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**Consultations and discussions regarding peer reviews on competition law and policy;
review of the Model Law; and studies related to the provisions of the Set of Principles and Rules**

Strengthening private sector capacities for competition compliance

Note by the UNCTAD secretariat¹

Executive summary

When businesses adhere to competition law and regulations, they contribute to markets operating smoothly, innovation, productivity and to overall and sustainable and inclusive development. Compliance with competition law is also relevant for achieving the Sustainable Development Goals. However some businesses are loath to comply with the law even though it may lead to severe negative consequences. Regulatory authorities therefore have a key role to play in order to encourage and enforce regulatory compliance. Authorities face several challenges in terms of boosting compliance of competition law and regulations.

The present background note examines the drivers of compliance and noncompliance with competition law and the common tools used to encourage or promote an organization's compliance with the law. Based on the analysis of these drivers and tools, the background note looks at the different ways in which compliance can be strengthened in both the private sector and in regulatory authorities.

¹ This document has not been formally edited.

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Mandate

UNCTAD is the focal point on work on competition policy and related consumer welfare within the United Nations. Its mandate was established by the General Assembly (resolution 35/63, 1980) in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, commonly referred to as the United Nations Set.

To achieve the objectives of the United Nations Set, UNCTAD is mandated to undertake the following core functions: (a) provide its member States with a forum for intergovernmental policy dialogue and consensus-building in the area of competition laws and policies; (b) carry out research and analysis in this area for, and/or in collaboration with, its member States and international networks on competition policy; and (c) promote the use of competition law and policy as tools for achieving domestic and international competitiveness.² Furthermore, UNCTAD is mandated to support developing countries in the formulation and implementation of competition laws and facilitate the exchange of experiences and best practices in different regions.³ This mandate was renewed in 2012 at the thirteenth session of the United Nations Conference on Trade and Development in Doha.⁴

At the last session of the Intergovernmental Group of Experts on Competition Law and Policy in July 2013, it was recommended that UNCTAD undertake research on ways of strengthening competition compliance. In this regard, the present background note has been prepared to facilitate the deliberations and exchange of experiences and best practices on the topic.

I. Introduction

1. “Competition is central to the operation of markets, and fosters innovation, productivity and growth, all of which create wealth and reduce poverty.”⁵ However, markets are made up of vested interest groups, incumbent monopolistic firms, collusive businesses and other stakeholders seeking to maintain a dominant position, thus creating an unequal playing field preventing competition. This unfair advantage may lead to the exclusion of competitors and the exploitation of consumers. Thus, competition law and other related laws help to maintain and encourage the process of competition. When these laws are applied in markets, they constrain the activities of businesses that lead to unfair competition⁶ and guide businesses on how to conduct and operate in markets.

2. When the law is breached intentionally or unintentionally, the situation may manifest itself in various consequences for stakeholders, including firms and individuals. These include financial penalties, unenforceability of agreements, administrative and advisory costs, injunctions, third-party damages actions, adverse publicity, director

² See the Accra Accord, chap. II, para. 104, in TD/442.

³ *Ibid.*, paras. 104 (e) and (g).

⁴ See the Doha Mandate, para. 56 (m), in TD/500/Add.2.

⁵ Organization for Economic Cooperation and Development (OECD), 2008, Why is competition important for growth and poverty reduction, p. 3, conference documentation for the Global Forum on International Investment, available at <http://www.oecd.org/investment/globalforum/40315399.pdf> (accessed 16 August 2016).

⁶ For example, competition law forbids anticompetitive agreements/cartels (price fixing, bid rigging, customer market allocation), abuse of market power (predatory pricing and refusal to supply) and other anticompetitive agreements (supplier/distributor restrictions).

disqualification and, in certain cases, imprisonment.⁷ Such penalties can cause bad publicity, serious reputational damage and potentially, a real risk for the viability of the business. Therefore, being compliant with competition laws or having a compliance policy can be an effective means of protection against such hazards, but not all businesses, particularly small and medium-sized enterprises, have the capacity to comply with the law which puts them at risk of a breach and the consequences thereof.

3. The present paper discusses what can be done to strengthen private sector compliance with competition law.⁸ The paper is divided into four parts. The first part gives a brief introduction on competition compliance. The second part discusses the drivers of compliance and non-compliance, and the common tools used by competition authorities and the private sector to promote compliance with competition law. The third part provides examples of strategies, incentives and services that contribute to strengthening capacities to comply with competition law. The final part discusses a way forward for both regulatory authorities and the private sector in strengthening compliance. The section also highlights questions for discussion.

Competition laws and competition compliance

4. Promoting and enforcing compliance with competition law is usually undertaken by national competition authorities (NCAs), an integrated public authority (as in the case of the European Commission) or the courts. Competition authorities are entrusted with the responsibility of investigating possible violations of the law and have the power to impose sanctions or bring an end to infringements committed by businesses, while courts prosecute compliance violations and impose fines and prison sentences.⁹ In most jurisdictions, competition authorities and courts work together on enforcing competition law, and it is increasingly becoming difficult to evade the consequences of non-compliance.

5. Over 140 countries around the world have laws commonly referred to as competition laws, antitrust laws and sometimes as anti-monopoly or fair trade practice laws.¹⁰ These laws prohibit agreements, practices and conduct that have an impact on competition in a national market.¹¹ They seek to maintain a level playing field for all participants in the market, and they also allow businesses to avoid the consequences of anticompetitive behaviour when they engage in activities such as mergers and acquisitions, joint ventures or simply in defending their market position or conduct. If the objectives of competition are to be met, it is crucial for all businesses, regardless of size, to stringently comply with these laws.

6. Unfortunately some businesses have a tendency to breach such laws intentionally or unintentionally. Others develop strategies that enable them to minimize the risks of

⁷ Deloitte and Touche, 2007, The deterrent effect of competition enforcement by the Office of Fair Trading, United Kingdom of Great Britain and Northern Ireland, available at http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.oft.gov.uk/shared_oftr/reports/Evaluating-OFTs-work/oft962.pdf (accessed 16 August 2016).

⁸ The primary sources of information for the present background document include research conducted by the United Kingdom Office of Fair Trading, now the Consumer and Markets Authority, the OECD, the International Competition Network and the International Chamber of Commerce. The document also draws on information provided on websites from competition authorities and academic literature on compliance with competition law.

⁹ Infringements committed by businesses include non-compliance with court rulings, violation of undertakings with competitive agencies, desisting orders and any other form of remedies issued to resolve a particular case.

¹⁰ The Baker and McKenzie Global Competition Compliance Toolkit, 2013.

¹¹ International Chamber of Commerce SME toolkit, 2013, Why complying with competition law is good for business.

involvement in competition law infringements and the consequences of anticompetitive behaviour.¹² Such strategies not only help businesses to minimize exposure to the laws in advance, they also help to determine circumstances where businesses may be the victim of anticompetitive conduct by other parties.

7. Compliance with competition laws may involve the need to make complex economic and technical decisions. For example, businesses operating in different jurisdictions are subject to variations on substantive and institutional aspects of competition laws, and even on the specific goals that are furthered by such laws.¹³ Therefore business actions in different national jurisdictions may come under scrutiny for non-compliance if the actions taken by the business in that country has an impact in the host country market. Furthermore, what may constitute compliance in one market may not do so in another market because of differences in the law. Compliance cases with competition law across borders have risen in recent times due in part to increased cross-border activities resulting from the effects of globalization. This has led to increased complexity of cooperation in multi-jurisdictional cases that can sometimes lead to inconsistent decisions and unchallenged illegal conduct.¹⁴

II. Drivers of compliance

8. Several factors contribute to compliance with competition laws. Therefore, a good understanding of factors that motivate businesses to achieve compliance helps to understand the challenges they face when seeking to comply with competition law.¹⁵ It also helps to identify areas in which competition authorities and the private sector can strengthen their capacities to enhance compliance and design more effective and practical compliance programmes. This section will highlight some of the drivers of compliance and non-compliance with competition law which have already been extensively researched by different authors.

9. As part of a 2007 study conducted by Deloitte and Touche for the Office of Fair Trading (OFT) of the United Kingdom on drivers of compliance and non-compliance with competition law, interviews were conducted with in-house counsels from larger companies and other in-house competition law compliance specialists across businesses based in or trading in the United Kingdom. The study highlighted fines, adverse publicity and director disqualification as the most significant deterrents for breaching competition law.¹⁶ However, when the interviewees were asked to rank five different factors that drive compliance (namely, criminal penalties, fines, disqualification of directors, adverse publicity and private damages actions), both lawyers and companies agreed penalties were the most important sanction and private damages actions the least. In contrast, companies considered director disqualification and adverse publicity as more important drivers to compliance than fines.¹⁷

¹² http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

¹³ Gal MS, Fox EM, 2014, Drafting competition law for developing jurisdictions: learning from experience, Paper 374, New York University Law and Economics Working Papers.

¹⁴ <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm>.

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf.

¹⁶ Deloitte and Touche, 2007, The deterrent effect of competition enforcement by the Office of Fair Trading, United Kingdom, available at http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf (accessed 16 August 2016).

¹⁷ Ibid.

10. Another study conducted for the Consumer and Markets Authority (CMA)¹⁸ of the United Kingdom by IFF Research in 2015, highlighted that two-thirds of 1,201 private businesses surveyed reported that their motivation to comply with competition law were pull factors, i.e. doing the right thing ethically, participating in a level playing field, gaining business advantage and enhancing their reputation, while less than one third attributed compliance to push factors, i.e. avoidance of breaking the law, risk of fines and prosecution.¹⁹ Of the pull factors, the most important driver for compliance was deemed to be ethically doing the right thing, whereas the obligation to businesses to comply with the law was considered most important among push drivers, followed by risks of fines.²⁰

11. The significance of fines in driving compliance hinges on its severity and the impact on the business as demonstrated in the European Union where imposed fines can be as high as 10 per cent of the company's annual worldwide turnover.²¹ For example, in 2013, the European Commission imposed a severe fine of 561 million euros on Microsoft for failing to comply with its commitments to offer users a browser choice screen enabling them to easily choose their preferred web browser.²² The factors taken into account in the calculation of the fine included the gravity and duration of the infringement, the need to ensure a deterrent effect of the fine and, as a mitigating circumstance, the fact that Microsoft cooperated with the Commission and provided information which helped the Commission to investigate the matter efficiently.²³ Other aspects of breaches in competition law have also attracted heavy fines in recent years. In one such case, car glass producers involved in a market sharing cartel received a fine of 1.3 billion euros²⁴ (see box 1).

Box 1

Antitrust: The European Commission fines car glass producers over 1.3 billion euros for market sharing cartel

“The European Commission imposed fines, totalling 1,354,896,000 euros, on Asahi, Pilkington, Saint-Gobain and Soliver (car glass manufacturers) for illegal market sharing and exchange of commercially sensitive information regarding deliveries of car glass in the European Economic Area, in violation of the ban of the European Commission Treaty and of the European Economic Area Agreement on cartels and restrictive business practices (article 81 of the European Commission Treaty and article 53 of the European Economic Area Agreement).

Asahi, Pilkington and Saint-Gobain are the three major players in Europe. Between early 1998 and early 2003 these companies discussed target prices, market sharing and customer allocation in a series of meetings and other illicit contacts. The Belgian company Soliver also took part in some of these discussions. These four companies controlled about 90 per cent of the glass used in the European Economic Area in new cars and for original branded replacement glass for cars at that time, a market worth about 2 billion euros in the last full year of the infringement.

¹⁸ The CMA was established to replace the Office of Fair Trading in 2013, taking its powers in 2014.

¹⁹ United Kingdom businesses' understanding of competition law, 2015, prepared for CMA by IFF Research.

²⁰ Ibid.

²¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901%2801%29&from=EN>.

²² European Commission, 2013, Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments, press release, available at http://europa.eu/rapid/press-release_IP-13-196_en.htm (accessed 16 August 2016).

²³ Ibid.

²⁴ http://europa.eu/rapid/press-release_IP-08-1685_en.htm?locale=en.

The Commission started the cartel investigation on its own initiative following a tip from an anonymous source. The Commission increased the fines on Saint-Gobain by 60 per cent because it was a repeat offender. Asahi provided additional information to help expose the infringement and its fine was reduced by 50 per cent under the Leniency Notice. These are the highest cartel fines the Commission has ever imposed, both for an individual company (880,000,000 euros on Saint-Gobain) and for a cartel as a whole.”

Source: European Commission, 2008, Antitrust: Commission fines car glass producers over €1.3 billion for market sharing cartel, press release, available at http://europa.eu/rapid/press-release_IP-08-1685_en.htm?locale=en (accessed 16 August 2016).

12. Fines often lead to other events that are likely to influence a company’s conduct towards compliance with competition law or regulatory action. For example, market traders tend to downgrade the value of the company’s shares when businesses are exposed to fines and this impacts the dividend due to shareholders. In 2014, a high-profile fund manager concerned about the impact of fines on the Hongkong and Shanghai Banking Corporation Limited for rigging currency markets sold the fund’s position in the bank because of worries that a substantial fine could hamper the bank’s ability to grow its dividend.²⁵ The bank’s shares fell as the market digested the impact of the regulatory breaches, which knocked 9 per cent off its profits.²⁶ Lower profits affect a business’s ability to provide a satisfactory return on investment (higher dividends, share buybacks, etc.) to shareholders and risk capital or retention of profits within the company. Consequently, it is likely to influence the conduct of the business in complying with the law.

13. Compliance with competition law is also enhanced when there is a clear, visible and personal commitment from businesses to do the right thing.²⁷ Wils (2013) argues that businesses are best placed to prevent antitrust infringements because it is the businesses that hire employees and determine the level of authority given to employees to set or negotiate prices or to conclude or negotiate contracts. Businesses are also responsible for defining profit targets, performance goals and incentives given to employees.²⁸ Therefore, the extent to which businesses are prepared to engage with competition law would depend on the corporate compliance practice.

14. A survey²⁹ of United Kingdom businesses’ understanding of competition law in 2014 similarly revealed that when there is commitment to compliance from the top of the organization, it contributed significantly to compliance in the organization as a whole. It also helped position the organization as an ethical business and created opportunities to win more business.³⁰ According to the International Chamber of Commerce, the opportunity for conducting ethical business and being perceived as championing a good cause has strongly contributed to compliance with antitrust law.³¹ Furthermore, the OFT research on the drivers of compliance and noncompliance with competition law underscores

²⁵ <https://risk.thomsonreuters.com/sites/default/files/GRC01700.pdf> .

²⁶ <http://www.theguardian.com/business/2014/nov/03/hsbc-warns-378m-potential-forex-rigging-fine>.

²⁷ International Chamber of Commerce SME toolkit, 2013, Why complying with competition law is good for business.

²⁸ Wils WPJ, 2013, Antitrust compliance programmes and optimal antitrust enforcement, *Journal of Antitrust Enforcement*, vol. 1, no. 1.

²⁹ IFF Research, 2015, United Kingdom businesses’ understanding of competition law.

³⁰ Hodges C, 2015, Enforcement, compliance and ethics law and corporate behaviour: Integrating theories of regulation.

³¹ International Chamber of Commerce, Antitrust Compliance Toolkit, 2013.

that a solid commitment to compliance by senior management is the crucial factor in driving compliance in their business.³²

15. Another reason for compliance is the high price to pay for non-compliance for both individuals and businesses. The potential disqualification of directors plays a very important role in complying with rules and regulations in the market against anticompetitive behaviour. The United Kingdom OFT has set guidelines for disciplining individuals involved in a breach of competition law.³³ These guidelines also indicate that the court sanctioning the punishment must consider whether the person's conduct as a director makes him or her unfit to be concerned in the management of the company. Directors sanctioned by the courts can face a maximum period of 15 years of disqualification during which it is a criminal offence to be a director of a company; to act as a receiver of a company's property; to be concerned or take part in the promotion, formation or management of a company directly or indirectly; or to act as an insolvency practitioner.³⁴

16. A 2015 survey conducted by IFF Research on United Kingdom businesses' understanding of competition showed that 72 per cent of respondents were compliant with competition law because of the risk of prosecution.³⁵ The fear of damage to corporate or individual reputation also contributes significantly to businesses' complying with competition law since fines only imposed on businesses might not deter individual managers.³⁶ In 2007, the United Kingdom Office of Fair Trading, the European Commission and the Department of Justice of the United States of America investigated a cartel involved in bid rigging which led to both fines,³⁷ and jail sentences for three former executives of one of the companies (see box 2).³⁸

Box 2

The marine hoses cartel

“Marine hoses are used to load sweet or processed crude oil and other petroleum products from offshore facilities (for example, buoys, floating production, storage and offloading systems) onto vessels and to offload them back to offshore or onshore facilities (for example, buoys or jetties).”³⁹

On 28 January 2009, the European Commission adopted a decision relating to proceedings under article 81 of the European Commission Treaty imposing a fine of over 131 million euros on six producers of marine hoses.

Six producers of marine hoses were found guilty of anticompetitive arrangements which consisted of allocating tenders, fixing prices, fixing quotas, fixing sales conditions, sharing the market geographically and exchanging sensitive information on prices, sales volumes and procurement tenders.

³² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf .

³³ Company Directors Disqualification Act, 1986, s 9A, see <http://www.legislation.gov.uk/ukpga/1986/46/contents>.

³⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf .

³⁵ IFF Research, 2015, United Kingdom businesses' understanding of competition law, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf.

³⁶ Hodges C, 2015, Enforcement, compliance and ethics law and corporate behaviour: Integrating theories of regulation, p. 431.

³⁷ http://ec.europa.eu/competition/publications/cpn/2009_2_12.pdf .

³⁸ <http://www.theguardian.com/business/2008/jun/12/corporatefraud.ukcrime>.

Three former executives of one of the companies involved in the cartel (Dunlop Oil and Marine Limited) were given jail sentences in the United Kingdom ranging from two and a half years to three years for conning the Ministry of Defence and others about specialist marine hosing.

Sources: European Union Competition Policy Newsletter, 2009, available at http://ec.europa.eu/competition/publications/cpn/2009_2_12.pdf, and *The Guardian*, 2008, available at <http://www.theguardian.com/business/2008/jun/12/corporatefraud.ukcrime>.

^a European Union Competition Policy Newsletter, 2009, p. 53.

Drivers of non-compliance

17. Businesses may not comply with competition laws for several reasons. This includes regulatory and law patterns, equitability of the obligations detailed in the laws, lack of knowledge about the law, corporate commitment to compliance with competition laws and resources.

18. When competition laws are difficult to understand, there is a tendency for businesses, irrespective of size, to contravene them because of the inadequate understanding of the obligations they are under. A United Kingdom study on businesses' understanding of competition law show that only 23 per cent of 1,201 private businesses interviewed knew competition law well. This suggests that 77 per cent of businesses lack knowledge of completion law to varying degrees.³⁹ From the group that knew competition law well, larger businesses claimed a greater level of awareness than smaller businesses, that is, nearly 37 per cent of medium-sized businesses and 57 per cent of large businesses.⁴⁰

19. Competition authorities frequently introduce new regulations that need highly priced compliance skills, time consuming remedial actions and an operational budget. Meanwhile operational budgets in businesses have become tighter and the compliance departments or officers assigned to oversee compliance are expected to do more with less. Due to resource constraints faced by most regulatory authorities and private business (both manpower and financial resources) in developed and developing countries alike (e.g. severe shortages of suitably skilled personnel), many compliance activities are not pursued. The inability to achieve a competition law compliance culture in an evolving complex business environment partially explains why competition law is breached.

20. A study by the London School of Economics commissioned by the OFT to analyse competition compliance and deterrence resulting from the United Kingdom competition regime found out from a survey it conducted that the most important driver of non-compliance with competition law is lack of knowledge about the law. The survey conducted by the study received 501 responses from large firms and 308 responses from small firms, of which 85 per cent and 73 per cent of respondents from large and small firms respectively noted that lack of knowledge about the law was very or quite likely to increase the risk of non-compliance.⁴¹ Although some violators may genuinely commit offences of non-compliance because of genuine ignorance of the law, others do so due to loss of trust in legal advice, wilful and reckless negligence, arrogance or even belief that the activity is profitable.

³⁹ IFF Research, 2015, United Kingdom businesses' understanding of competition law, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses__understanding_of_competition_law_-_report.pdf.

⁴⁰ Ibid.

⁴¹ Office of Fair Trading, 2011, *The impact of competition interventions on compliance and deterrence, Final Report*.

21. According to an Office of Fair Trading report on drivers of compliance and non-compliance with competition law, any apparent ambiguity or lack of management commitment to competition law compliance creates a risk of non-compliance.⁴² Furthermore, senior management perception that competition laws can be flouted without legal consequences contributes to driving non-compliance.⁴³ An OECD report on promoting compliance with competition law also points out that compliance matters in the area of competition are not treated in the same way as other areas, such as health and safety or environmental protection, that attract more attention.⁴⁴ This apathetic attitude of some boardrooms towards compliance often leads to fewer resources devoted to developing compliance programmes and a weakened commitment by businesses to strengthen compliance.

22. The conditions prevailing in the market may also contribute to the dynamics of non-compliance. For example a market made up of a small number of players, no price transparency, homogenous products, pervasive exchanges of information among competitors and/or sending public signals about planned price and/or output levels may facilitate collusion in businesses or contribute to abuse of dominant positions.⁴⁵ Businesses with dominant positions (very high market share, deep pockets, excess capacity and low price elasticity of demand) are likely to conduct their activities independently of their customers, competitors and consumers and are very often those that repeatedly infringe on competition law even though they have a special responsibility compared to others not to engage in behaviour considered to be abusive.

23. “Rogue” employees are another reason for non-compliance with competition laws.⁴⁶ A “rogue” employee is a person who knows very well the sorts of activity that would be likely to infringe, but who goes ahead and engages in the infringing conduct anyway. Rogue employees circumvent or override internal controls that lead to non-compliance with rules and regulations.⁴⁷ Where the rogue is at a managerial level, other employees working under the rogue might be encouraged to turn a blind eye out of personal loyalty, fear, simple indifference or the belief that the activity was profitable.⁴⁸ The frequent violations of competition law suggest that rogue employees could play a significant role in derailing business efforts to achieve compliance.

III. Common tools/activities used to promote compliance with competition law

24. A variety of tools are employed by regulatory agencies and business to promote and achieve compliance objectives. These include advocacy, incentives/leniency programmes, administrative resolution,) voluntary/mandatory schemes and corporate sanctions.

25. **Advocacy.** In advocacy interventions, NCAs focus on raising public awareness on different aspects of anticompetitive behaviour that contravene the law without using enforcement mechanisms. It is achieved, inter alia, by organizing conferences focused on the benefits of business compliance with competition laws, with training seminars to

⁴² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf.

⁴³ United Kingdom Office of Fair Trading, 2010, *Drivers of Compliance and Non-compliance with Competition Law*.

⁴⁴ <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

⁴⁵ OECD, 2011, Policy roundtables: Promoting compliance with competition law.

⁴⁶ United Kingdom Office of Fair Trading, 2010, *Drivers of Compliance and Non-compliance with Competition Law*.

⁴⁷ <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

⁴⁸ *Ibid.*

enhance awareness about the benefits of compliance and to strengthen/reinforce business compliance behaviour.

26. Also used frequently in advocacy are publications, dissemination of newsletters or press releases on measures to prevent or minimize the risk of contravening antitrust laws, competition enforcement and policy matters, law enforcement guidelines, reports on specific topics, annual reports explaining the activities of the competition agency and major competition topics/issues.

27. NCAs also use education and advice to nudge businesses in the right direction on competition compliance. They provide information to businesses on how to deal with issues related to compliance or facts related to competition law so that they can gain a better understanding of the laws even where a possible contravention of the law is unlikely. In this regard, NCAs are exploring the use of websites as an interactive educational tool that is freely available to everyone⁴⁹ to facilitate the flow of advice. In certain cases, for example when a new competition law goes into effect, businesses are given free transitional advisory opinions on whether their existing business arrangements violate the new provisions.⁵⁰ This type of dialogue between business and competition authorities is essential in reducing the potential of non-compliance.

28. **Incentives/leniency programmes.** Leniency programmes are used by NCAs in exchange for businesses adopting a proactive and rigid internal programme of self-assessment and in monitoring of compliance activities. Leniency programmes may include less severe punishments for whistle-blowers (i.e. reporting by an employee of non-compliance activities to senior management of the organization and to competition authorities) or businesses that admit to participating in unethical behaviour. For example, fines may be reduced or cancelled if a company that has participated in a cartel admits its anticompetitive activities, stops participating in the cartel and cooperates fully with the authorities in their investigations against the other participants.⁵¹ This can generally only benefit a company if it gives the authorities in that country information that the authorities do not already have and which is instrumental in enabling them to stop the cartel's activities. A well-designed leniency programme can be an essential tool for enhancing effective enforcement against the most serious infringements, in particular secret price-fixing and market-sharing cartels.

29. **Administrative resolution.** NCAs sometimes use administrative agreements to enforce competition compliance when businesses are seen to demonstrate conduct that has a potential risk of contravening the law. The agreement may consist of a commitment by the business that corresponds to a signed agreement between the national authority and the business, setting out detailed terms and conditions of the resolution. Administrative resolutions generally involve the business agreeing to stop the conduct and compensate those who have suffered to their detriment because of it and to take other measures necessary to ensure that the conduct does not recur. In this case, the NCA is unlikely to accept an administrative resolution for conduct that recurs after having been subject to a previous administrative resolution.⁵²

30. **Voluntary/mandatory compliance schemes.** Many businesses embark on voluntary self-regulation schemes that help in minimizing the risk of being non-compliant with competition law. Such schemes may help in reducing the punishment meted out to

⁴⁹ OECD, 2011, *Policy Roundtables – Promoting compliance with competition law*.

⁵⁰ Ibid.

⁵¹ https://www.akzonobel.com/system/images/AkzoNobel_Competition_Law_Compliance_Manual_tcm9-16085.pdf.

⁵² <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>.

them when they are found guilty of anticompetitive behaviour. Sometimes, competition agencies follow schemes enshrined in law that guide businesses to comply with the law (see box 3 for the Brazilian approach).⁵³

Box 3

Approach to compliance of the antitrust authority of Brazil

“Brazilian law (Ordinance No. 14/2004) provides guidance on how to design a compliance programme by setting out the requirements and conditions for the relevant Brazilian antitrust authority... to issue a compliance certificate. This is effectively a ‘quality seal’ that will be issued if the compliance programme is in line with the legal directives described in the Ordinance. The certificate attests that the company [in question] has an antitrust compliance programme in force, and that [its] senior management has set certain directives to promote an antitrust culture. To obtain a certificate (valid for two years), the company must provide a description of its programme, disclosing the standards and procedures which [its] employees have to follow, and the designation of [its] managers to coordinate and supervise the programme’s proposed objectives.”

Source: International Chamber of Commerce, Policy and Business Practices – Promoting antitrust compliance. Available at http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf (accessed 17 August 2016).

31. **Corporate sanctions.** A wide range of sanctions has been used by NCAs that may encourage businesses to strengthen compliance activities. For example, in Brazil, sanctions on companies involved in cartels can include, inter alia, a ban on eligibility for official financing and for participating in bidding processes involving authorities; cartel participants denied the possibility of paying federal overdue debts in instalment; total or partial cancellation of tax incentives or public subsidies; and shareholders forced to spin off, transfer corporate control to third parties, sell assets or partially stop commercial activities as a penalty for antitrust breaches.⁵⁴

32. There is no one-size-fits-all strategy to encourage compliance with competition law. Some competition agencies, for example, the Competition and Consumer Protection Commission of Zambia, use a combination of tools to encourage and enforce compliance with competition law (see box 4).⁵⁵

Box 4

Competition compliance and the role of the Competition and Consumer Protection Commission, Zambia

The Competition and Consumer Protection Commission (CCPC) “considers a combination of strategies that are aimed at both encouraging voluntary compliance and securing compliance by applying all enforcement measures required. This is arguably more efficient and contributes more to consumer and societal welfare. This is because deterrence through fines and penalties may not, on their own, be enough to ensure compliance, simply because deterrence does not address business or societal perceptions of the ‘morality’ of the behaviour in question and, therefore, does not foster a real ethical business culture.

⁵³ http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf.

⁵⁴ <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf>.

⁵⁵ <http://www.ccpc.org.zm/competition-compliance-and-role-of-ccpc/>.

CCPC has drafted various guidelines in its pursuit to fulfil its mandate of promoting and enhancing competition and consumer welfare in the economy for the benefit of the people of Zambia. Predominant among the guidelines includes the Merger Regulation Guidelines, the Fines Guidelines as well as the Settlement Procedure Guidelines. The Merger [Regulation] Guidelines give practical advice and guidance on the application of the relevant procedures and assessment methods set out in the Competition and Consumer Protection Act (the Act) and in the regulation. [The] Settlement Procedure Guidelines provide guidance on how enterprises that have engaged in anticompetitive behaviour propose remedies and penalties to CCPC for having broken the law.

In addition, CCPC conducts talks and trainings to both the private and the public sector[s, as well as trade and] professional associations. For instance, last year's talks were conducted with institutions which included professional associations, [the] manufacturer's association and training for judges and magistrates. Besides, CCPC also conducts talks to institutions of learning, such as high schools, colleges and universities with a view to increasing levels of compliance and awareness. CCPC also strives to ensure compliance and build a competition culture by disseminating information on a weekly basis in local newspapers, quarterly newsletters as well as various information platforms, such as website, Facebook and Twitter pages.

Source: Zambia Competition and Consumer Commission, available at <http://www.ccpc.org.zm/competition-compliance-and-role-of-ccpc/> (accessed 17 August 2016).

IV. What can be done to strengthen compliance with competition law?

33. A review of the common tools used to promote compliance and the drivers of compliance/non-compliance with competition law shows that the private sector approach compliance is through a self-driven internal process because of ethical standards and the consequences for breaching the law, and NCAs through encouraging or forcing regulations on market participants.

34. However constraining factors, such as lack of resources, make some of these approaches ineffective. For regulatory authorities, the lack of human and technological capacity and a lower operational budget hinder their ability to monitor, review and verify compliance cases, act swiftly and diligently in the investigations of non-compliance cases, address instances of non-compliance and deter such behaviour in the future.

35. On the part of the private sector, lack of resources makes operating in an evolving complex business environment, where competition authorities frequently introduce new regulations that need highly priced compliance skills, time consuming remedial actions and an operational budget, extremely difficult. This is particularly so for smaller companies, where limited budgets to hire external experts to plug the gaps in knowledge deficits is often the case.

36. It follows from the above that building capacity in human and technological resources, strengthening advocacy programmes and establishing high, ethical standards in businesses are important elements to strengthening compliance activities. This section outlines potential ways through which compliance can be strengthened in the private sector as well as ways in which regulatory authorities can enhance efforts to promote compliance.

Training

37. As previously mentioned, the shortage of skilled personnel is a major reason why breaches of competition law occur. One practical way to improve skills of staff is offering training to employees to improve their knowledge and complement their academic educational backgrounds. Training employees raises the level of understanding at firms of how the application of competition law could impact staff duties and responsibilities, what is obstruction under the laws and how to recognize potential signs of other businesses infringing the law; it also enables businesses to move forward confidently in applying the law and remaining competitive.

38. Different methods of staff training can be mobilized. These include workshops where staff learn from specialists or experts on the subject matter, sponsored courses in relevant subjects, e-learning, coaching by establishing a close working relationship with experienced staff and exposing staff to other parts of the business to learn new activities and how this may impact the overall compliance strategy of the business. Training, however, entails some upfront costs to the participating businesses, which explains why it is not frequently used. A 2014 study by the United Kingdom Competition and Markets Authority on United Kingdom businesses' awareness and understanding of competition law, understanding of anticompetitive behaviours and penalties for any violations showed that only 6 per cent of more than 1,000 senior personnel with responsibility for sales at private sector businesses in the United Kingdom reported that they trained employees on competition law within the last 12 months from when the study was launched. Among the large businesses surveyed, only 41 per cent conducted competition law training during the same period.⁵⁶

39. Nevertheless, training prepares staff to achieve compliance goals faster with fewer consequences. In order to make training effective, the study suggests five requirements to be included in the training programmes. These include (a) targeting the right people; (b) addressing the right issues; (c) communicating the consequences of breaching competition laws; (d) updating employees, new and old, on changes to the law, stressing the importance of ongoing compliance on a regular basis; and (e) prioritizing compliance with resources available.⁵⁷ In targeting the right people, targeting by NCAs of stakeholders for training should include officials from Government, the legal profession and representatives from the private sector, as well as trade unions and members of chambers of commerce. However, one major drawback with training is that it could result in employees with new skills and qualifications seeking better job opportunities elsewhere if there is no opportunity for advancement within the company that sponsored the training.

Human resources

40. Recruiting qualified personnel well versed in competition law, markets and its dynamic nature, and in distinguishing anticompetitive from pro-competitive business to the business or regulatory authority, is another viable way of strengthening capacity in compliance, though often limited financial resources stifle such efforts.

41. Human resources departments strapped for cash should consider offering a superior work-life balance, a variation of interesting cases to handle and higher job security as a strategy to attract and retain employees which would compensate for lower salaries.⁵⁸ NCAs should also collaborate with academic institutions in analysing the impacts of

⁵⁶ Ginsberg MR and LoBue RP, 2015, Do businesses understand competition law? Antitrust update.

⁵⁷ Ibid; see http://www.antitrustupdateblog.com/blog/do-businesses-understand-competition-law/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

⁵⁸ http://unctad.org/meetings/en/SessionalDocuments/trdbpconf8d5_en.pdf.

anticompetitive behaviour and non-compliance practices with a view to obtaining actionable recommendations that lead to strengthening compliance.

Outreach programmes

42. As discussed in the previous section, regulatory authorities use outreach programmes, such as advocacy, to promote activities geared towards compliance with the law and in regulatory reform. A successful advocacy programme can bring about change of attitude, policies or practices and will depend on a variety of factors, inter alia, a sustained effort by the regulatory agency. The message in such programmes should clearly bring to the attention of businesses/policymakers what is being proposed, why it is needed and the difference it will make to existing practices. In compliance-related matters, it will drive businesses to examine their practices to make sure that their compliance is strengthened in the areas where the NCA is providing information on. As communication provides the most effective means for disseminating information,⁵⁹ a good communications strategy is warranted for effective advocacy.

43. There are several ways through which advocacy can be used to enhance compliance and policy change. Stepping up outreach programmes through media outlets, such as newspapers, radio and television, is one way by which this can be achieved.⁶⁰ In this method competition authorities can use the media to frame the problems from a public policy perspective and strategically apply pressure to key decision makers in order to change the environment.⁶¹ Exposure of non-compliance activities by businesses through the media is also likely to push businesses to conform to competition laws (see box 5).⁶² Media advocacy should be carefully planned and skilfully executed taking into account the audience because it can potentially bring about bad publicity and contribute to mobilizing opposition.

Box 5

Leveraging the media in competition compliance in South Africa

“The media [in South Africa] have played a very important role in increasing awareness of the Competition Act, especially in reporting on contraventions uncovered by the competition authorities. The extensive coverage of tribunal hearings means that no businessperson should be able to claim that they are unaware of the existence of the Competition Act. Private sector bodies – in particular law firms and the large consultancies – have gradually developed compliance programmes through which their clients are educated about the requirements of the Act, and the boundaries between robust competitive conduct, on the one hand, and anticompetitive contraventions of the Act, on the other.”

Source: Competition Commission South Africa, 2009, *Unleashing Rivalry*, p. 73. Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf> (accessed 17 August 2016).

44. Other channels that can be used for strengthening communications are regularly updated websites of NCAs or social media. For example, through the UNCTAD Competition and Consumer Protection for Latin America (COMPAL) programme, the website for the Colombian competition and consumer protection authority was redesigned, and this contributed to strengthening competition advocacy by the agency. The strategy was

⁵⁹ http://unctad.org/meetings/en/Contribution/ccpb_SCF_AdvocacyGuidelines_en.pdf.

⁶⁰ http://unctad.org/meetings/en/SessionalDocuments/ciclpd28_en.pdf.

⁶¹ Ibid.

⁶² <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf>.

assessed by external evaluators of COMPAL and found to be relevant and effective. In El Salvador, an innovative and cost-efficient application enabled the competition authority to enhance transparency and citizen participation in competition issues. Through this award-winning application, the public has easy access to public information relating to cases sanctioned by the authority, and the application also provided a platform for providing comments and sharing related information⁶³ that has contributed to strengthening compliance and improving advocacy programmes. Constantly encouraging compliance is known to have some effectiveness in changing the mindset of responsible staff and the business as a whole.⁶⁴

Internal compliance programmes

45. Many businesses promote an understanding of competition law among employees by providing detailed policies and procedures that address relevant compliance issues for business. These are often found in compliance programmes that enable employees to follow permissible behaviour so that the risk of being non-compliant is minimized if the company is investigated for violating competition law. However, focusing on rules rather than establishing a culture of compliance can run into problems, as emphasizing rules can lead employees to look for loopholes to exploit rather than looking for ways to act ethically.⁶⁵

46. In-house compliance programmes make a good starting point for businesses in their efforts to strengthen compliance with the law. It requires the commitment of all employees to the programme and a good understanding of the business activities in relation to the law, continuous monitoring and updating of the programme. The OECD offers recommendations on essential elements of compliance programmes which make them more effective to meet expectations of NCAs (see box 6).⁶⁶ Some NCAs also provide frameworks to help businesses design their own compliance programmes in relation to competition laws (e.g. Australia, Canada, Japan, the Netherlands, etc.).⁶⁷

Box 6

Essential elements that make compliance programmes effective

“Risk assessment, prioritization and abatement. The company should regularly identify and assess its compliance risks, being particularly certain to reevaluate them when entering new markets or making new hires in key positions. Specific risks that may arise in each business unit should be considered. The idea is to identify who the violation-prone groups are, given the nature of their operations and/or personalities. For cartel violations, these groups tend to include senior executives, persons who make pricing or marketing decisions and those who attend trade association meetings. Risks can then be prioritized and steps can be taken to mitigate them via training, monitoring, seeking expert legal advice and setting up reward/punishment incentives for personnel.

Commitment. To be effective, [compliance programmes] must have the full, visible support of a company’s board and [chief executive officer], and it must be given adequate resources, including (in larger firms) a dedicated and empowered compliance officer. It

⁶³ <http://www.worldbank.org/en/events/2014/11/26/2014-competition-advocacy-contest>.

⁶⁴ According to the International Competition Network, over 55 per cent of competition authorities believe that their role in advocacy is excellent or good. See <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>.

⁶⁵ <http://blogs.wsj.com/riskandcompliance/2016/03/15/what-matters-more-following-rules-or-creating-ethical-culture/>.

⁶⁶ <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

⁶⁷ http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf.

should be made clear that violations, especially price fixing, will not be tolerated, i.e. that the company will not defend or support violators and that they will lose their jobs.

Screening/monitoring. Compliance should be monitored, evaluated and reported.

Documentation. Compliance efforts should be well documented so that they can be not only proven in the event of a breach, but studied with regard to what went wrong and then improved.

Continuous improvement – The company should periodically update its [compliance programme] and ensure that it remains well-suited to the company’s actual activities.”

Source: OECD Policy Roundtables, 2012, Promoting Compliance with competition law, p. 42.

Available at <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> (accessed 17 August 2016).

Organizational culture

47. Raising awareness for compliance does not automatically translate into changed behaviour within the business community, as very often it is difficult to convince not only senior management but also middle management of the importance of effective compliance. As a result many compliance commitments and programmes remain symbolic in businesses if there is a high probability of avoiding detection by persons in charge of business units and the expected gain outweighs the expected cost and rational behaviour.⁶⁸

48. In this regard, it is important to establish an organizational culture in ethical behaviour as that will lay out the basics of compliance to everyone within the firm as well as set clear expectations as to what role everyone has to play in ensuring the business adherence to its code of conduct.⁶⁹ It will instil an obligation in every employee of what is right to do in the business and put it on a steady path to improving compliance. When the culture is established, it should be effectively communicated to all staff and there should be a system of measuring and reporting on business compliance activities against planned objectives so that non-compliance activities can be immediately acted upon. A 2005 survey by the Institute of Business shows that employees are 50 per cent less likely to have observed misconduct when the business has ethics-related actions and a high level of commitment by top management.⁷⁰ Establishing a strong ethics culture goes a long way in facilitating and strengthening competition compliance with competition law as strong ethics guide decisions made by employees and reinforce the right thing to do.

Cooperation and partnership

49. Trade and business associations can also play a role in enhancing compliance culture because of their role in representing their members (small and medium-sized enterprises and large enterprises alike) before the authorities and defending their interests. These associations use their expertise to engage in activities that include supporting small and medium-sized enterprises, helping to educate and update their members on applicable rules and regulations, and enhancing consumer protection by developing standard terms and conditions, product safety and technical norms.⁷¹ The contribution of trade and business

⁶⁸ OFT, 2009, *An assessment of discretionary penalties regimes*.

⁶⁹ <http://rilianceassist.com/3-elements-effective-compliance-culture/>.

⁷⁰ http://www.ibe.org.uk/userfiles/briefing_1.pdf.

⁷¹ Kellezi P, Kilpatrick B and Kobel P, 2014, *Antitrust for small and middle size undertakings and image protection from non-competitors*.

associations to enhancing compliance is recognized by the OFT in terms of being effective partners in disseminating their guidelines. However, these associations can also be sources of potential anticompetitive activity because they provide a forum for businesses to meet and cooperate so partnerships should be formed with extreme care.

50. The arrival of ethical funds has also presented an opportunity for NCAs to engage them in their quest to improve compliance with competition laws. An ethical fund could be persuaded not to invest in companies found to be involved in anticompetitive behaviour such as cartels.⁷² As businesses need investment, this could have an impact on their attitude towards strengthening their compliance activities.

V. The way forward

51. Compliance with competition law will always present challenges for various reasons, such as the complexities in the law; the difficulty in minimizing information transfer between competitors; and ensuring that activities across different jurisdictions are within the boundaries of the law. Nevertheless, a concerted effort by all stakeholders including the international community would go a long way towards strengthening capacity in compliance with competition law. To achieve this objective, the key recommendations for stakeholders are:

- (a) Recommendations for regulatory authorities:
 - (i) Increase public awareness campaigns and sharing of information on compliance and initiatives through appropriate channels (e.g. websites, newsletters, media etc.)
 - (ii) Improve efficiency and effectiveness of investigations by leveraging technology and software in analysing and evaluating patterns of non-compliance
 - (iii) Collaborate with educational institutions to analyse non-compliance cases with a view to obtaining actionable recommendations that lead to strengthening compliance
 - (iv) Encourage voluntary measures to achieve compliance by providing guidance and assistance on relevant aspects of the law and on the design of compliance programmes.
- (b) Recommendations for the private sector:
 - (i) Carefully assess the exposure to legal risks presented by the prevailing laws in the market in which the business operates; and this may extend to other markets in other countries;
 - (ii) Devise a strategy to mitigate identified legal risks,⁷³ for example, through periodically reviewing the risks and updating policies, procedures and existing compliance programs, seeking expert legal advice, and setting up reward/punishment incentives for personnel;
 - (iii) Cultivate an ethical culture with a strong sense of accountability;
 - (iv) Understand compliance risk of all staff and offer regular training so that they have the necessary skills to navigate through complex competition rules;

⁷² OECD, 2011, *Policy Roundtables – Promoting compliance with competition law*.

⁷³ Legal risks may include price fixing, for example bid rigging, customer allocation, predatory pricing and refusal to supply, supplier/distributor restrictions and collective agreements to boycott others in the market.

- (v) Provide ongoing feedback to team members so that procedures can be reviewed if required.
- (vi) Seek legal expertise with experience in competition law when necessary to guide staff in complying with the law or on evaluating anti-competitive information exchanges with competitors
- (vii) Engage with the regulatory authorities to understand the intentions of regulators.
- (c) Recommendation for Government. Make competition laws clear so that they can be applied in a transparent and non-discriminatory manner.
- (d) The international community:
 - (i) Collaborate with NCAs in designing and implementing rules that are clear and have a maximum impact on strengthening compliance taking into consideration resource constraints;
 - (ii) Collaborate with international competition agencies to facilitate the exchange of experience and best practice, and in joint enforcement of the laws.

52. The compliance strategies highlighted in this paper focus on internal processes, communications, monitoring and enforcement, and are by no means exhaustive. There are a wide range of implications for possible non-compliance activities (e.g. marketing strategies and production-related information), abuse of dominance or supply chain irregularities that may need other strategies by both regulatory authorities and the private sector that need to be further investigated.

Questions for discussion

53. The following questions for discussion are proposed:
- (a) What strategies could be recommended in addition to those highlighted in this background paper for strengthening compliance with competition law?
 - (b) What should priorities be in compliance matters for competition authorities given the limited resources at their disposal and the costs associated with compliance activities, in terms of both human and financial resources?
 - (c) Given that severe shortages of suitably skilled personnel in public and private sectors hampers compliance activities, what practical measures can be adopted to strengthen capacity in businesses and countries with limited resources?
