denying access to an essential facility is omitted in the Act as an abusive practice of a dominant or monopoly enterprise. For Seychelles, which has a number of privatized SOEs that used to be in monopoly positions, the abusive conduct of denying access to essential facilities to other emerging competitors would be a serious anti-competitive practice.	Certain abuses that are widespread in Seychelles, such as denial of access to essential facilities, should be added to the list of conduct that constitutes abuse by firms in dominant positions under section 7(3) of the Fair Competition Act.	Legislature, on technical advice of the FTC
	The provisions of section 11 of the Fair Competition Act do not distinguish between horizontal agreements and vertical agreements. This might cause confusion and enforcement problems since the treatment of such agreements under competition law and policy is different. Most horizontal agreements are inherently harmful to competition and are therefore per se prohibited, while some others are considered using the rule of reason approach since they may have efficient elements, and even be pro-competitive. On the other hand, most vertical agreements are considered using the rule of reason approach. Among horizontal agreements, there is also a distinction between hard-core cartels and other types of anti-competitive agreements. Hard-core cartels "are anti-competitive agreements between competitors with no other purpose or effect than to raise prices or reduce output". The four types of horizontal agreements that generally fall within the definition of hard-core cartels are price fixing, market sharing, bid rigging, and output restriction. Group boycotts by businesses may also fall within an expanded list of hard-core cartels. It is widely accepted that hard-core cartels are always anti-competitive and that they could be reasonably presumed to be illegal without further inquiry, or are per se prohibited. Other horizontal agreements and most vertical agreements are considered using the rule of reason approach because they might have pro-competitive or efficiency features.	The provisions of the Fair Competition Act on anti-competitive agreements should be divided to deal separately with horizontal and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be per se prohibited, and other agreements, which should be considered using the rule of reason approach. Therefore, as the anti-competitive business conduct provided for under subpart V of part III of the Act refers to the hard-core cartel activities of price fixing, production limitation and bid rigging, these should be provided for under the subpart dealing with horizontal agreements. Resale price maintenance under subpart III of the Act should be provided for under the subpart dealing with vertical agreements, but still per se prohibited, due to the severity of the practice in Seychelles and the fact that it constitutes vertical price fixing.	Legislature, on technical advice of the FTC

Table 7 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Competition Act	The merger control provisions of subpart IV of part III of the Fair Competition Act are not comprehensive enough and only cover basic issues such as merger application or notification and permission for mergers. There is a convergence of views among competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control, including time frames within which a merger investigation must be completed.	The merger control provisions of the Fair Competition Act should cover all basic elements or issues of merger control. In particular, provision should be made for size-of-the-transaction merger notification thresholds (i.e. based on merging parties' annual sales or turnover, total assets or both) and the charging of merger notification fees.	Legislature, on technical advice of the FTC
	Section 28(1) does not make clear which anti-competitive agreements or practices are subject to authorization by the Commission. In most cases, and in accordance with international best practices, horizontal agreements of a hard-core cartel nature, and other per se prohibited conduct and practices are not subject to authorization. The term "public benefit", referred to in section 28(2), is also not defined, such that it gives the competition authority wide discretion in considering applications for authorization, and this discretion might be abused. In some other competition legislation, public interest factors that must be taken into account are specifically provided for and include the promotion of technical or economic progress and transfer of skills, the promotion of employment and the enhancement of competitiveness or advancement or protection of the interests of small and medium-sized businesses.	Per se prohibited anti-competitive agreements and practices should not be subject to authorization under the Fair Competition Act and the term "public benefit" in considering applications for authorizations, referred to in section 28(2) of the Act, should be clearly defined in the Act.	Legislature, on technical advice of the FTC
	Section 35(1) of the Fair Competition Act provides for the discontinuation of the Commission's investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) of the Act however provides that "where the Commission discontinues an investigation under subsection (1) it shall: (a) within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and (b) submit a report of the discontinuation to the Minister within three months of such discontinuation". The requirement that the Commission report to the Minister its decisions to discontinue competition investigations limits its independence and reduces its decision-making autonomy. The purpose and limitations of this requirement are also not stated in the Act, such that it leaves the Commission open to political interference in its decision-making processes.	The provision in section 35(2) (b) of the Fair Competition Act, stating that if the FTC discontinues an investigation it should "submit a report of the discontinuation to the Minister", should be deleted from the Act.	Ministry of Finance, Trade and Investment
Increasing the capacities of FTC staff	The Competition Department of the Commission's Secretariat is currently staffed only by economists, while the effective handling of competition cases requires the services of both economists and lawyers.	The Competition Department of the Commission's Secretariat should have a mixture of economists and lawyers as case officers, with the immediate recruitment of an economist and a lawyer to augment the understaffed department.	FTC
Comprehensive competition policy	The enactment of the competition law preceded the formal adoption of a comprehensive competition policy, a process that is still ongoing. The policy is being developed by the FTC for presentation to the Cabinet by the Minister of Finance.	The FTC should receive local, regional and international technical assistance in drafting a comprehensive competition policy, since the process requires extensive research on current economic and legal environments in the country and the region and internationally.	UNCTAD

Table 8 Recommendations on consumer protection matters

Topic	Observation	Recommendation	Directed to
Consumer protection policy	There is currently no consumer protection policy. A policy would help focus debate on the widest range of implementation strategies, priorities and performance.	A comprehensive consumer protection policy should be developed in consultation with stakeholders and published.	Government
Aiding and abetting contraventions	There may be a legislative loophole which those persons who assist or facilitate contraventions may use to avoid sanction, as they may not have committed a primary offence.	A new offence of aiding or abetting a contravention of the Fair Competition Act and the Consumer Protection Act should be created.	Government
Product safety	Part VI on consumer safety is not referred to in the objectives.	The Consumer Protection Act should be amended to include a reference to consumer safety in the objectives list in section 3.	Government
Efficient and effective compliance	The explicit adoption of the pyramid of enforcement responses concept will provide a policy rationale for enforcement strategies and decisions.	The Secretariat should explicitly adopt the pyramid of enforcement responses concept and continue its current practice of attempting to resolve most complaints through negotiations and warnings. The Secretariat should use more serious contraventions, or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low-level contraventions will be resolved quickly and at low cost.	FTC
Appropriate and respective roles of the FTC Secretariat and the Board	The lack of clarification of the respective roles of the FTC Secretariat and Board results in some confusion, apparently inappropriate work practices and communications and potential legal challenges.	The issue of discontinuance reporting should be one of the issues considered when clarifying the respective roles of the Board and Secretariat.	Government and FTC
Unfair contract terms	Unlike many of the other proscribed conducts it is not always clear to businesses or consumers what might be an unfair contract.	The Secretariat should publish a guideline explaining the unfair contract term provisions.	FTC
Business access to information relevant to mandatory obligations and requirements	Low- or no-cost access to information relevant to mandatory obligations and requirements will enhance compliance.	The FTC website should include a page either listing any applicable trade descriptions prescribed by the Minister and required expiry dates, or providing links to other government sites where that information may be obtained.	FTC
More effective monitoring and involvement of NATCOF	Monitoring of market conduct may be expensive without the involvement of volunteers.	The FTC should consider the potential of enlisting the cooperation of NATCOF in an ongoing monitoring programme focusing on the display of expiry dates, failure to label in an appropriate language and failure to provide receipts, with a view to contributing to FTC enforcement actions.	FTC
Refunds for contravention of part V provisions	The current wording may be taken to preclude a full refund.	Section 40(2)(b) of the Consumer Protection Act should be amended to read "refund to the consumer a reasonable portion or the whole of the price paid for the service performed and goods supplied, having regard to the extent of the failure".	Government
Product safety	There is a potentially significant restriction on the application of the protections without a readily apparent justification.	(a) Section 50(4)(a) of the Consumer Protection Act should be repealed; (b) Section 50(4)(b)(ii) of the Act should be amended to replace the words "the person reasonably believed that the goods would not be used or consumed in Seychelles" with wording similar to "if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement"; (c) Section 50(5)(b) should be repealed.	Government

Table 8 Recommendations on consumer protection matters

Topic	Observation	Recommendation	Directed to
Penalties and their application	Current maximum fines do not provide a significant deterrent to larger businesses contravening the Act. If determinations do not explicitly state the rationale for penalties, observers may be unclear as to whether all relevant factors were considered and on the reasons imposed fines were set as they were.	<p>(a) The maximum fines should be increased to a level at which they provide the Board with penalty options to provide a significant deterrent for the worst contraventions and reflect the quite significant financial incentives sometimes linked to unlawful conduct in a commercial environment;</p> <p>(b) Section 67 of the Consumer Protection Act should be amended to read: "67(1) Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person— (a) in the case of an individual, to pay a penalty of a sum not exceeding SR 1 million; or (b) in the case of a person other than an individual, to pay a penalty of a sum not exceeding SR 4 million. Penalties for breaches of provisions of this Act (2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penalty of a sum not exceeding SR 1 million";</p> <p>(c) The FTC should routinely consider each of the factors listed in section 67 and any other factors it considers relevant when imposing sanctions, and its reasoning should be referred to in its written determinations.</p>	Government and FTC
Sanctions and remedies	The wider the range and scope of available sanctions and remedies the greater the flexibility of the FTC to match the sanctions and remedies to particular circumstances and to respond appropriately to new or recurring compliance issues.	<p>(a) Consideration should be given to amending the Consumer Protection Act to provide a wider range of sanctions and remedies;</p> <p>(b) The Board should consider the expanded use of section 68(b) where it believes appropriate.</p>	Government and FTC
Potential new and temporary role for FTC	The FTC is facing the challenge of raising its profile and creating a reputation as a regulator that is both market-oriented and consumer-focused. It would benefit from a high profile role that would be seen to deliver immediate benefits to consumers and the economy.	Consideration should be given to amending the Consumer Protection Act to give the FTC specific powers in relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.	Government and FTC
NATCOF	The principal consumer organization is concerned that some complaints are taking too long to resolve. NATCOF has a presence and sophistication greater than average consumers.	Both the concept of providing for a designated super complainant and the practicality of designating NATCOF as a super complainant should be explored.	Government and FTC

Table 9 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Trading Commission Act	Section 32(2) of the Fair Trading Commission Act provides that “the Commission may decide not to investigate a complaint against an enterprise where in response to a complaint made directly to an enterprise the complainant, in the opinion of the Commission, has obtained reasonable redress”. A decision not to investigate a complaint if the complainant has obtained reasonable redress may not be appropriate for competition complaints, most of which not only affect the direct complainants but other industry players as well. It has now been generally accepted that the role of competition law enforcement is not to protect individual competitors but to promote the whole process of competition. Therefore, competition authorities should be obliged to investigate competition complaints for the purposes of promoting competition in the market by preventing the abuse of dominant positions or eliminating anti-competitive practices unless “the complaint is trivial, frivolous or vexatious” or “is not made in good faith” as provided for in section 32(1) of the FTC Act. Even in the matter of consumer cases, if the complaint reveals a systemic problem, it should be pursued in the public interest. It would be a mistake for a consumer protection agency to narrow its approach to simply obtaining a resolution for those few consumers who take the time and effort to complain.	The provisions of section 32(2) of the Fair Trading Commission Act, stating that the FTC may decide not to investigate a competition complaint against an enterprise where the complainant subsequently obtains a reasonable redress, should be deleted from the Act.	Legislature
	Section 39(1) of the Fair Trading Commission Act gives the Commission powers to conduct hearings into competition and consumer protection complaints. However, section 39(2) of the Act provides that “at a hearing before the Board in respect of a breach of any written law relating to consumer protection, fair competition or other written law which the Commission has jurisdiction to administer, the complainant is entitled to be heard in person or represented”. While the above provisions are in line with the principles of natural justice that the Commission is obliged under section 41(2) of the Act to have regard to, in formulating and issuing procedural rules that govern the conduct of hearings before it, the rules of natural justice include the need to take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of an investigation is given an adequate opportunity to make representations on the matter. In any competition case, and in many consumer protection cases as well, complainants are not the only ones whose interests are likely to be affected by the outcome of an investigation, since respondents and other interested stakeholders are as well. The respondents and other interested parties should also be entitled to be heard in person or represented at the Commission’s hearings.	Section 39(2) of the Fair Trading Commission Act should be amended to entitle respondents and other interested parties in a competition or consumer protection case to also be heard at the Commission’s hearings together with the complainant.	Legislature
	Sections 49 to 54 of the Fair Trading Commission Act provide for the imposition of fines and penalties for the obstruction of investigations by the Commission, obstruction of the execution of search warrants given to the Commission, destruction or alteration of records that are required to be produced to the Commission, giving of false or misleading information to the Commission and failure to comply with Commission directions or orders. However, in most cases, the penalty is a fine not exceeding SR 100,000 or imprisonment for a term not exceeding two years or both.	Fines provided for under the Fair Trading Commission Act for breach of the Act should be made more deterrent.	Legislature

Table 9 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Trading Commission Act	<p>The statutory functions of the FTC in terms of section 4(1) of the Fair Trading Commission Act include both adjudicative and investigative functions, which are not apportioned between the Commission's Secretariat and Board of Commissioners. However, unclear statutory separation of a Commission's adjudicative and investigative functions has grave legal implications of a due process and natural justice nature.</p>	<p>There should be a clear separation of the Commission's adjudicative and investigative functions under the Fair Trading Commission Act, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners adjudicative functions, with well-defined responsibilities and spheres of operation.</p>	Legislature
	<p>The Commission's Board of Commissioners is made up of five Commissioners appointed on a part-time basis, and Board decisions are taken on the basis of majority voting. Section 15 of the Fair Trading Commission Act stipulates that three Commissioners shall constitute a quorum for any meeting of the Board. The disclosure of interest provisions of section 11 of the Act mean that in the event of a conflict of interest, Board members need to abstain from voting, after disclosing the interest. The previous Board of Commissioners, whose term of office ended in January 2013, had three members with direct interests in the banking services sector, and felt obliged to recuse themselves from any competition and consumer protection decision involving players in that sector or any of their major customers, thus affecting the Board's decision-making quorum. The Board was thus rendered powerless to decide on any case affecting the banking and financial services sector. While the new members of the Board are drawn from a wider economic background, the problem may recur if not formally addressed. The appointment of members of the Board of Commission for terms of only three years also raised stakeholder concerns as being too brief to enable members to grasp the intricacies of competition and consumer protection law and policy to enable them to effectively contribute to decision-making on such matters.</p>	<p>Membership on the Commission's Board of Commissioners should be increased from five to eight members to ease quorum problems on the Board. For the same reason, members of the Board should be drawn from diverse economic backgrounds, to avoid one sector dominating its membership. The terms of office of Board members should also be increased to five years, to enable the members to fully contribute to the operations of the Commission with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should, however, be staggered to avoid a sudden and total departure of experience and knowledge.</p>	Ministry of Finance, Trade and Investment
	<p>The appointment of the Chief Executive Officer of the Commission as an ex officio member of the Board of Commissioners is cause for concern. The Chief Executive Officer heads the Commission's Secretariat, essentially the Commission's investigative branch, while the Board is the Commission's adjudicative branch. Natural justice principles dictate that there should be a clear separation of the competition authority's adjudicative and investigative functions, otherwise the Commission's decisions on competition or consumer protection cases may successfully be appealed against in law courts. While it is noted that the Chief Executive Officer only participates in the Board's deliberations and decision-making on administrative matters, and not in the determination of competition and consumer cases, which are considered at separate meetings, these precautions are only administrative and are not enshrined in the Act.</p>	<p>The ex officio membership of the Commission's Chief Executive Officer to the Board of Commissioners under section 5(1) of the Fair Trading Commission Act should be removed to avoid conflict of interest problems in the Board's determination of competition and consumer protection cases. Alternatively, a separate Board could be established to only consider and adjudicate on competition and consumer protection cases, on which the Chief Executive Officer would not be a member.</p>	Ministry of Finance, Trade and Investment and Legislature

Table 9 Recommendations on competition matters

Topic	Observation	Recommendation	Directed to
Revision of the Fair Trading Commission Act	Seychelles has a number of sector regulators, most of which were established well before the FTC, with some therefore having some competition functions. Sectoral regulation in Seychelles is in sectors such as financial services sector, communications, energy, media services and the fishing industry. As noted by the FTC, the establishment of the Commission, mandated to enforce the competition and consumer protection Acts, which cover all sectors of the economy, has created some level of confusion and conflict with regard to certain sector regulators' roles and mandates vis-à-vis competition and consumer related issues. Section 4(1) of the Fair Trading Commission Act gives the Commission primary responsibility over the enforcement of competition law in Seychelles as a regulator.	The FTC should be given statutory supremacy over competition matters in Seychelles. Those sector regulators with competition functions should be obliged by statute to negotiate and conclude concurrent jurisdiction agreements with the FTC on the promotion of competition in their respective sectors. In this regard, the relevant provisions of the Competition Act 2003 (No. 2 of 2003) of Namibia would provide a good guide.	Ministry of Finance, Trade and Investment and Legislature
Remuneration of Commissioners	The current Commissioners' fees consist of only a single component, a monthly fee paid regardless of the number of days of work required in that month. There is no allowance for time spent preparing for meetings (often referred to as reading time), which may be significant if there are several cases to be determined at a particular meeting or if there are any substantial competition cases to be heard. The responsibilities and work requirements of boards of competition authorities in the region are, however, higher than those of boards of other parastatal organizations in terms of preparation for meetings, including reading extensive volumes of documents and actual participation in meetings, including lengthy hearings in competition cases. The opportunity costs for part-time Board members of attending meetings and hearings are also very high, given the fact that they have full-time jobs elsewhere.	In addition to a fixed monthly fee, members of the Commission's Board of Commissioners should also be paid sitting fees for attending and participating in Commission meetings, including hearings.	Ministry of Finance, Trade and Investment
Building and increasing the capacities of FTC officials	The FTC is currently understaffed, with a number of unfilled posts in the establishment, for the amount of work which it is expected to do.	The vacant posts in the Secretariat, particularly that of Director in the Legal Department, should be filled as a matter of urgency.	FTC
	The Board of Commissioners requires more competition and consumer protection adjudication courses, given its limited knowledge and experience in this highly specialized field, and the fact of an increasing number of cases, particularly consumer protection cases. Consideration could also be given to assigning a regional or international competition and consumer protection expert for a period of three to six months to assist in the training of the Board of Commissioners and in the implementation of the required changes in the Board's procedures.	The Board of Commissioners should be given capacity-building and technical assistance in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of three to six months to assist in the training of Board members and implementation of the required changes in the Board's procedures.	UNCTAD

Table 10 Recommendations on other relevant matters

Topic	Observation	Recommendation	Directed to
Appeals	The Appeal Tribunal, established under the Fair Trading Commission Act, is an important institution in the enforcement of Seychelles' competition and consumer protection laws. Certain parties might contemplate lodging an appeal because there is no immediate prospect of that appeal being heard, and so any penalty or order of the Board of Commissioners would be rendered ineffective. Furthermore, precedents inform business, consumers and FTC staff on the interpretation of provisions and on the evaluation of evidence and likely imposition of penalties, orders and remedies. In doing so, they promote both compliance and more effective and efficient administration by the FTC.	The Appeal Tribunal, as provided for in all three Acts under the administration of the FTC (i.e. the Fair Trading Commission Act, the Fair Competition Act and the Consumer Protection Act), should be established without further delay.	Ministry of Finance, Trade and Investment
Advocacy and awareness	The FTC is still in its formative stages, having commenced operations only about two years ago. However, expectations for the FTC are high in both the public and private sectors of the Seychelles economy. Most of the stakeholders consulted during the fact-finding visit to Seychelles were of the opinion that the Commission is doing a good job, while others felt that it needs to do more to publicize itself. Successful advocacy will ensure that the FTC is consulted when important economic initiatives are being discussed, help secure the FTC budget and more generally increase its power to persuade and influence. It will also increase the effectiveness of educational activities because it will increase the perceived relevance of both the laws and the FTC.	The FTC should undertake more advocacy and awareness activities, aimed at government ministries, legislature and judiciary, as well as business and consumer associations, to increase its visibility. In this regard, the Communications and Corporate Services Department of the Commission's Secretariat should be adequately resourced and equipped, and work closely with the operational Departments of Competition and Consumer Affairs.	FTC
Increasing the capacities of FTC officials	Competition cooperation under COMESA provides wide opportunities for the FTC. Regional cooperation under COMESA is aimed at assisting those member States with no competition policies and laws, or competition authorities to implement and enforce the policies and laws, to formulate the policies and laws and establish the implementation and enforcement agencies, and is also aimed at developing young competition authorities, particularly in case handling. The work programme of the COMESA Competition Commission also includes capacity-building and the exchange of information among national competition authorities through workshops and seminars. Under the SADC, an ambitious project under the European Union TradeCom Facility on the design and development of a case management online resource database has recently been completed. The database, at http://www.sadc.int/competitioncases , is hosted on the SADC platform and uses the SADC domain.	The FTC should continue to cooperate with other competition and consumer protection authorities in the COMESA and SADC regions, particularly with regard to the use of and contribution to the SADC online resource database on competition and consumer protection cases.	FTC
	The FTC has benefited, or stands to benefit, from the programmes of relevant international organizations such as the International Competition Network (ICN) the International Consumer Protection Enforcement Network (ICPEN), the Organization for Economic Cooperation and Development (OECD), UNCTAD and the World Trade Organization (WTO). The FTC has greatly benefited from the UNCTAD Capacity-Building and Technical Assistance Programme. In its unpublished draft annual report for the year ending December 2011, the Commission also reported that discussions were underway with UNCTAD on a three-year technical assistance project covering various relevant technical assistance areas. Besides UNCTAD, the ICN has emerged as a leading international organization that promotes competition policy and law. One particular ICN programme that would be of interest to the FTC is its Advocacy and Implementation Network Support Programme (AISUP), under which ICN members may seek advice about specific ICN work products or receive assistance on how ICN recommendations and other guidance documents might be implemented within their jurisdiction.	The FTC should continue with increased intensity its active participation in the programmes of relevant international organizations, such as ICN, ICPEN, OECD, UNCTAD, etc. The Commission will thereby not only benefit immensely from international best practices but will receive direct notification of the organizations' programmes, including conferences and workshops. In particular, the Commission should pursue to completion its discussions with UNCTAD on the three-year technical assistance project and should seek relevant assistance under the AISUP of the ICN.	FTC

