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**Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally
Agreed Equitable Principles and Rules for the Control of Restrictive Business
Practices**

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Item 6 (a) of the provisional agenda

Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter X

Model Law on Competition (2010) – Chapter X

Functions and powers of the Administering Authority

I. The functions and powers of the Administering Authority could include (illustrative):

- (a) Making inquiries and investigations, including as a result of receiving complaints;*
- (b) Taking the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister;*
- (c) Undertaking studies, publishing reports and providing information to the public;*
- (d) Issuing forms and maintaining a register, or registers, for notifications;*
- (e) Making and issuing regulations;*
- (f) Assisting in the preparation, amending or review of legislation on restrictive business practices, or on related areas of regulation and competition policy;*
- (g) Promoting exchange of information with other States.*

II. Confidentiality

- 1. According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.*
- 2. Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.*
- 3. Protecting the deliberations of government in regard to current or still uncompleted matters.*

COMMENTARIES ON CHAPTER X AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. Most competition legislation establishes a list of the functions and powers that the Authority possesses for carrying out its tasks, and that provide a general framework for its operations. An illustrative list of functions of the Authority is contained in Chapter X of the Model Law on Competition. It is important to note that 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, as well as transparency.

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

2. The Authority may act on its own initiative, or may follow certain indications that the anti-competitive practice exists, for example as a result of a complaint made by any person or enterprise. The United Nations Set of Principles and Rules on Competition specifies that States should institute or improve procedures for obtaining information from enterprises necessary for their effective control of restrictive business practices.¹ The Authority should also be empowered to order persons or enterprises to provide information and documents, and to call for and receive testimony.

3. In the event that this information is not supplied, it may be appropriate to obtain a search warrant or a court order, where applicable, in order to require that information be furnished and/or to permit entry into premises where information is believed to be located. In many countries, including Argentina, Australia, Germany, Italy, Hungary, 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 without announcement in search of relevant information (so-called dawn raids). 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, in cases where an on-the-spot inspection to obtain copies of information, documents, books and other instruments is hindered or is likely to be hindered, a magistrate can order that an inspection be performed. In Poland, in cases of utmost urgency where there is a justified suspicion of a serious violation of the competition law, and particularly if 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 investigation. The Polish Office of Competition and Consumer Protection may search premises, apartments, transport vehicles and so on at the request of the EU Commission when the Commission meets with resistance from any person requested to provide documents, information or 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 on the request of the Commission.

4. Many jurisdictions impose penalties, including in some cases fines and imprisonment, for willful failures to comply with the Authority's investigative orders.

Leniency programmes²

5. Over the past decade, a large number of competition authorities have adopted so-called leniency programmes as an investigation tool to uncover the most serious form of anti-competitive practices, i.e. hard-core 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 member who reports its cartel membership to a competition [law] enforcement agency."³ The cartel member must self-report and fulfil certain other

¹ See point E.6 of the Set.

² For specific information on leniency programmes in developing countries, see the note by the UNCTAD secretariat on the effectiveness of leniency programmes as a tool for the enforcement of competition law against hard-core cartels in developing countries. TD/RBP/CONF.7/4.

³ International Competition Network (2009). Drafting and implementing an effective leniency programme". Chapter 2 in *Anti-Cartel Enforcement Manual 2009*. Available at <http://www.internationalcompetitionnetwork.org>.

requirements. Typically, cartel members must confess, cease cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against the other cartel members. For its part, the competition law enforcer transparently and credibly commits to a predictable pattern of penalties designed to give cartel members incentives to apply for leniency.

6. About 50 jurisdictions have self-identified as having a cartel leniency programme.⁴ Among medium- and low-income countries, Brazil, Mexico, the Russian Federation and South Africa have active leniency programmes. Chile recently joined this group. Their programmes are similar to and work in parallel with those of the United States and the European Union, among others – the jurisdictions that probably receive the largest number of leniency applications. However, most medium- and low-income countries have no leniency programme.

7. Recent comparative research carried out by the UNCTAD secretariat has identified the conditions necessary for an effective leniency programme:

8. 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.

9. The penalties imposed on cartel members 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.

10. The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated.

11. To attract international cartel members, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

12. Finally, it is indispensable to mention that 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.

13. The following table provides examples of investigative regimes.

Alternative approaches in existing legislation – Investigative regimes

Country	Powers of Authority	Sanctions for non-compliance
European Union	The Commission may: <ul style="list-style-type: none"> – Require the provision of information – Enter premises and inspect them – Examine documents and records, and take copies – Seal premises or records for defined periods of time – Require any person to give an explanation of facts or documents 	Non-compliance results in fines that may not exceed 1 per cent of the total turnover in the previous year of the infringing business.

⁴ *ibid.*

<p>United States</p>	<p>The authorities may require a person to:</p> <ul style="list-style-type: none"> – Provide documents, information or other material – Give a sworn oral deposition <p>The 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 is a criminal offence punishable by fines and imprisonment.</p>
<p>Turkey</p>	<p>The Competition Board may request information it deems necessary from public institutions and organizations, undertakings and trade associations. Officials of these bodies are obliged to 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 being investigated refuses to allow the dawn raid.</p>	<p>Failure to provide the requested information and the provision of wrong information can be sanctioned with a fixed pecuniary fine.</p> <p>Hindering an on-site investigation can be sanctioned by a fixed periodic monetary fine per day.</p>
<p>China</p>	<p>According to Article 39 of the Anti-Monopoly Law of the People’s Republic of China, the Anti-Monopoly Authority is empowered to:</p> <ul style="list-style-type: none"> – Enter the business premises of the enterprise under investigation or any other relevant place to investigate; – Request the subjects of an investigation to disclose relevant information; – Review and duplicate the relevant business documents etc.; – Seize and detain the relevant evidence; – Inquire about the bank accounts of the business operators who are under investigation. 	<p>According to Article 52 of the Anti-Monopoly Law of the People’s Republic of China, pecuniary penalties may be imposed for failure to submit required information, provision of false information, destruction or removal of evidence, and other forms of hindering/obstructing investigations.</p>
<p>New Zealand</p>	<p>The Commission may require the production of documents (subject to legal privilege) and the provision in writing of information, and may require persons to appear before it to give evidence and produce documents.</p> <p>The Commission may also obtain (from a court) and execute search warrants.</p>	<p>Failure to comply with the Commission’s investigative powers is an offence, resulting in fines.</p>

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

14. The Administering Authority would need – as a result of inquiries and investigations undertaken – to take certain decisions, for example, initiating proceedings or calling for the discontinuation of certain practices, or denying or granting authorization of matters notified, or imposing sanctions, as the case may be.

15. The precise decision-making powers of the Authority will depend on the structure of the Authority and its relationship to the government and courts (see chapter IX), and specifically, on 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;

16. 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:

17. Of a sector, or a market for goods and services, to determine whether there are structural barriers to competition in that market;

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

19. Of an aspect of the competition legislation, to assess whether the law is achieving its stated policy goals.

20. Many countries' authorities also publish reports or guidelines outlining the authorities' approaches to enforcement procedures or to the assessment of certain forms of economic activity in competition law terms. 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 they may simply indicate the Authority's approach to interpreting and applying the competition legislation.

21. Finally, an important role for the Authority, particularly in countries where competition law has recently been introduced, is to educate the public and the business community on 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;

22. The laws of most countries having notification procedures include provision for some system of registration which must be characterized by transparency. This is the case, for example, of Spain, with the Registry for Safeguarding Competition. The European

Commission publishes an overview of all notified concentrations on its webpage. Some countries maintain a public register in which some, but not all, of the information provided through notification is recorded. The usefulness of a public register lies in the belief that publicity can operate to some extent as a deterrent to enterprises engaging in restrictive business practices, and can provide an opportunity for persons affected by such practices to be informed of them. Such persons can also make specific complaints and advise of any inaccuracies in the information notified. However, not all the information notified can be registered, and one of the reasons for this is that some information will relate to so-called “business secrets”, where disclosure could affect the operations of the enterprise in question. The need for appropriate handling of sensitive business information by 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.

23. 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 information necessary to support a competition assessment before approaching the Authority.

(e) Making and issuing regulations;

24. 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.

(f) Assisting in the preparation, amending 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 the drafting of laws that may have anti-competitive effects, and also for studying and submitting to the government the appropriate proposals for amendment of the legislation on competition. This is the case, for example, of Bulgaria, at the level of the Commission for the Protection of Competition;⁵ of Portugal, with its Council for Competition, which can formulate opinions, give advice and provide guidance in competition policy matters;⁶ and of Spain, at the level of the Court for the Protection of Competition⁷ and the Competition Protection Service.

⁵ Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition. Article 4 (3).

⁶ Decree Law No. 371/93 of 29 October 1993 on Protection and Promotion of Competition. Article 13 (1) (b), (c) and (d).

⁷ 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: 66.

(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 exchange of information on restrictive business practices. It would be convenient to provide the Authority with the power to promote such exchange by clearly establishing this 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 latter is increasingly important, due to the international character of many cartels. An ability to exchange or share evidence helps ensure efficient enforcement against cartels.

Alternative approaches in existing legislation – Information-sharing

Belgium	Under the legislation of Belgium, 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. ⁸
Germany	Under the seventh amendment, of 12 July 2005, to Germany's Act Against Restraints on Competition, the Bundeskartellamt's authority to cooperate with other competition authorities (especially within the European Competition Network) has been strengthened, for example in respect of information exchange and mutual assistance with investigations.
Australia	<p>In 2007, the Parliament of Australia passed legislation which enables the Australian Competition and Consumer Commission (ACCC) to share certain information obtained during the course of its investigations with foreign and domestic government bodies.</p> <p>Previously, the ACCC 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 ACCC to disclose this and other information (known as "protected information") to specified agencies, bodies and persons if the Chair of the ACCC 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 allows the ACCC to disclose protected information to "a foreign government body". This power will assist the ACCC in coordinating investigations with international enforcement counterparts.</p> <p>Information will be considered "protected" where it is, inter alia:</p>

⁸ Law on the Safeguarding of Economic Competition. Article 50 (b).

	<p>(a) given to the ACCC in confidence and relates to a matter arising under a 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 ACCC and relates to a matter arising under a core statutory provision;</p> <p>(c) obtained by the ACCC 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 Trade Practices Act; or</p> <p>(d) given in confidence to the ACCC by a foreign government body and the information 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 align with 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.</p> <p>Section 155AAA is consistent with, and builds upon, clause (g) of Chapter X of the Model Law. Importantly, the section provides a legislative basis for the ACCC to share information with its international counterparts in appropriate circumstances, including under Australia's bilateral agreements.</p>
Algeria	<p>The Algerian regulation establishes a framework for cooperation between the Competition Board and foreign competition authorities, with a view to ensuring 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 ("ordre public") 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 EU.⁹</p>
New Zealand / Australia / Canada	<p>The New Zealand Commerce Commission, the Australian Competition and Consumer Commission and the Canadian Commissioner of Competition share information and cooperate on enforcement efforts, pursuant to a memorandum of understanding.</p>

28. 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, as well as between France and Germany. There is also a multilateral agreement between Denmark, Iceland and Norway.

⁹ Euro-Mediterranean Agreement establishing an association between the European Communities and their member States on the one hand and Algeria on the other (22 April 2002).

II. Confidentiality

1. *According information obtained from enterprises containing legitimate business secrets reasonable safeguards to protect its confidentiality.*
2. *Protecting the identity of persons who provide information to competition authorities and who need confidentiality to protect themselves against economic retaliation.*
3. *Protecting the deliberations of government in regard to current or still uncompleted matters.*

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

Alternative approaches in existing legislation – Protection of confidential information

Australia	<p>At the time of introducing criminal sanctions for cartel conduct in 2009, the Parliament of Australia also introduced amendments to the Trade Practices Act to enhance the protection of cartel information provided to the ACCC (known as “protected cartel information”). The Parliament recognized that whistleblowers/informants would be more willing to provide information about cartel conduct to the ACCC if the protection afforded to that material was enhanced.</p> <p>Protected cartel information is defined as information provided in confidence to the ACCC where it relates to a breach or potential breach of the criminal cartel offence or civil cartel prohibition.¹⁰</p> <p>Broadly, the ACCC is not required to disclose protected cartel information, however it 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 ACCC in confidence;</p> <p>(b) Australia’s relations 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 style="padding-left: 20px;">(i) the protection or safety of the informant or of persons associated with the informant; and</p> <p style="padding-left: 20px;">(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; and</p> <p>(e) the interests of the administration of justice.¹¹</p>
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¹⁰ See sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the Trade Practices Act. Available at <http://www.comlaw.gov.au/>.

¹¹ See subsection 157C(5) of the Trade Practices Act. Available at <http://www.comlaw.gov.au/>.

	<p>However, a court or tribunal may require the ACCC 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 II of the Model Law.</p>
China	<p>Article 41 of the Anti-Monopoly Law of the People’s Republic of China stipulates that the Anti-Monopoly Law Enforcement Agency and its staff members shall have the responsibility to keep business secrets, which they obtain when enforcing the law, confidential.</p> <p>Article 38(2) states that any entities or individuals may tip off any suspicious monopolistic conduct to the Anti-Monopoly Law Enforcement Agency. The Anti-Monopoly Law Enforcement Agency shall keep the informer confidential.</p>
Malaysia	<p>Article 21 of the Competition Act 2010 provides for the protection of confidential information. It reads as follows:</p> <p>(1) 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>(2) Nothing in subsection (1) shall operate to prevent the disclosure of information where –</p> <ul style="list-style-type: none"> (a) the disclosure is made with the consent of the person from whom the information was obtained; (b) the disclosure is necessary for the performance of the functions or powers of the Commission; (c) 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; (d) the disclosure is made in connection with an investigation or an infringement or an offence under this Act; or (e) the disclosure is made with the authorization of the Commission to any competition authority of another country in connection with a request by that country’s competition authority for assistance. <p>(3) For the purposes of this section, “confidential information” means trade, business or industrial information that belongs to any person, that has economic value, and that is not generally available to or known by others.</p>