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Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of Restrictive Business Practices

Ways and means to strengthen competition law enforcement and advocacy

Note by the UNCTAD secretariat

Executive summary

Chapter I of this report discusses ways and means to strengthen law enforcement of particularly young competition agencies and draws conclusions with regard to the challenges facing competition agencies in their enforcement work. Chapter II is devoted to strengthening competition advocacy. Building on the experience of competition agencies, it discusses how competition agencies can strengthen their advocacy arms to strengthen awareness and trust in specialized circles and the general public alike.

Contents

Introduction

1. Competition policy has two major components. The first is a competition law that contains the substantive rules to enforce against anticompetitive market conduct, as well as an enforcement mechanism, such as an authority. The second major instrument, which is particularly important in the interface with other economic policies, is competition advocacy.[1]

2. Both competition law enforcement and advocacy have a critical and mutually reinforcing role in building and sustaining a competition regime, supported by a high level of institutional trust and ideally imbedded in a set of complementary policies.

3. The two aspects have a particular importance for all competition law regimes. Effective law enforcement informed by complaints or solid sector enquiries leads to the implementation of competition law and builds a body of precedent decisions, which helps to clarify the meaning of the law for enforcers and business alike and lends vibrancy to legislation. At the same time, enforcement activities test and strengthen the capabilities of new agencies, creating important experiences and helping to fine-tune enforcement practices and competition law in subsequent judicial reviews.

4. Competition advocacy reinforces the effects of law enforcement by disseminating the mandate, work and results produced by the competition authority. Encompassing however far more than the mere duties of a press office for the competition authority, competition advocacy aims to advocate a set of efficiency-enhancing policies and a pro-competitive mindset of economic policy beyond the narrow scope of antitrust. Competition advocacy thereby seeks to build overall institutional trust in the aims, substance and enforcement of competition law as "good law" and an expression of good governance.

5. This report is divided in two parts: Chapter I discusses the ways and means employed by competition agencies to strengthen law enforcement over the past five years. Particular attention is given to young competition agencies and conclusions are drawn with regard to the challenges facing competition agencies in their enforcement work.

6. Chapter II is devoted to strengthening competition advocacy. Building on the experience of competition agencies in the past five years, it discusses how competition agencies can strengthen their advocacy arms to strengthen awareness and trust in specialized circles and the general public alike.

7. This report draws on the work carried out by the Intergovernmental Group of Experts (IGE) on Competition Law and Policy on the effectiveness of competition agencies as well as the work of other organizations and institutions, including OECD, the International Competition Network, national competition authorities and regional agencies.

I. Formulation of sound competition law and policy

8. Competition law can only take hold in a jurisdiction if the new law and enforcement structure is integrated into the existing legal and regulatory environment and takes notice of the pre-existing conditions on the ground. Moreover, the complex nature of competition

[1] This view is embraced by UNCTAD, for example in TD/B/C.I/CLP/28, and all mayor development organizations active in advisory and capacity-building work in competition law and policy. See also World Bank and the Organization for Economic Cooperation and Development (OECD), 1998, *A Framework for the Design and Implementation of Competition Law and Policy*, chap. 6, p. 93.

law and its narrow relationships with other laws sanctioning market-distorting behaviour[2] require that competition law be embedded in a network of policies and complementary laws and understood as only one part of a wider competition policy.

9. Competition system design therefore requires a careful pre-reform assessment of existing economic conditions and legal structures and careful attention to how competition policy will be implemented.

10. Good law enforcement depends on three elements: Good laws,[3] efficient and fair prosecution by a law enforcement agency, and a fair and competent trial or judicial review.[4] The past five years have seen significant developments on all three aspects in most jurisdictions.

11. In most cases, a necessary predicate for the development of good legislation and effective enforcement systems depends on the existence of a political consensus in favour of a market economy characterized by robust competition. Otherwise, it is unlikely that the Government will approve strong laws and systems, appoint qualified staff and grant the competition authority the necessary independence. This is often a challenge, especially in developing and transitional economies, where entrenched and well-connected incumbents have much to lose in such a system. At the same time, development of such a consensus may benefit from the existence of a law and an authority dedicated to that purpose. In many respects, developing an effective competition law mechanism is a conundrum in which it is unclear whether the law or the political consensus should come first. While in principle it may be hoped that they will be mutually supportive, if the political support for a law and authority is so weak that it cannot be employed effectively, the entire idea of competition law and policy may lose credibility. In this regard, a bottom-up approach is preferable.

A. Substantial elements of the law

12. In the past five years, the trend towards the inclusion of competition law in the catalogue of public economic law has continued, jurisdictions with competition laws have further adapted and fine-tuned their laws, and enforcement systems and convergence in the scope, coverage and enforcement of competition laws and policies worldwide has continued.

13. Contributing factors to this trend remain the following:

(a) The continuing trend towards liberalization of markets and adoption of competition policies;

(b) Greater emphasis on consumer welfare, efficiency and competitiveness objectives in the provision or application of competition laws;

[2] Although there is no definitive set of interrelated policies, the relationships between competition law and a range of criminal and administrative laws is well documented. Competition law interacts with the following criminal prohibitions: Bribery and anti-corruption laws, as lex generalis and securities law, in particular provisions of market manipulation and insider trading as lex specialis. With regard to administrative law, competition law interacts with procurement and subsidies and State aid rules. The relationship between domestic competition law and bilateral and multilateral free trade arrangements is also commonly discussed.

[3] The term “good law” shall refer to the quality of the law. While there is no legally defined concept of a good law, it can be assumed that it is well worded and well structured, with clearly defined relationships to overlapping areas of law and is accessible to all.

[4] For a more comprehensive study on the effectiveness of competition authorities, see TD/B/COM.2/CLP/59 and TD/B/C.I/CLP/8.

(c) Greater emphasis on and similarity in economic analyses and enforcement techniques;

(d) The universal condemnation of collusive practices;

(e) Tightening of enforcement;

(f) A more prominent role for competition authorities in advocating competition principles in the application of other governmental policies;

(g) The strengthening of international consultations and cooperation in competition matters.

14. A further decisive new factor is the advent of new deep mega-regional and trade agreements that include provisions of the introduction, harmonization and strengthening of competition laws.

15. Important differences remain nevertheless among competition laws and policies:

(a) The priority attached to competition policy vis-à-vis other policies;

(b) The importance attached to objectives other than consumer welfare or efficiency under many competition laws;

(c) Legal approaches to the control of anticompetitive practices;

(d) Analytical techniques utilized;

(e) Substantive rules applicable in particular to vertical restraints, abuses of dominant positions, mergers, joint ventures and interlocks;

(f) The structure or scope of de minimis, intellectual property or other types of exemptions;

(g) Enforcement capabilities and actual strength of enforcement;

(h) Legal doctrines under which competition laws are applied outside national territory;

(i) The ability to apply them or frequency of application;

(j) The rights of defendants and the ability to appeal the decisions of competition authorities;

(k) The extent to which different countries participate in international cooperation in this area;

(l) Regulatory restrictions upon market entry;

(m) The extent to which anticompetitive conduct by national and/or local Governments may be subject to the reach of competition law.

16. Some laws in developing countries and economies in transition have followed the UNCTAD Model Law, which provides a good basis for starting the drafting process, particularly in different economic settings.

Objectives of the law

17. The primary objective of competition law over time has been the improvement of allocative efficiency by undermining practices restrictive of competition – this remains the predominant objective of competition law in most jurisdictions. [5]

[5] All numbers, case and developments referred to in this paper are cited as they stood in October 2014.

18. Nevertheless, competition law has often been required to accommodate certain non-economic, political or social considerations. Non-economic considerations include consumer protection issues beyond the enhancement of consumer welfare and the promotion of economic efficiency.[6] A common objective for the inclusion of competition policy in regional trade agreements is to prevent private agreements from re-erecting barriers to trade, thereby supporting the political aims of the free trade arrangement.[7]

19. Other relatively common objectives are promoting small and medium-sized enterprises, restricting undue concentration of economic power and ensuring fair competition. Public interest objectives, which may be relevant to development objectives, are fairly widespread among developing countries, but also present in the competition laws of some developed countries.

Scope of application

20. With regard to the jurisdictional reach of competition law, most jurisdictions continue to apply their competition law domestically and extraterritorially where anticompetitive behaviour causes sufficient domestic effect[8] and in accordance with domestic case law on extraterritorial application of competition law.[9]

Prohibited practices: Horizontal and vertical

21. The Model Law lists a number of core restraints to trade in chapter III and the prohibition of an abuse of a dominant position in chapter IV.

22. Core restrictions are price-fixing agreements, collusive tendering (bid rigging), market or customer allocation, collective restraints on production or sale (including the imposition of quotas, concerted refusal to purchase or supply and collective denial of access to an arrangement, or association that is crucial to competition (essential facility).

23. Most jurisdictions list a number of practices as per se restrictive of competition or at least overwhelmingly likely not to benefit from an efficiency consideration. Hard-core restraints almost universally encompass cartels, bid rigging, and resale price maintenance.

24. In the last five years, certain new practices and sectors have come under antitrust scrutiny, including increased enforcement in the financial services sectors or restrictions on the cost of labour or State aid scrutiny of European Union member States' tax regimes.

Abuse of dominance

25. With regard the abuse of a dominant position, major steps have been taken over the last five years to conceptualize the concept of market dominance in an ever-evolving

[6] For example, the introduction of the Sherman Act (1890) was accompanied by political pressure to address the growing monopoly power of trusts in the United States of America, not only in the economic but also in the political sphere. The inclusion of a competition article in the European Community was motivated by a desire to prevent private arrangements from re-erecting the trade barriers abolished by what is now art. 34 of the Treaty on the Functioning of the European Union. Further, the South African competition law refers clearly to the promotion of black ownership. See note 8 below.

[7] The European Court of Justice joined cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR-299.

[8] The case of the S.S. Lotus (*France v. Turkey*), 1927, Permanent Court of International Justice, 7 September.

[9] For the United States, see *Hartwood Fire Insurance Co. v. California* 509 U.S. 764 (1993); for the European Union, see joined cases C-89/85, C-104/05, C-116/85 and C-125/85 *Woodpulp* (1989), ECR-I 1307.

economic climate and have exposed some rifts between the leading jurisdictions in the conceptualization and prosecution of dominance cases in the new economy.

Exemptions and exceptions

26. The efficiency-enhancing potential of certain agreements has long been recognized. The Model Law states that there should be a possibility to exempt certain types of non-hard-core restrictions upon prior notification to the competition authority.

27. All competition laws allow for exceptions and exemptions in accordance with their efficiency-enhancing effects or certain policy priorities. Competition authorities also tend to publish guidance on their application of exceptions.

28. This concerns in particular the efficiency-enhancing effects of cooperation in the form of joint ventures (production, research and development and distribution) or other types of cooperation.

29. Furthermore some jurisdictions continue to apply generous exemptions of entire sectors where domestic policy considerations are at play.

Merger control

30. The past five years have seen significant changes in global mergers and acquisitions as the world economy plunged into and emerged from the global financial crisis and the European sovereign debt crisis.[10]

31. With regard to substantial changes in merger legislation, for instance in European Union legislation, there has be a further harmonization where Germany departed from its traditional "market control" test (*Marktbeherrschungstest*) introducing the significant impediment of competition test used at the European level, and which is similar to the substantial lessening of competition test used in North America. At the same time, China has emerged as an established player in the merger sphere, making waves with high-profile interventions in domestic and even foreign-to-foreign transactions.[11]

32. At the international stage, multi-jurisdictional mergers often require multiple filings, sometimes – owing to domestic turnover thresholds – even in cases without any or significant domestic effects (foreign-to-foreign mergers). As a result, the International Competition Network and OECD have taken important measures to promote convergence of notification standards and procedures, especially as regards the minimum effects a transaction should have on a jurisdiction before it is appropriate for that country to require notification and review. The competition authority of India has assumed a role corresponding to the growing weight of that country in the world economy since merger control enforcement began in 2011. The authority has handled approximately 160 cases since 2011; it approved all cases and only imposed conditions in three cases. The authority has moreover sharpened its understanding of key aspects of the merger regime, including the notion of control. Brazil, the Russian Federation and South Africa have similarly stabilized their merger regimes and continue to work steadily on merger notifications.

[10] See for example the following transactions: AT and T/Diect TV (review ongoing); Glencore/Xstrata; Publicis/Omnicom (abandoned); Chquitta/Fyffes; Lafarge/Holcim; P3 Alliance (not approved); Microsoft/Nokia; Deutsche Börse /New York Stock Exchange Euronext (not approved).

[11] Chinese Ministry of Commerce announcement No. 46/2014 of 17 June 2014, P3 Alliance.

Sanctions

33. Sanctions in most member States are administrative or judicial in nature, with some jurisdictions enforcing criminal sanctions against the perpetrating company or individual sanctions.

34. The fines awarded for breaches of antitrust law have increased significantly over the last five years, owing in part to a higher rate of enforcement in transition and developed economies and stricter reading of fining guidelines. Individual and collective fines reached record levels in China and the European Union.[12]

35. There is an ongoing discussion in the European Union as to whether the levels of the fines designed at least to deter, if not punish, competition law violations are still administrative in nature. With the accession of the European Union to the European Court of Human Rights (ECHR), this discussion has gained renewed importance concerning the compatibility of European Union enforcement procedures with the due process requirements of art. 6 (1) ECHR.[13]

Anticompetitive conduct by State entities

36. Governmental conduct is capable of inflicting as much harm on competition as private sector anticompetitive behaviour. In many cases, this results from private firms – often with historical links to regulators – asking for regulation or legislation that has the effect of suppressing competition. In other cases, State-owned firms that compete in commercial markets are given special advantages through subsidies, the authority to grant licences or through corrupt linkages. In yet other cases, the conduct has a more benign explanation: the regulator, seeking to further a legitimate objective, fails to appreciate the impact that its action has on the market.

37. Since sovereign bodies have the right to regulate economic behaviour, this presents difficult issues for competition authorities. In some countries, such as the Russian Federation, the law expressly allows the competition law to be enforced against State actors. Others, such as the European Union, have special regimes to address State aids that distort competition. Whether competition law intervention is permitted may depend on whether the State is acting in a commercial capacity or a sovereign capacity.

38. In cases where the State is acting in a sovereign capacity, one tool that may be granted to a competition agency is the authority to advocate for sound competition policies before regulators, legislators and local government units.

[12] In August 2014 China imposed its largest ever collective cartel fine of RMB 832 million ($135.3 million) on a group of seven Japanese auto-parts manufacturers. Collective fines in the European Union between 2010 and September 2014 amounted to EUR 8.587 million, up from EUR 7.947 million in the previous four-year period. Similarly, the largest-ever collective fine of EUR 1.4 million was imposed in 2012 on the member of the cathode ray tube cartel. The third-largest collective fine in history was imposed on the members of the EURIBOR Cartel in 2013. The total fines cited in this paper reflect the fines as they stood on 3 September 2014.

[13] See D Slater, S Thomas and D Waelbroeck, 2008, Competition law proceedings before the European Commission and the right to a fair trial: No need for reform? Global Competition Law Centre Working Papers Series, Working Paper 04/08.

B Institutional design of a competition agency

Tasks and powers of the agency

39. Most competition legislation establishes a list of the tasks and powers of a competition agency in carrying out its core functions; such a list provides a general framework for its operations. An illustrative list of functions of the Agency is contained in chapter X of the Model Law. The functions and powers of the administering authority could include the following:

(a) Making enquiries and investigations, including as a result of receiving complaints;

(b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;

(c) Undertaking studies, publishing reports and providing information to the public;

(d) Issuing forms and maintaining a register for notifications;

(e) Making and issuing regulations;

(f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;

(g) Promoting exchange of information with other States.

40. A common feature is that the agency's functions must be based on the principle of due process and transparency as defined in domestic and international standards. In most European jurisdictions, due process requirements are guided at the minimum by art. 6(1) ECHR, and the corresponding ECHR jurisprudence can give detailed substantial guidance also to jurisdictions outside the circle of signatories.

41. The authority may act on its own initiative, or following a formal complaint or any other form of notification by a third party.

42. The Model Law recommends in this context that States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices. The administering authority should also be empowered to order persons or enterprises to provide information and documents, and to call for and receive testimony, where warranted also by means of unannounced inspections, or dawn raids.

43. Decision-making of the competition agency is required as a result of enquiries and investigations undertaken to take and publish a formal decision in the Official Gazette. For example, initiating proceedings or calling for the discontinuation of certain practices, or denying or granting authorization of matters notified or imposing sanctions. The decision-making powers of any individual authority will depend on its structure. For example, chapter IX of the Model Law summarizes the number of design choices available for the composition, structure and responsibilities of the authority responsible for competition: the bifurcated judicial model, the bifurcated agency model and the integrated agency model.

44. Concerning the scope of coverage and owing to the high level of specialization and the unique experience of the competition agency, a growing number of new laws or amendments give the agency additional responsibilities, such as advising on the drafting of laws that may have anticompetitive effects, and also for studying and submitting to the Government the appropriate proposals for amendment of the legislation on competition.

This is the case, for example, for Bulgaria, at the level of the Commission for the Protection of Competition;[14] Portugal, with its Council for Competition, which can formulate opinions, give advice and provide guidance in competition policy matters;[15] and Spain, at the level of the Court for the Protection of Competition[16] and the Competition Protection Service.

45. In addition, some competition agencies are mandated with wider powers and functions, such as competition enforcement, consumer protection, regulation of sectors, data protection, protection of intellectual property rights and monitoring of public procurement. These are known as umbrella agencies.

C. Relationship of competition agencies with other government bodies and regulators

46. The relationship between sector regulation and competition policy is highly complex in theory and largely dependent on the domestic legal, economic and regulatory environment in practice.

47. Chapter VII of the Model Law holds that regulatory decisions, especially where they have a bearing on competition in the sector, should be scrutinized under a competition law perspective to avoid undue anticompetitive effects. Competition law also has an important role to play in the regulation and adjustment of newly privatized sectors in regulating the market behaviour of newly privatized incumbents.

48. In the past five years, most jurisdictions have recognized the need for competition agencies and sector regulators to work together, further fine-tuning the demarcation line between sector regulation and competition policy and providing a fair allocation of competencies. While some jurisdictions, for example in the United Kingdom, follow an integrated model whereby competition law enforcement in certain sectors is delegated to the sector regulator, most jurisdictions follow an integrated approach separating sector regulation from competition law enforcement.

49. Legislators should strive for policy coherence between the mandate of the competition authority and sector regulators. Different countries have chosen different models to create and ensure coherence in the activities of the agents.[17]

50. A particularly important role in ensuring the differences in competition law enforcement falls to the government minister responsible for the enforcement of competition law or the independent agency. In most jurisdictions, either the Ministry for Economic Affairs or the Department of Justice bears overall or joint responsibility for the competition authority. Most jurisdictions separate administrative allocation and direct accountability on matters of substance.

51. The role of the minister responsible for competition law consists largely of setting the political goals for competition policy, including regular revisions of the competition law as well as a degree of administrative supervision of the competition authority. Many jurisdictions also envisage a role for the minister in a defined set of cases with a political dimension. A minister's role may in these circumstances include special powers to clear a merger, joint venture or any other type of cooperation that would fail the standard test due

[14] Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition, art. 4 (3).

[15] Decree Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition, art. 13 (1) (b), (c) and (d).

[16] Law 16/1989 of 17 July for the Protection of Competition, art. 26. Additional information can be found at Tribunal de Defensa de la Competencia. Memoria 1992: 66.

[17] See TD/B/COM.2/CLP/44.

to certain public interest considerations, or the approval of a crisis of export cartel. It important, however, to ensure the transparency of a decision that overrides the decision of a competition agency. Germany provides a useful example.

52. Importantly, the minister's discretion is clearly limited in competition law to dealing with cases involving areas of extreme domestic sensitivity such as national security or essential public services. Moreover the minister's margin of appreciation should be limited by general administrative or constitutional law, which would also give competitors a possibility to challenge the decision on administrative or constitutional grounds before the highest domestic courts.

Independence and influence

53. It is generally accepted that decisions by competition authorities should be based on objective evidence; further, those authorities should maintain a consistent respect for market principles and the decision-making process should be neutral and transparent. The reasoning behind this view is that sound policy outcomes are assured only when decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups. Thus, Government is compelled to cede control over day-to-day functions and decision-making to the authority. As a direct consequence, private interest groups are denied the possibility to lobby ministers and lose the means for gaining favourable treatment.

54. Neutral and transparent decision-making processes, however, are dependent on both sufficient independence from the interference of special interest and the effective judicial review of and sufficient procedural rights of defendants to scrutinize the decisions of the authority. In addition to prescribing the authority's structure, enabling legislation should also give legal meaning to the authority's operational independence by prescribing functions, powers, the manner in which members of management and staff are to be appointed, their tenure and removal, and how the body is to be financed. Likewise, legislation should address how the body shall relate to the executive and legislature.

55. Whereas the conditions for independence of agencies vary between member States because of differences in the legal, political and economic systems, the independence of a competition authority can be measured in qualitative terms.

56. Decisive factors are the areas and degree and regularity of ministerial interference as well as the hierarchical relationships between officials and civil servants at the competition authority, the tenure and appoint of staff and management and the allocation and organization of the budget. Moreover soft factors such as administrative culture, political opinion and interpersonal relations will influence the relationship between the officials and the authority.

57. As with any complex piece of economic law, the organizational challenge for legislators will be to design a competition enforcement system that allocates sufficient policy space to the elected Government while retaining sufficient autonomy for the competition authority to do its work free from interference by special interests.

58. Tensions between the minister responsible for competition policy and the competition authority may arise from time to time as a result of insufficient clarity on the respective roles and responsibilities of the minister and the management of the competition authority, on how the competition authority is to be responsive to political direction and on issues related to the streamlining of public expenditures for which the minister or another government department may be accountable.

59. In such a conflict, it is important to observe the division of powers between the executive and its agencies and the judiciary. Whereas in ordinary administration, the

executive may take full responsibility for the actions of their subordinate departments, the special nature of competition law prohibits such an approach. Effective review of the decisions of the competition authority should therefore fall to the judiciary, which should be able to review the decisions of a competition authority. The exact scope of judicial review, however, should be adapted to the needs and capabilities of each jurisdiction with regard to legal and factual review of complex economic cases and analysis.

Country-specific considerations

60. Competition law enforcement is highly influenced by a number of domestic factors including, but not limited to, the level of economic development, the legal and institutional set-up and quality of law enforcement, the political system and the geographical size of the country.

Level of development

61. The level of economic and legal development of a country will strongly influence the form of suitable competition law appropriate in a jurisdiction and determine its enforcement needs. Economic development influences the quality of law enforcement and the availability of well-educated staff and has clear bearings on the competition problems of any economy and the political forces shaping the adoption of competition law.

Legal and political factors

62. The legal system of the host jurisdiction and the overall level and quality of law enforcement and judicial review are key factors for the daily success of a competition regime. For example, civil law jurisdictions with a tradition in administrative law can easily adopt a central enforcement approach based on an administrative procedure subject to judicial review. Common law jurisdictions with their court-centred approach, however, should adopt a prosecutorial approach where a competition authority needs to bring a case before a national court and win a verdict. Judicial review in this instance is limited to the normal appeals process.

63. The wider legal environment of constitutional and ordinary provisions on economic freedom and fairness play an important role in determining the scope and legal grounding of the competition law as well.

64. Anti-corruption laws are the most fundamental example for this in lex generalis, whereas modern securities law encompasses important lex specialis rules for the conduct of market players in financial markets. Equally, rules on procurement, subsidies or any other rules on market behaviour play an important role in determining the wider legal environment for and perception of a competition law.

65. Political factors are often underestimated as a determinant of the success of a competition law regime. Political support and a commitment to a free and fair economy overall are also key. Competition law is thus best embedded into a large package of a competition policy and an overall commitment to a free market economy. The political system determines important soft features of a competition law regime, including the relationship with other policies and the influence of official or even party politics on the competition authority.

Judicial review of competition cases

66. Due process and fair administrative decisions are a cornerstone of good governance and essential for any successful competition law regime.

67. Flawed decisions in competition cases may infringe on the rights of their addressees and third parties. More generally, they may also negatively affect economic activity in a given country. State-of-the-art competition law enforcement requires the existence of mechanisms to ensure that decisions taken by competition agencies are fair and lawful (judicial review). The addressees of a competition decision and possibly third parties need to be given the possibility to appeal against the decision, if they feel that their rights have been violated.

68. Judicial review is a requirement of due process and the rule of law, which subjects executive and – to certain extent – legislative action to control by the judiciary. It implies that decisions taken by public entities, government departments, sector regulators or administrative agencies can be challenged when the public entity has acted unlawfully. It reflects the separation of powers between the executive and the judiciary. In this context, it should, however, be noted that judicial review of competition cases also takes place in common law systems, where the initial decision is taken by a court instead of an administrative competition agency and therefore has a judicial nature.

69. Judicial review creates a strong performance incentive for competition authorities. The threat of a flawed decision being challenged and eventually cancelled in court should incentivize a competition authority to diligently perform its work and base its decisions on sound economic and legal assessment. Ideally, this will lead to a higher quality of competition decisions over time, which will also help build a positive reputation of the competition authority's work.

Staffing and financial resources of the competition authority

70. The possibilities of recruiting and retaining highly qualified personnel in public service, and especially in specialized areas such as competition enforcement, is thus limited, as capable civil servants may exit the public sector when their training and qualifications make them attractive to private sector employers.

71. The risk of corruption and capture in developing countries is a troublesome issue. The empirical evidence is mixed and theory does not predict that higher pay will always reduce corruption. Competition enforcement, particularly in jurisdictions that draw members of the board of commissioners from the private sector on a part-time basis, raises some tricky issues relating to members' impartiality and independence.

72. Concerns also revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity and the government–industry revolving door. This is a problem also for developed countries, but in smaller and poorer economies, these concerns take on a particular significance because there is a relatively smaller pool of individuals of sufficiently high standing to choose from.

73. The general shortage of skills affects not only the competition authority but also the legal profession, the business sector, the judiciary and the legislature. Since competition enforcement is not undertaken in a vacuum, this renders competition advocacy by the authority a critical factor in gaining credibility and a constituency.

Prioritization and resource allocation as a tool for agency effectiveness

74. Competition authorities need to discharge their mandate with highly diverging personal and financial resources. Whereas the budgets of some competition authorities exceed $100 million, others need to make do with much less. Equally the number and quality of personal varies dramatically between competition authorities. Expert economic

counsel and experienced litigators are available to competition authorities in unequal measures.[18]

75. Young competition authorities face the difficulties of policing markets where anticompetitive practices and oligopolistic market structures are spread across several sectors and initial competition law compliance is low. Furthermore, a lack of expert counsel in the private sector and the judiciary can hamper the willingness of defendants to adhere to competition law and comply with its provisions.

76. UNCTAD research has shown that young competition authorities need to observe a learning curve to improve their case-handling skills and test the legislation in practice. Prioritization and effective allocation of financial and personal resources is therefore paramount for all competition authorities and bears particular significance for small and emerging economies. Therefore, the authority should pay close attention to the real developments in critical markets on its own account and perhaps monitor such developments by way of market enquiry.

Knowledge and human-resource management for effective enforcement of competition law

77. Human resources and knowledge management are crucial aspects for the long-term success of a competition authority. Competition law enforcement requires a complex legal and economic skill set and constant professional development.

78. The development of true expertise in competition law takes years of experience in addition to a long and challenging education. Moreover, case-handling skills and sector knowledge are essential to effectively discharge the duties of a completion authority.

79. It is therefore of particular importance for competition authorities to attract the best and brightest legal and economic minds and to offer them attractive long-term career perspectives. At the same time, it is important to archive institutional memory and to utilize the highly specialized skills and experiences built over time.

80. To compete with attractive private sector prospects, competition authorities must therefore offer attractive and comprehensive job opportunities to attract and retain employees over time. Competition on mere salary alone will be impossible for most authorities. Other factors, such as the work–life balance, access to interesting cases, collegiate atmosphere and higher job security can complement a sufficiently competitive salary in this context.

81. Moreover, the retention of institutional knowledge is exceptionally important to allow case handlers to quickly benefit from experiences already accumulated within the organization with certain types of abuses, certain sectors or even individual companies.

II. Ways and means to strengthen competition advocacy

82. As previously noted, competition advocacy goes beyond simple press work for the competition authority and encompasses the advocacy of competition policy as part of a set of mutually reinforcing market-oriented policies, designed to correct and suppress market distorting behaviour and correct market failures. At the same time, competition advocacy aims to build institutional trust in the competition authority and competition law enforcement regime as a whole.

[18] For a full analysis, see *Global Competition Review Issue*, 2014, 17(6):4.

83. This broader perspective leads to a wider group of stakeholder and target audiences, beyond the interested circles.[19]

84. Many countries also give their competition authorities or associated high-level advisory bodies the responsibility of advising the Government on the competition impact of proposed new laws and domestic legislative procedural regulations. For example, in India, all levels of Government may seek the Competition Commission's opinion when considering competition policy matters, while the autonomous Government of Andalusia, Spain, is obliged by law to seek an opinion. However, the opinions of the Commission are not binding on the minister. Similarly, in Tunisia, the minister may consult the competition council on all new proposals for legislation and any other competition matters, but the opinions of the council are binding on the minister.

85. As competition advocacy is a tool for enhancing voluntary compliance and policy coordination, its core activity at the outset, especially for young competition authorities where stakeholders need to be informed of the existence and objectives of a new competition law, is to reach out and make policymakers aware of the possible synergies and/or tensions that may arise from certain policy measures, including, but not limited to, the creation and/or protection of national champions.

86. As such, a well-developed and comprehensive communication strategy is one of the most powerful tools competition authorities possess to establish, maintain and promote competition culture. Experiences of both mature and young competition authorities indicate that a communication strategy, when used effectively, can educate and engage the general public, increase compliance with competition laws, shape policy debates and empower competition authorities.

A. Media advocacy strategies depending on target audience

87. In this process, target-specific communication strategies are essential to disseminate the work the competition agency to different groups. Depending on the target audience, the competition authorities should emphasize different aspects of their work and use appropriate communication tools and style. For instance, advocacy to politicians and senior civil servants tasked with ensuring overall policy coherence should emphasize the role of competition policy in the overall economic policy of a country, whereas advocacy to the academic or legal community can go into more technical detail. In contrast, advocacy to the media must meet the challenge to translate complex legal and economic concepts into simple assumptions suitable for reporting in a daily newspaper.

Central government institutions

88. Competition authorities are dependent on the central Government, beyond the minister responsible for competition policy. General policy guidelines will have a significant impact on the competition culture in general. Competition advocacy to the central Government should clarify and advocate the advantages of pro-market reforms and competition law as a cornerstone of overall economic policy.

Sector regulators

89. Sector regulators play an important role in the competitive conditions in several critical sectors of particular importance to the general public such as water, electricity, gas

[19] The ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation is another attribute by which the operational independence of competition authorities is assessed. See TD/B/COM.2/CLP/67.

or health care. In this role they are powerful players, influencing both the prices paid by consumers as well as the profit margins of undertakings or the number of competitors active in a certain sector.

90. In line with the overall political and regulatory structure, competition advocacy must therefore convince sector regulators of the benefit of competition, even if this means in some instances a loss of original power. A good approach to engage sector regulators could be common initiatives or common studies on competitive conditions with a view to improving overall effectiveness in the sector.

Judges

91. Courts fill gaps in the initially broad provisions and interpret the law in conjunction with other provisions of domestic law, thereby integrating it into the national body of laws. Furthermore, endorsement by the highest courts gives the new competition law important constitutional credibility. Nevertheless, competition law is complex in nature and requires in-depth understanding. Therefore it is crucial to provide judges with training in the substantive provisions of competition law, and constitutional and wider legal relationships.

92. UNCTAD has developed a strategy to reach out to judges by providing peer-to-peer sharing through exchange programmes with other courts, for example through its Competition and Consumer Protection for Latin America programme known as COMPAL. Equally expert training by international experts and (ideally) fellow judges trained in the application of competition law is therefore crucial to facilitating judicial review as an important element of competition law enforcement.

Businesses

93. Competition policy aims to enhance the possibilities of businesses at large by providing a level playing field for free and fair competition between businesses. In this respect, competition law is an important legal instrument for business to counter unfair and threatening behaviour by competitors.

94. Any communication strategy aimed at business must make abundantly clear that competition policy ultimately aims at the reduction of overall regulation and sector-specific rules for the benefit of market-oriented and fair market regulation limited to those areas affected by genuine market failure. At the same time, the advocacy strategy must equally emphasize the limitations that competition policy sets to certain types of business conduct. Highlighting enforcement successes, especially in combating hard-core restraints and the most harmful behaviour, is therefore, a vital component of any communications strategy.

95. Ultimately, advocacy to businesses should aim at enhancing overall compliance with competition law and empowering and encouraging them to use competition law where they are affected by anticompetitive activities, making use of public enforcement through the complaint mechanism or relying on its provisions in private litigation, that is to say, to terminate harmful supply agreements or initiate damages claims.

Consumers

96. Competition advocacy to consumers is crucial to highlight the positive aspects of competition law. At the same time, consumers should be made aware of relevant complaint and redress mechanisms under the jurisdiction of the competition authority.

97. To that end, competition authorities should maintain effective and understandable websites that explain their mandate to the general public in simple terms. Equally, selected cooperation with radio and television, showcasing particular enforcement successes, should be considered.

B. Usefulness of sector studies or enquiries for advocacy and future enforcement activities

98. Sector enquiries look into the competitive conditions of a given sector in to determine sources of possible restraints of competition and paint a picture of the sector concerned for the respective competition authority.

99. From an advocacy perspective, sector enquiries serve an important purpose: they highlight the work of the competition authority and provide the public with a direct and relatable insight into their work. In particular they can create a bond between the consumer and the competition authority.

100. A good example is the work of the Fiscalía Nacional Económica of Chile in undertaking numerous sector studies annually. These range from studies on complex markets on telecommunications to studies on non-regulated markets. They have been used as an advocacy tool to connect with consumers at large as well as to inform key stakeholders about the conditions of competition in the market.

101. Another example is that of the German Federal Cartel Office on Fuel Prices, where a dedicated "transparency team" (*Markttransparenzstelle*) monitors the difficult fuel market. The Federal Cartel Office deals directly with the general public by feeding a smart phone application with real-time market data provided by the fuel providers pursuant to section 47k in conjunction with an administrative order by the Federal Ministry for Economic Affairs and Energy. The introduction of the transparency point brought considerable media coverage, helping to highlight the link between consumer protection and competition policy and establishing consumer confidence in this crucial sector and significantly increasing institutional trust in the Office.

102. In some jurisdictions, sector enquiries have been crucial to further detect collusive practices. This is the case of the market of garbage collection in Colombia, where the Superintendence of Industry and Commerce commissioned UNCTAD to carry out a sector study under the COMPAL programme. Based on the findings of the study, the Superintendence officially opened an investigation in the market of Bogota.

III. Lessons for the future: How to improve competition enforcement and advocacy

103. Since the Sixth Review Conference in 2010, many young competition regimes have lived through the inception phases of their institutional development and established a working environment. In turn, mature competition agencies find themselves further entangled in a web of growing bilateral and multilateral agreements, while facing the need to cooperate with a growing number of emerging economic powers that have introduced competition law in recent years and are now stepping- up enforcement.

104. Competition agencies need to adjust and strengthen both their enforcement and advocacy practice in order to continually deliver their mandate and further promote a competition culture.

105. In improving and further strengthening competition law enforcement, young competition agencies should focus on the following:

(a) Define a workable set of substantive and procedural elements of the competition law that will provide an operational basis for a competition agency;

(b) Ensure that the design of competition agencies allow for a great deal of independence and accountability, compared with the central Government and other institutions;

(c) Develop a working relationship of mutual respect with the judiciary;

(d) Engage in international cooperation in the enforcement of competition law in fighting secret, multinational collusive agreements.[20]

106. With regard to advocacy, young competition authorities should be able to:

(a) Develop media advocacy strategies;

(b) Set up criteria to prioritize sectors of interest when allocating resources;

(c) Be aware of the lessons that late adopters of competition law can learn from countries with established competition cultures. An adaptation process should be taken into account;

(d) Request UNCTAD to carry out capacity-building assistance to stakeholders for effective media advocacy;

(e) Be aware how to handle competition advocacy where media and political freedom is an issue;

(f) Apply the best modalities of international cooperation in advocacy in general and with respect to media in particular.

107. Whereas the recommendations above can only indicate trends and needs to be translated into domestic solutions on an individual needs basis, a comprehensive independent review of competition law and policy can help to further assess individual areas of improvement. In this regard, the UNCTAD voluntary peer review on competition policy provides a comprehensive start based on thorough evaluation to identify the specific needs of countries. It involves the scrutiny of competition policy as embodied in the law and reflects on the effectiveness of institutions and institutional arrangements.

[20] International organizations, including UNCTAD and OECD, have long been active in studying and reporting on hard-core cartels. Also, for the past seven years, representatives of the competition agencies have met annually to discuss anti-cartel enforcement techniques. The International Competition Network has embarked on a programme to address the challenges to anti-cartel enforcement posed by international and domestic cartels. Developing countries will be limited, if only by resource constraints, in their ability to participate in these international forums. However, most of the work product generated in these forums is publicly available, usually on the Internet. These resources are a rich source of information for less-experienced competition agencies.