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Review of chapters IX and X of the Model Law on Competition

**Model Law on Competition (2019),
revised chapter X***

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I. Outline of chapter X of the Model Law on Competition

Functions and powers of the administering authority:

1. The functions and powers of the administering authority could include, for example, the following:
 - (a) Making inquiries and investigations, including as a result of receipt of complaints;
 - (b) Taking the necessary decisions, including the imposition of sanctions, or recommending the same to the government minister concerned;
 - (c) Undertaking studies, publishing reports and providing information to the public;
 - (d) Issuing forms and maintaining a register or registers for notifications;
 - (e) Making and issuing regulations;
 - (f) Assisting in the preparation, amendment 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.
2. Confidentiality
 - (a) According reasonable safeguards to protect the confidentiality of information obtained from enterprises containing legitimate business secrets;
 - (b) Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation;
 - (c) Protecting the deliberations of government in regard to current or still uncompleted matters.

II. Commentaries on chapter X and alternative approaches in existing legislations

A. Introduction

1. Most competition legislation establishes a list of the functions performed and powers possessed by the competition authority for carrying out its tasks, providing a general framework for its operations. An illustrative list of functions of the competition authority is contained in chapter X of the Model Law on Competition. All these functions are related to the activities that the competition authority or competition enforcement agency might develop, as well as the means usually at its disposal for carrying out its tasks. A common feature is that the authority's functions must be based on the principle of due process of law, fairness, non-discrimination, accountability and transparency.

(a) *Making inquiries and initiating investigations, including as a result of receipt of complaints*

2. The authority may act on its own initiative or follow up on certain indications that an anticompetitive practice exists, for example, as a result of a complaint made by a person or enterprise. The United Nations Set of Principles and Rules on Competition in paragraph E.6 specifies that States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices.

3. The authority should also be empowered to issue requests for information and order persons or enterprises to provide information and documents and to call for and receive testimony.

4. In the event that this information is not supplied, the obtaining of a search warrant or a court order may be envisaged, where applicable, in order to require that information be furnished and/or to permit entry into premises where relevant information is believed to be located. In many countries, including Argentina, Australia, Germany, Italy, Hungary, Mexico,¹ Norway, Pakistan, Peru and the Russian Federation, as well as in the European Union, the administering authority has the power to order enterprises to supply information and to authorize a staff member to enter premises unannounced to carry out a search for relevant information (so-called dawn raids).

5. However, entry into premises may be subject to certain conditions. For example, in Argentina, Austria or Germany, a court order is required for entry into private dwellings. In Turkey, if an on-the-spot inspection to obtain copies of information, documents, books and other instruments is hindered or likely to be hindered, a criminal magistrate can order that the inspection be performed. In Poland, in cases of utmost urgency where there is justified suspicion of a serious violation of the competition law, particularly if a delay might enable destruction of evidence, it is possible to obtain a search warrant from the Competition and Consumer Protection Court at any time during the proceeding. The Polish Office of Competition and Consumer Protection may search premises, apartments, transport vehicles and so on at the request of the European Union Commission when the latter encounters resistance from any person requested to provide documents, information and other evidence while conducting an investigation pursuant to Community regulations; the Commission's representatives may also participate in an inspection when the Office is inspecting an undertaking at the request of the Commission.

6. Many jurisdictions impose penalties, including in some cases fines and imprisonment for wilful failures to comply with the authority's investigative orders. With regard to evidence gathering, best practice in this area of competition enforcement suggests that there should be a strong presumption in favour of disclosing as many facts as possible to the respondents to enable them to defend themselves fully. A continuous process of engagement between the competition authority and the respondent concerning the allegations and the evidence supporting such claims would ensure that the respondent is apprised of not just the inculpatory and exculpatory evidence that underpins the competition authority's case, but also a description of the factual basis of the case and the economic and legal analysis that forms the basis of the theory of infringement.²

7. Alternative approaches used in investigative methods are considered below.

Table 1

Alternative approaches in existing legislation: Investigative regimes

<i>Country</i>	<i>Powers of authority</i>	<i>Sanctions for non-compliance</i>
China	<p>According to Anti-monopoly Law article 39, the anti-monopoly authority is empowered to:</p> <p>(a) Enter business premises of the business operators who are under investigation or any other relevant place to investigate;</p> <p>(b) Request subjects of an investigation to disclose relevant information;</p> <p>(c) Review and duplicate relevant business documents and so forth;</p>	<p>According to Anti-monopoly Law article 52, pecuniary penalties may be imposed for failure to submit required information, for provision of false information and for destruction or removal of evidence and other forms of hindering or obstructing investigations.</p>

¹ The Mexican Competition Authority received additional powers to conduct dawn raids under a legal reform in 2011 and the new Federal Competition Law (2014). See Organization for Economic Cooperation and Development (OECD), 2018, Investigative power in practice: Contribution from Mexico (COFECE), session IV (DAF/COMP/GF/WD(2018)28), 28 November, available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2018\)28/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2018)28/en/pdf).

² International Chamber of Commerce, 2010, Recommended framework for international best practices in competition law enforcement procedures, Document No. 225/666, 8 March.

<i>Country</i>	<i>Powers of authority</i>	<i>Sanctions for non-compliance</i>
	<p>(d) Seize and retain relevant evidence;</p> <p>(e) Enquire about the bank accounts of the business operators who are under investigation.</p>	
European Union	<p>The Commission may:</p> <p>(a) Require the provision of information;</p> <p>(b) Enter into and inspect premises;</p> <p>(c) Examine documents and records, and take copies;</p> <p>(d) Seal premises or records for defined periods of time;</p> <p>(e) Require any person to give an explanation of facts or documents.</p>	<p>Non-compliance results in fines that may not exceed 1 per cent of the total turnover of the infringing business in the previous year.</p>
New Zealand	<p>The Commission may require the production of documents (subject to legal privilege) and the provision in writing of information; it may also require persons to appear before it to give evidence and produce documents.</p> <p>The Commission may also obtain (from a court) and serve search warrants.</p>	<p>Failure to comply with the Commission's investigative powers is an offence resulting in pecuniary penalties.</p>
Turkey	<p>The Competition Board may request information it deems necessary from public institutions and organizations, undertakings and trade associations. Officials of these bodies must provide the necessary information within the period fixed by the Board.</p> <p>According to article 15 of the Act on the Protection of Competition, the Competition Board is empowered to carry out unannounced on-site investigations. A judicial authorization is only required if the undertaking subject to the investigation refuses to allow a dawn raid.</p>	<p>Failure to provide the requested information and the provision of wrong information can be sanctioned with a fixed pecuniary penalty.</p> <p>Hindering an on-site investigation can be sanctioned by a fixed daily pecuniary penalty.</p>
United States of America	<p>The authorities may require a person to:</p> <p>(a) Provide documents, information or other material related to the investigation;</p> <p>(b) Submit to interviews;</p> <p>(c) Make a sworn oral deposition.</p> <p>Typically, these measures are carried out through civil investigative demands or subpoenas. The United States Department of Justice is also entitled to proceed with a criminal investigation, employing criminal investigative powers</p>	<p>Failure to comply with a civil investigative demand or subpoena is a criminal offence punishable by fines and imprisonment.</p>

B. Leniency programme

8. Over the past decade, a large number of competition authorities have adopted so-called leniency programmes³ as an investigative tool to uncover the most serious form of anticompetitive practices, that is, hardcore cartels. A leniency programme is a system, publicly announced, of “partial or total exoneration from the penalties that would otherwise be applicable to a cartel participant in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition agency providing leniency.”⁴ Leniency programmes have proven to be a powerful tool for cartel detection. Developing competition regimes can benefit from leniency programmes, as they help to reduce the amount of human and financial resources needed to secure compliance with the competition law.

9. In general, the key aspects of a leniency regime are the following: (a) a clear identification of the benefits of the regime; (b) clear indications of whether employees of the applicant are granted immunity from criminal prosecution; (c) the nature and extent of the information the applicant must provide to benefit from leniency; (d) transparent and predictable procedures underpinning the regime; and (e) a clear statement indicating that, based on the competition authority’s track record, enterprises consider the leniency programme to be predictable and beneficial.

10. Under a leniency regime, the cartelists must self-report and fulfil certain other requirements. Typically, cartelists must admit the relevant facts constituting a contravention, cease cartel activity and fully cooperate in providing significant evidence to assist in the proceedings against other cartel members. In comparison, the competition law enforcer transparently and credibly commits to a predictable pattern of penalties designed to give cartelists incentives to apply for leniency.

11. Currently, more than 60 jurisdictions have leniency programmes in place.⁵ Most medium- and low-income countries, however, have none. Exceptions include Brazil, Chile, Mexico, the Russian Federation and South Africa. Their programmes are similar to and work in parallel with those of the United States and the European Union – jurisdictions that probably receive the largest number of leniency applications.

12. Recent comparative research carried out by the UNCTAD secretariat identify the necessary conditions for an effective leniency programme:

(a) Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency;

(b) Penalties imposed on cartelists who do not apply for leniency are significant and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;

(c) The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;

(d) To attract international cartelists, the leniency programme sufficiently protects information for the applicant not to be more exposed than non-applicants to proceedings elsewhere;

(e) Finally, in the process of investigation, the general principles and rules of due process of law, which in many countries is a constitutional mandate, must be duly observed, including where applicable, rules of legal privilege.

³ For specific information on leniency programmes in developing countries, see TD/RBP/CONF.7/4.

⁴ International Competition Network, 2014, Drafting and implementing an effective leniency programme, chapter 2, in *Anti-Cartel Enforcement Manual*, available at www.internationalcompetitionnetwork.org/working-groups/cartel/investigation-enforcement/ (accessed 22 April 2019).

⁵ OECD, 2018, Challenges and coordination of leniency programmes (DAF/COMP/WP3(2018)1), 5 June, available at [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf).

- (b) *Taking the necessary decisions, including the imposition of sanctions, or recommending the same to the government minister concerned*

13. As a result of inquiries and investigations undertaken, the administering authority would need to take certain decisions, for example, to initiate proceedings or call for the discontinuation of certain practices, deny or grant authorization of matters notified or impose sanctions, as the case may be. In that regard, remedies in competition cases can include the typical mandatory or preventive injunction issued by a court of law or the imposition of pecuniary penalties. The range of remedies adopted by a competition regime should afford the competition authority flexibility to meet the range of circumstances that arise in a competition law case.

14. The precise decision-making powers of the authority will depend on the structure of the authority and its relationship to the Government and courts (as to which, see chapter IX), and specifically whether the authority has a first instance decision-making capacity (as in the European Union), or whether it must act through the courts (as in the United States).

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

15. The authority could undertake studies and obtain expert assistance for its own studies, or commission studies from outside. In Brazil, for example, the law establishes that the Economic Law Office of the Ministry of Justice shall carry out studies and research with a view to improving antitrust policies. Some legislation explicitly requests the authorities to engage in particular studies. There are various reasons to undertake studies. For example, the authority might choose to commission a study on the following:

(a) A sector, or market for goods and services, to determine whether there are structural barriers to competition in that market;

(b) A particular business practice or economic activity (e.g. bundling goods and services) to determine the economic and competitive consequences of that activity;

(c) An aspect of the competition legislation, to assess whether the law is achieving its stated policy goals.

16. In newer competition regimes such as that of the Caribbean Community (CARICOM), where the Community competition law calls for member States to “take the necessary legislative measures to ensure consistency and compliance with the rules of competition”⁶ and in circumstances where Community institutions are mandated to “develop and establish appropriate policies and rules of competition within the Community, including special rules for particular sectors”,⁷ both legal and economic studies will have to be undertaken to assess the level of reform that is needed to secure compliance of a member State with Community competition law mandates and formulate enforcement priorities that are in line with the underlying treaty objectives and goals of the Community.

17. Finally, an important role for the authority, particularly in countries where competition law has recently been introduced, is to educate the public and business community about the implications of competition law and the boundaries of lawful conduct (competition advocacy). To this end, the authorities in many countries issue annual reports, as well as public notices, pamphlets and educational papers.

- (d) *Issuing forms and maintaining a register or registers for notifications*

18. The laws of most countries having notification procedures include provisions for some system of registration which must be characterized by transparency. The European Commission publishes an overview of all notified concentrations on its webpage. Some countries maintain a public register in which certain, but not all, of the information provided through notification is recorded. The usefulness of a public register lies in the

⁶ Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (2001), article 170(1)(b)(i).

⁷ Revised Treaty of Chaguaramas (2001), article 182.

belief that publicity can operate to some extent as a deterrent to enterprises engaging in restrictive business practices, as well as provide an opportunity for persons affected by such practices to be informed of them. However, not all the information notified can be registered, and one of the reasons for this is that certain information will relate to so-called “business secrets”, and disclosure could affect the operations of the enterprise in question. The importance of sensitive business information in the hands of the competition authorities cannot be overstated because a breach of such confidentiality will strongly discourage the business community from quick compliance with reasonable requests for information.

19. Where a notification system or a register is used, it is important to consider whether it is necessary to afford the competition authority the power to review the need for the regime or alternatively, whether it is necessary to include a sunset clause limiting the use of the notification regime after a specified event or period.

20. Issuing standard forms for the notification of mergers or restrictive trade practices can streamline the authority’s decision-making process and ensure that parties gather the necessary information to support a competition assessment before approaching the authority.

(e) *Making and issuing regulations*

21. The authority should also have powers to issue implementing regulations to assist it in accomplishing its tasks. Due to the complexity of decision-making in some areas of competition law – for instance merger clearance and authorizations of restrictive trade practices – authorities commonly issue implementing regulations outlining procedures for notifying transactions or practices, gathering information, and assessment and decision-making.

22. It is important to publish instruments of interpretation such as guidelines, application manuals, practice notes and brochures which explain the enforcement rules and clearly set out the procedures and criteria of assessment to be used for assessing alleged anticompetitive conduct and resolving an enforcement action. Moreover, the agency should specify the rules for engaging with the competition authority during an investigation – making clear the means of communication to be used by the agency, for example, whether communication will be carried out through formal written communication, emails, conferences, preliminary meetings and hearings. The authority should also clearly set out in a published document the time frame within which the respondent has to make submissions, taking due care to allow the respondent sufficient time to investigate the breadth of the allegations, avoiding unrealistic time limitations and allowing sufficient time in view of the complexity of the issues underpinning the case concerned.

23. Many countries’ authorities also publish reports or guidelines outlining their approaches to enforcement procedures or the method of assessment of certain forms of economic activity in terms of competition law. For example, competition authorities frequently issue guidelines on the assessment of mergers. These guidelines may have the force of law (if the authority in question is afforded regulation-making powers) or may simply indicate the authority’s approach to interpreting and applying the competition legislation without having the binding force of law.⁸

24. Providing full disclosure of the rules of assessment and engagement in a published and widely disseminated document ensures that both the competition authority and the respondent are well apprised of the matter throughout the course of an investigation, affording both sides an evolving view of the economic and legal issues as the investigation of the facts progresses. Publication of rules is also important to promote good governance within the competition authority and a degree of certainty for businesses, thereby minimizing the possibility of technical challenges to decisions.

⁸ See *Official Journal of the European Union*, 2004, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

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

25. Owing to the high level of specialization and the unique experience of the administering authority in the field of competition, a growing number of new laws or amendments give the authority the additional responsibility of advising on draft bills that may affect competition, as well as of studying and submitting to the Government the appropriate proposals for the amendment of legislation on competition. This is the case, for example, in Bulgaria at the level of the Commission for the Protection of Competition;⁹ in Portugal, with its Council for Competition, which can formulate opinions, give advice and provide guidance in competition policy matters;¹⁰ and in Spain, at the level of the Court for the Protection of Competition¹¹ and the Competition Protection Service.

(g) *Promoting exchange of information with other States*

26. The United Nations Set of Principles and Rules on Competition requires States to establish appropriate mechanisms at the regional and subregional levels to promote the exchange of information on restrictive business practices. It would be worthwhile to provide the authority with the power to promote such exchange by clearly establishing it as one of its functions.

27. Information exchange serves the multiple purposes of allowing the sharing of expertise, encouraging convergence in competition law standards around the world and supporting the exchange of evidence. The last point is becoming increasingly important due to the international character of many cartels. An ability to exchange or share evidence helps ensure efficient enforcement against cartels.

28. Indeed, best practice in this area of competition law enforcement suggests that the current trend is to define the terms of cooperation between countries in a bilateral agreement. It is therefore becoming more common to see cooperation in document and information-sharing provided for in bilateral trade agreements. The North American Free Trade Agreement (1994)¹² and the Economic Partnership Agreement between the CARIFORUM¹³ States and the European Community and its Member States¹⁴ contain terms of cooperation in the area of competition law broad enough to encompass cooperation in the area of information exchange and document sharing.

29. Information exchange and consultations are also provided for in bilateral agreements between the United States, Australia, Brazil, Canada, Germany, Israel, Japan, Mexico and the European Commission;¹⁵ between France and Germany;¹⁶ and in a multilateral agreement between Denmark, Finland, Iceland, Norway and Sweden.¹⁷

⁹ Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition, article 4 (3).

¹⁰ Decree Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition, article 13 (1) (b), (c) and (d).

¹¹ Law 16/1989 of 17 July for the Protection of Competition, article 26. Additional information on this matter can be found at Tribunal de Defensa de la Competencia, Memoria 1992, p. 66.

¹² Article 1501(2) of the Agreement states that “[E]ach Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area”.

¹³ Caribbean Forum of African, Caribbean and Pacific States.

¹⁴ See for example, article 128 of the Economic Partnership Agreement, which allows for exchange of information and enforcement cooperation among the parties to the Treaty.

¹⁵ International Competition Network, 2018, Members, available at www.internationalcompetitionnetwork.org/members (accessed 22 April 2019).

¹⁶ See the German–French Competition Conference, which takes place twice a year and addresses questions of competition law that arise particularly in and between those countries, available (in German) at www.bundeskartellamt.de/DE/UeberUns/Veranstaltungen/Deutsch-FranzoesischerWettbewerbstag/deutsch-franzoesischerwettbewerbstag_node.html (accessed 22 April 2019). See also Autorité de la concurrence and Bundeskartellamt [French and German

30. Whatever agreements are reached, it is important for both the requesting and responding competition authorities to have full knowledge of each other's domestic laws on confidentiality, legal professional privilege and contempt of court. It is also important for the competition authority to be in a position to verify that the requesting jurisdiction's laws respect the right of the defence and are able to maintain the full realm of confidentiality it is usually afforded under the legal system of the responding jurisdiction.

31. In connection with the latter point, OECD, for example, has set out a number of best practices in formal information exchange. Where multilateral agreements establish the terms of agreement between competition agencies on the exchange of information, through voluntary and compulsory practices, it is a necessary follow-up to those agreements that the agencies engage in a process of reviewing any obstacles – whether in other treaties or national legislation – to secure the effective cooperation mapped out under those multilateral agreements.

32. Many States have gone as far as incorporating bases of cooperation with other competition agencies in their competition legislation. This is a growing trend, perhaps indicative of what is soon to become common practice in this area of competition law enforcement. Some approaches taken in competition legislation are described in the following table.

Table 2

Alternative approaches in existing legislation: Information sharing

<i>Countries</i>	<i>Approaches</i>
Algeria	The Algerian regulation establishes a framework for cooperation between the Competition Board and foreign competition authorities, with a view to ensuring the adequate implementation of national and foreign competition laws and developing collaboration and information exchange between the authorities concerned, subject to the rules relating to national sovereignty, public policy (<i>ordre public</i>) and professional secrecy. This framework is in conformity with the provisions for cooperation contained in article 41 and annex 5 of the association agreement with the European Union. ^a
Australia	<p>In 2007, the Australian Parliament passed legislation that enables the Australian Competition Authority to share certain information obtained during the course of its investigations with foreign and domestic government bodies.</p> <p>Previously, the Authority could only disclose information obtained through its compulsory information-gathering powers when performing its own duties or functions, or if otherwise required by law.</p> <p>The new provisions allow the Authority to disclose this, and other information, known as protected information, to specified agencies, bodies and persons if the Chair of the Authority is satisfied that the information will enable or assist that body to perform its powers or functions.</p> <p>Significantly, section 155AAA of the Trade Practices Act (1974)¹⁸ allows the Authority to disclose protected information to a foreign government body. This power will assist the Authority in coordinating investigations with international enforcement counterparts.</p> <p>Information will be considered protected where it is, <i>inter alia</i>:</p> <p>(a) Given to the Authority in confidence and relates to a matter arising under a</p>

competition authorities], 2016, Competition law and data, available at www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf.

¹⁷ See www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf.

¹⁸ The Trade Practices Act (1974) was renamed the Competition and Consumer Act (2010), effective 1 January 2011.

<i>Countries</i>	<i>Approaches</i>
	<p>core statutory provision.</p> <p>(b) Obtained under section 155 of the Trade Practices Act or obtained under the search and seizure powers of the Authority and relates to a matter arising under a core statutory provision obtained by the Authority under the various information-gathering powers concerning the telecommunications industry and the telecommunications access regime and relates to a matter arising under part XIB or XIC of the Act.</p> <p>(c) Given in confidence to the Authority by a foreign government body and relates to a matter arising under a provision of a law of a foreign country (or part of a foreign country).</p> <p>The new provisions reflect the philosophy expressed in section E, paragraph 7 of the United Nations Set of Principles and Rules on Competition and are consistent with the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders.</p> <p>Section 155AAA is consistent with, and builds upon, clause (g) of chapter X of the Model Law on Competition. Importantly, the section provides a legislative basis for the Authority to share information with its international counterparts in appropriate circumstances, including under the bilateral agreements of Australia.</p>
Australia, Canada and New Zealand	The Australian Competition and Consumer Commission, Canadian Commissioner of Competition and New Zealand Commerce Commission share information and cooperate on enforcement efforts pursuant to a memorandum of understanding.
Belgium	Under Belgian law, it is possible to communicate the necessary documents and information to the appropriate foreign authorities for competition matters, under agreements regarding reciprocity in relation to mutual assistance concerning competitive practices. ^b
Germany	Paragraph 50 (a) of the German Act against Restraints of Competition allows for the exchange of confidential information as long as their confidential nature is safeguarded. The German Competition Authority may cooperate with other competition authorities to provide evidence for competition law violations, especially among members of the European Competition Network, for mutual assistance with investigations.

^a Euro-Mediterranean Agreement establishing an association between the European Communities and their member States, and the People's Democratic Republic of Algeria (22 April 2002).

^b Law on the Safeguarding of Economic Competition, article 50 (b).

III. Confidentiality

A. Introduction

33. The following elements of the Model Law on Competition are discussed in this section:

- (a) According reasonable safeguards to protect the confidentiality of information obtained from enterprises containing legitimate business secrets;
- (b) Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation;
- (c) Protecting the deliberations of government in regard to current or still uncompleted matters.

34. In accordance with United Nations Set of Principles and Rules on Competition section E, paragraph 5, legitimate business secrets should be accorded the normally applicable safeguards, in particular to protect their confidentiality. Confidential information

submitted to the administering authority or obtained by it can also be protected, in general, by the national legislation regarding secrecy. Nevertheless, in some countries, the competition legislation contains special provisions on the secrecy of the evidence obtained during the proceedings.

35. With regard to the protection of confidential information, best practice in competition law enforcement appears to be driven by the need to safeguard the fundamental rights of parties to the proceedings – whether they cooperate voluntarily or on a compulsory basis. Another key underlying motive defining best practice in this area is that affording safeguards and protecting confidential information help the competition agency to secure the cooperation and trust of market players on a sustainable basis. Competition agencies rely on all market players to provide valuable information to assist in their assessment of the facts to which to apply a legal standard. Market players, usually the competitors of a company under investigation, are generally the primary source of evidence that can inform on the conduct itself and on the effect of such conduct on the relevant market. Even the firms under investigation can be sources of information. For example, the evidence upon which competition authorities rely is usually found in internal communications (emails, meeting minutes, memorandums and the like) and business forms (sales of goods contracts). If the competition authority does not afford protection to the information provided by market players, it may find itself in a position in which not even the most coercive measures can bring forth information upon which it can make an objective assessment of the issue.

36. It is therefore important for the agency to allow the informant to designate the documents it deems to be confidential and to provide reasons for labelling a document “confidential”. The agency will have provided guidance that sets out the criteria for giving documents confidential treatment and the methods it uses to ensure the confidentiality of the entire document or parts thereof.

37. In general, it would appear that the common thread among agencies in this area of law is to afford confidential treatment to documents that would disclose information that is likely to expose a business to appreciable competitive or commercial harm. Confidential information is usually protected by making publicly available only properly redacted versions of documents and by ensuring that the agency personnel involved in the investigation make sworn or written statements committing to non-disclosure of the confidential material other than for purposes legitimately having to do with the investigation.

38. Safeguards for the protection of confidential information should extend beyond the investigation of specific infringements of the competition legislation and should also be afforded during sector investigations.

Table 3

Alternative approaches in existing legislation: Protection of confidential information

<i>Countries</i>	<i>Approaches</i>
Australia	<p>When the Parliament of Australia introduced criminal sanctions for cartel conduct in 2009, it also made some amendments to the Trade Practices Act (1974) to enhance the protection of cartel information provided to the Australian Competition Authority, which is known as protected cartel information. The Parliament recognized that whistle-blowers and informants would be more willing to provide information about cartel conduct to the Authority if the protection afforded to that material were enhanced.</p> <p>Protected cartel information is defined as information provided in confidence to the Authority where it relates to a breach or potential breach of the criminal cartel offence or civil cartel prohibition.</p> <p>Broadly, the Authority is not required to disclose protected cartel information but may do so after weighing certain public interest considerations set out below:</p> <p>(a) The fact that the protected cartel information was given to the Authority in</p>

Countries	Approaches
	<p>confidence;</p> <p>(b) Relations of Australia with other countries;</p> <p>(c) The need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;</p> <p>(d) In a case where the protected cartel information was given by an informant:</p> <p>(i) The protection or safety of the informant or of persons associated with the informant;</p> <p>(ii) The fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;</p> <p>(e) The interests of the administration of justice.</p> <p>However, a court or tribunal may require the Authority to disclose protected cartel information to it after weighing the public interest factors set out above.</p> <p>The regime applying to protected cartel information also restricts use of the information in secondary proceedings.</p> <p>The provisions in respect of protected cartel information build on the clauses contained in chapter X, article 2 of the Model Law.</p>
China	<p>The Anti-Monopoly Law of China, article 41 states that the Anti- Monopoly Law Enforcement Agency and its staff shall have the responsibility to keep the confidentiality of business secrets that they obtain when enforcing the law.</p> <p>Article 38 states that any entities or individuals may report any suspicious monopolistic conduct to the Anti-monopoly Law Enforcement Agency, which shall keep the name of the informer confidential.</p>
Malaysia	<p>The Competition Act (2010), article 21 provides for the protection of confidential information.^a It reads as follows:</p> <p>(a) Any person who discloses or makes use of any confidential information with respect to a particular enterprise or the affairs of an individual obtained by virtue of any provision of this Act commits an offence.</p> <p>(b) Nothing in this subsection shall operate to prevent the disclosure of information where:</p> <p>(i) The disclosure is made with the consent of the person from whom the information was obtained;</p> <p>(ii) The disclosure is necessary for the performance of the functions or powers of the Commission;</p> <p>(iii) The disclosure is reasonably made during any proceedings under this Act, provided that such disclosure is not made against any direction by the Commission or the Competition Appeal Tribunal before which the proceedings are taking place;</p> <p>(iv) The disclosure is made in connection with an investigation or an infringement or an offence under this Act;</p> <p>(v) The disclosure is made with the authorization of the Commission to any competition authority of another country in connection with a request for assistance by that country's competition authority.</p>

^a For the purposes of this section, "confidential information" means trade, business or industrial information belonging to any person that has economic value and is not generally available to or known by others.

B. A measured approach to adopting best practices

39. The above survey of the formulation of enforcement rules reflects some of the common practices and best practice in competition law enforcement systems with regard to investigative techniques, information sharing and maintaining confidentiality in proceedings. Many competition regimes have demonstrated, for example, that a leniency programme helps a competition authority to obtain more evidence than it normally would using traditional methods of evidence gathering.¹⁹ Further, many competition regimes are including provisions within their competition legislation to facilitate mutual legal assistance in investigating and remedying competition law infringements in simplified ways that help to expedite the process.²⁰ Further, a common investigative technique of competition authorities may be the use of coercive measures as part of the investigative method and also as a means of sanctioning non-compliance with an investigation or an imposed remedy. For example, as noted above, several regimes use searches and seizures as an evidence-gathering method and impose criminal penalties or large fines for non-compliance with an investigation.

40. The use of coercive measures as a tool in investigating competition law infringements, for example, may be reflective of best practice as far as designing competition law enforcement systems is concerned. Similarly, information sharing between competition authorities is becoming more common and is also reflective of best practice in competition law enforcement.²¹ However, the following issues may become subject to legal challenge: the imposition of criminal sanctions for non-compliance with an investigation or for breaches of the competition legislation; the imposition of unusually large fines; the commingling of the role of investigator, prosecutor and adjudicator under the auspices of an administrative authority; and a whole host of other functions defined along the lines of international best practice. Best practices, therefore, should be tested against the domestic laws of a jurisdiction before they are adopted. A cautionary note for new competition agencies is that best practices are reflective of common approaches but do not always guarantee respect for due process, natural justice and constitutional tenets of every domestic law.

41. The competition authority, which is generally defined as an administering authority in many jurisdictions, must demonstrate, although sometimes difficult, that there is a separation between the instruction and decision-making phases. Further, it is difficult to justify the imposition of penal sanctions and high levels of fines in systems in which the competition authority must justify before a government ministry the use of public resources and the reason for their existence each year. It is also difficult to guarantee a respondent's fundamental rights (whether those rights stem from case law, a constitution or a treaty) when the competition agency is engaged in enforcement multi-tasking.

42. Therefore, while the allocation of certain powers and functions to the competition authority may be a common enforcement method, it may not necessarily reflect the optimal allocation of powers to the competition agency and should not be construed strictly as best practice as far as enforcement methods are concerned, unless certain checks and balances are put in place. The enforcement methods of the European Commission Directorate-General for Competition and the United States Federal Trade Commission may not be suitable for use in new and developing competition regimes where the law and legal system are markedly different from that of the European Union and the United States. Indeed, a look at competition case law in newer competition regimes such as those of Jamaica, and even case law from years ago in the advent of regimes such as Australia, suggests that adhering to common practice or international best practices in formulating procedural rules

¹⁹ Leniency programmes adopted in Brazil, Mexico and South Africa for example, have led to more successful enforcement actions than in the years before a leniency programme was adopted in these jurisdictions. See UNCTAD/RBP/CONF.7/4.

²⁰ CARICOM (Revised Treaty of Chaguaramas (2001) and Economic Partnership Agreement).

²¹ OECD, 2005, Best practices for the formal exchange of information between competition authorities in hardcore cartel investigations, OECD Competition Committee.

– or copying and pasting legislation – will not guarantee that the formulated rules will be free from legal challenge.

43. A look at the early days of competition case law across a number of jurisdictions illustrates the problem of designating powers and functions of the competition authority without paying due regard to their legal efficacy in the respective domestic setting. For example, information sharing is a topical issue of competition enforcement, and many jurisdictions have incorporated information sharing as part of their competition legislation. However, a number of important issues can be foreseen with regard to information sharing. For example, where judicial proceedings are pending in a competition law matter, could a competition agency be prevailed upon to aid another country's competition authority by supplying documents to assist in a parallel investigation in the requesting country without being held in contempt of court? Similarly, in the context of regional or community competition law regimes such as those of CARICOM or the Southern African Development Community, could a member State's competition authority conduct an investigation in parallel where the issue is pending before the community court without courting a citation for contempt of court? A similar question was handled in the early days of the Australian Competition Authority in *Brambles Holdings Ltd and Another v. Trade Practices Commission*.²² The case concerned the power of the Authority under section 155 of the Trade Practices Act (1974) to require a person to produce information or documents or to submit to an investigation by the Authority. The Commission launched an investigation to find information and documents relating to an ongoing investigation for which penalties and injunctions were being pursued for the alleged breach of section 45 of the Act. The underlying section 45 proceedings had reached the stage where the matter was being considered by the court. The court found that the matters for which the finding of evidence was being sought by the Authority was currently under consideration by the court, and since it was the function of the court to determine issues before it, the Authority's parallel investigation constituted contempt of court, as the Authority's actions interfered with the ordinary course of justice. It is likely that many new competition regimes that have adopted cooperation agreements for which information sharing is a key goal may find themselves in a similar position where a decision must be made to hand over evidence to another jurisdiction where proceedings are ongoing in their domestic court.

44. The European Court of Human Rights has repeatedly noted that competition law procedures must respect the basic requirements under the European Convention on Human Rights, article 6.²³ Further, the European Community (EC) saw challenges to its procedural rules in the early days of the Council Regulation (EC) 1/2003, which implements the Community's rules of competition and continues to face such challenges. Currently, legal practitioners across the Community still voice their dissatisfaction with the multi-functional Directorate-General for Competition.

45. The procedures of Council Regulation 1/2003, which also defines the Community's procedures in competition law cases, have not been amended to afford procedural safeguards that are called for repeatedly in competition case law of the Community.²⁴ Yet many new and developing competition regimes look to the procedures noted under the Regulation as possible templates for their procedural rules and, indeed, many of the Community's rules are represented as best practice in competition law enforcement. The outcome of copying best practice or using the rules of other regimes as a template, unchecked, could prove to be detrimental to a new competition authority. For example, owing to a problem of poor delegation of function, the competition authorities of Barbados and Jamaica became lame duck institutions awaiting amendments to resolve procedural

²² [1980] 32 Australian Law Report 328.

²³ See, for example, the judgment of the Court of First Instance in case T-276/04, *Compagnie Maritime Belge v. Commission of the European Communities*, para. 66; and the judgment of the European Court of Justice in case C-338/00 P, *Volkswagen v. Commission of the European Communities* [2003] European Court Report I-9189, para. 97.

²⁴ While the text of Council Regulation 1/2003 remains unamended, Community case law affords a few procedural safeguards and rules respecting the rights of the defence. Many of the rules in the case law are reflected in the Community's internal rules of procedures and notices defining how it will proceed in investigating infringements of the rules of competition.

defects in their legislation. In a landmark decision of the Court of Appeal of Jamaica,²⁵ certain structural defects in the set-up of the Fair Trading Commission of Jamaica were revealed, including that the Fair Competition Act of Jamaica had failed to recognize staff other than Commissioners and did not provide for powers of delegation enabling the Commission to delegate investigative functions to its staff and erect a firewall between those charged with investigation and adjudication within the Commission. Similar problems are faced by the Barbados Fair Trading Commission, as the wording in that country's legislation mirrors that of the Jamaican legislation.²⁶

46. Further, the historical derivation of the law and legal system of many new and developing competition regimes has led to the transplant of constitutional doctrines such as the separation of powers doctrine, which is mainly a common law doctrine and has lent meaning to the significance of the vesting of the powers of each government branch in different and separate bodies. The doctrine is so entrenched in many legal systems that it is featured expressly in some constitutions. Separating the institutions themselves and assigning the right powers to the right institution is, with regard to best practices, the best way to make sure that the guaranteed fundamental rights of citizens are respected within the context of competition law enforcement and ensures that the relationship between institutions are regulated in such a way as to rule out arbitrary, discriminatory, prejudicial and results-oriented decision-making.

47. The optimal design and allocation of the powers of a competition authority go beyond ensuring the separation of powers and concern issues that require observation of the principles of natural justice. In Australia for example, the case of *Daniels Corporation v. Australian Competition and Consumer Commission*²⁷ raised the question as to whether legal professional privilege could be subverted under the Australian Trade Practices Act, section 155, such that the intent for which the coercive powers of investigation under the section are conferred is not defeated by the granting of legal privilege. Section 155 compels the production of information or evidence relating to a matter that may constitute a contravention of the Act. Legal professional privilege is one of those sacred doctrines of common law – and indeed of civil law and hybrid legal systems – that bear a strong relationship to the right to access counsel, which is a fundamental tenet of natural justice and, which for many judges, is a fundamental human right to be guaranteed in enforcement proceedings. In *Daniels*, the High Court of Australia held that the Australian Competition Authority's investigative power under section 155 gave no quarter regarding the subversion of legal professional privilege. Cases such as *Daniels* make it clear that principles of natural justice and any other rights accruing under common law cannot simply be dispensed with or subverted by the implied construction of a statute. Further, when tabling a power or function of a competition authority by statute and/or subsidiary regulations, those powers, though expressly conferred, are only legally sound and invulnerable to challenge when they observe the fundamental tenets of the legal system.

48. These early cases, for example the Jamaica Stock Exchange case, demonstrate that failure to adhere to constitutional doctrines and fundamental legal tenets when determining the organizational structure of an enforcement agency, as well as the allocation of power within that structure, can thwart the objective of the competition authority, even where it has adopted investigative methods that adhere to international best practices in competition law enforcement. Adopting international best practices in this area, whether it be a leniency or settlement programme, or methods of conducting inquiries, will not make a positive difference for a competition authority where those best practices are not premised on rules that govern the design of institutions aiming to maintain the rule of law within a State.

49. Therefore, all State institutions – even new-wave institutions such as competition authorities – must still adhere to the constitutional rules and rules governing the jurisdiction's legal system, which provide for how institutions are established and how power is allocated to the institution. Failure to do so would result in decision-making that

²⁵ *Jamaica Stock Exchange v. Fair Trading Commission*, Supreme Court Civil Appeal No. 92/97.

²⁶ See Fair Competition Act of Jamaica, part II, available at <https://moj.gov.jm/sites/default/files/laws/The%20Fair%20Competition%20Act.pdf>.

²⁷ [2002] High Court of Australia 49, 7 November 2002.

violates fundamental rights guaranteed by the constitution, breaches the principle of natural justice and could lead to decisions being taken ultra vires. This necessarily means that the optimal design of a competition authority – as well as the design of the powers and functions it carries out – depends on whether the powers and functions conferred on a competition agency are, inter alia, constitutionally sound and comply with the principles of natural justice.

50. Several competition regimes have to contemplate amendments to their legislation in order for them to be rid of the lame duck label they currently bear. A starting point for those agencies in determining the right allocation of powers and functions is to study competition law models that share a similar legal system. For example, States that have a common law legal system can look to Australia, Canada and the United Kingdom of Great Britain and Northern Ireland to ascertain the right allocation of power and function to the competition authority.

C. Summary of best practices in designating functions and powers of the competition authority

51. The rules of engagement with a competition authority should be designed so as to allow a respondent to have an evolving view of the authority's theory of infringement and should take care to avoid unrealistic time limitations.

52. Confidentiality in competition law proceedings should be designed to protect the fundamental rights of the individual and should respect due process, natural justice and the protection of commercial property.

53. Where the terms of cooperation in the area of document and information sharing are being crafted, it is important to ensure that the rights of the defence in each jurisdiction are to the extent possible afforded mutual recognition and respect by the cooperating parties.

54. The types of powers and functions that are allocated to a competition authority should be designed to withstand legal challenge and as such should respect the fundamental tenets of the legal system governing the allocation of responsibility within the State.
