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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**

**Model Law on Competition (2010) –  
Revised chapter X<sup>1</sup>**

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<sup>1</sup> This is a revision of document TD/RBP/CONF.7/L.10.

## Model Law on Competition (2010) – Revised 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 receipt of 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 LEGISLATIONS

### Introduction

1. Most competition legislation establishes a list of the functions and powers that the Authority possesses for carrying out its tasks, and which 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 mention 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 to be highlighted is that the Authority's functions must be based on the principle of due process of law, fairness, non-discrimination as well as accountability and transparency.

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

2. The Authority may act on its own initiative, or following 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<sup>2</sup>.

3. The Authority should also be empowered to 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 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 (EU), the Administering Authority has the power to order enterprises to supply information and to authorize a staff member to enter without announcement premises 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, where 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 a justified suspicion of a serious violation of the competition law, 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 proceeding. 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 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 on the request of the Commission.

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

6. As far as evidence-gathering is concerned, 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 respondent to enable it to defend itself fully. A continuous process of engagement between the Competition Authority and the respondent as regards the allegations and the evidence supporting such claims would ensure that the respondent is apprised of not just the inculpatory and exculpatory evidence which 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.<sup>3</sup>

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<sup>2</sup> See Point E.6 of the Set.

<sup>3</sup> The International Chamber of Commerce, *Recommended Framework for International Best Practices in Competition law Enforcement Procedures*, Document No. 225-666, 8 March 2010.

7. Alternative approaches in investigative methods are considered below.

**Alternative approaches in existing legislation – Investigative regimes**

Country	Powers of Authority	Sanctions for non-compliance
European Union	<p>The Commission may:</p> <ul style="list-style-type: none"> <li>– Require the provision of information</li> <li>– Enter onto and inspect premises</li> <li>– Examine documents and records, and take copies</li> <li>– Seal premises or records for defined periods of time</li> <li>– Require any person to give an explanation of facts or documents</li> </ul>	<p>Non-compliance results in fines that may not exceed per cent of the total turnover in the previous year of the infringing business.</p>
United States	<p>The authorities may require a person to:</p> <ul style="list-style-type: none"> <li>– Require a person to provide documents, information or other material</li> <li>– Give a sworn oral deposition</li> </ul> <p>The United States Department of Justice (DoJ) 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>
Turkey	<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 subject to the investigation refuses to allow the down-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>
China	<p>According to Article 39 of the Anti-monopoly Law, the Anti-monopoly authority is empowered to:</p> <ul style="list-style-type: none"> <li>– Enter business premises of the business operators who are under investigation or any other relevant place to investigate;</li> <li>– Request subjects of an investigation to disclose relevant information;</li> <li>– Review and duplicate the relevant business documents, etc.</li> <li>– Seize and detain the relevant evidence;</li> <li>– Inquire about the bank accounts of the business operators who are under</li> </ul>	<p>According to Article 52 of the Anti-monopoly Law, 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/obstruction investigations.</p>

	investigation.	
New Zealand	<p>The Commission may require the production of documents (subject to legal privilege), 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>	Failure to comply with the Commission's investigative powers is an offence, resulting in fines.

### *Leniency programmes<sup>4</sup>*

8. Over the past decade, a large number of competition authorities 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.”<sup>5</sup> 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. The key aspects of a leniency regime are usually (a) the clear identification of the benefits of the regime; (b) clear identification whether employees of the applicant were made immune 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) eventually, a clear statement that showed that the Competition Authority had a track record whereby enterprises found the leniency programme predictable and beneficial.

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

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

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

<sup>4</sup> 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 hardcore cartels in developing countries, TD/RBP/CONF.7/4.

<sup>5</sup> International Competition Network, 2009, “Drafting and Implementing an Effective Leniency Program”, Chapter 2 in *Anti-Cartel Enforcement Manual* at

[www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org).

<sup>6</sup> Ibid.

13. 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.

14. 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.

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

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

17. 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.

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

18. The Administering Authority would need, as a result of inquiries and investigations undertaken, to take certain decisions as, for example, to initiate proceedings or call for the discontinuation of certain practices, or to deny or grant authorization of matters notified, or to 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. Of course, the remedies must be sufficiently deterrent in nature to prevent re-offense and non-compliance with the law and/or the imposed sanction.

19. 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;*

20. 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:

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

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

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

24. 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”<sup>7</sup> and in circumstances where Community institutions are mandated to “develop and establish appropriate policies and rules of competition... including special rules for particular sectors”<sup>8</sup>, both legal and economic studies will have to be undertaken to (a) assess the level of reform that is needed to secure compliance of member State with the Community competition law mandates and (b) formulate enforcement priorities that are in line with the underlying Treaty objectives and goals of the Community.

25. 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 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;*

26. 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, in 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 certain, 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, as well as 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 certain information will relate to so called “business secrets”, and disclosure could affect the operations of the enterprise in question. 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.

27. 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.

28. 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.

<sup>7</sup> The Revised Treaty of Chaguaramas, Article 179(1)(b)(ii).

<sup>8</sup> Revised Treaty of Chaguaramas, Article 182.

*(e) Making and issuing regulations;*

29. 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.

30. It is also 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. It is also important for the agency to 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 via formal written communication, e-mails, conferences, preliminary meetings and hearings. The Competition Authority should also clearly set out in a published document the time-frame within which the respondent has to make submissions, taking care to allow the respondent sufficient time to investigate the breadth of the allegations, avoiding unrealistic time limitations and also allowing sufficient time in view of the complexity of the issues underpinning the case.

31. Many countries' authorities also publish reports or guidelines outlining the authorities' approaches to enforcement procedures or the method of 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 and does not have the binding force of law.

32. 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.

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

33. 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 for advising on the draft bills which may affect competition, as well as for 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<sup>9</sup>, Portugal with its Council for Competition, which can formulate opinions, give advice and provide guidance in

<sup>9</sup> Statute of 15 November 1991 on the Organization and Activities of the Commission for the Protection of Competition. Article 4 (3).



competition policy matters<sup>10</sup>, Spain, at the level of the Court for the Protection of Competition<sup>11</sup> and the Competition Protection Service.

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

34. The United Nations Set of Principles and Rules on Competition require States to establish appropriate mechanisms at the regional and sub-regional 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 it as one of its functions.

35. 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 is increasingly important due to the international character of many cartels. An ability to exchange or share evidence helps ensure efficient enforcement against cartels.

36. 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 the context of document/information-sharing provided for in bilateral trade agreements. The North American Free Trade Agreement<sup>12</sup> and the CARIFORUM–European Union Economic Partnership Agreement (EPA)<sup>13</sup> contain terms of cooperation in the area of competition law broad enough to encompass cooperation in the area of information exchange and document sharing.

37. 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, and also a multilateral agreement between Denmark, Iceland and Norway.

38. 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 important for the Competition Authority to be in a position to verify that the requesting jurisdiction's laws respect the right of the defense and is able to maintain the full realm of confidentialities they are usually afforded under the legal system of the responding jurisdiction.

39. In connection with the latter point, the Organization for Economic Cooperation and Development (OECD) has set out, for example, in a document noting a number of best practices in the area of formal information exchange. Where multilateral agreements set out terms of agreement between competition agencies on exchange of information, via voluntary and compulsory practices, it is a necessary follow-up to those agreements that the agencies

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

<sup>11</sup> 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.

<sup>12</sup> Article 1501(2) of NAFTA reads: “*Each 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.*”

<sup>13</sup> See for example, Article 128 of the CARIFORUM States–EU EPA, which allows for exchange of information and enforcement cooperation among the parties to the Treaty.

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.<sup>14</sup>

40. 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 surveyed below.

#### Alternative approaches in existing legislation – Information-sharing

Belgium	Under the 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 <sup>15</sup> .
Germany	Under the 7 <sup>th</sup> 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, such as in respect of information exchange and mutual assistance with investigations.
Australia	<p>In 2007, the Australian Parliament passed legislation which enables the Australian Competition Authority (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 Chairperson 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 (TPA) 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> <ul style="list-style-type: none"> <li>– given to the ACCC in confidence and relates to a matter arising under a core statutory provision</li> <li>– obtained under section 155 of the TPA or obtained under the search and seizure powers of the ACCC and relates to a matter arising under a core statutory provision</li> <li>– obtained by the ACCC under the various information gathering powers concerning the telecommunications industry and the</li> </ul>

<sup>14</sup> OECD Competition Committee, Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, October 2005.

<sup>15</sup> Law on the Safeguarding of Economic Competition, Article 50 (b).

	<p>telecommunications access regime and relates to a matter arising under Part XIB or XIC of the TPA, or</p> <ul style="list-style-type: none"> <li>– 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).</li> </ul> <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.<sup>16</sup></p>
New Zealand / Australia / Canada	<p>The New Zealand Commerce Commission, 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>

## *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.*

41. 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

<sup>16</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their member States, of the one part and the People’s Democratic Republic of Algeria of the other part (22 April 2002)

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.

42. As regards protecting the confidential information, best practice in competition law enforcement seems 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 the fact 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 aid in their assessment of the facts to which to apply a legal standard. Market players, usually the competitors of the company subject to investigation, are usually the primary source of evidence which can inform on the conduct itself and the effect of the conduct on the relevant market. Even the firms themselves that are being investigated are sources of information. For example, the evidence competition authorities rely on is usually found in internal communications (e-mails, meeting minutes, memorandums, etc.) 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 where not even the most coercive measures can bring forth information upon which it can make an objective assessment of the issue.

43. It is therefore important for the agency to allow the informant to designate the documents it deems to be confidential and to provide reasons why the “confidential” label should apply. The agency, of course, will have provided guidance which sets out the criteria for giving documents confidential treatment and the methods the agency uses to ensure confidentiality of all or portions of a document.

44. Generally, 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 about the business that is likely to place the business in 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 undertake sworn/written statements committing to non-disclosure of the confidential material other than for purposes legitimately having to do with the investigation.

45. It is important to note that the safeguards for the protection of confidential information should extend beyond investigation of specific infringements of the competition legislation and should also be afforded during sector investigations.

**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 TPA to enhance the protection of cartel information provided to the ACCC (known as ‘protected cartel information’). The Parliament recognised 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</p>
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	<p>the criminal cartel offence or civil cartel prohibition.<sup>17</sup></p> <p>Broadly, the ACCC is not required to disclose protected cartel information however 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: 40px;">(i) the protection or safety of the informant or of persons associated with the informant, and</p> <p style="padding-left: 40px;">(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.<sup>18</sup></p> <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 PRC 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 Competition Act 2010 provides for the protection of confidential information. It reads as follows:</p> <p>“21 (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> <p style="padding-left: 40px;">(a) the disclosure is made with the consent of the person from whom</p>

<sup>17</sup> See sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the TPA available at: <http://www.comlaw.gov.au/>.

<sup>18</sup> See subsection 157C(5) of the TPA available at: <http://www.comlaw.gov.au/>.

	<p>the information was obtained;</p> <p>(b) the disclosure is necessary for the performance of the functions or powers of the Commission;</p> <p>(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;</p> <p>(d) the disclosure is made in connection with an investigation or an infringement or an offence under this Act; or</p> <p>(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> <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 is not generally available to or known by others.</p>
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### A measured approach when adopting best practices

46. The survey of the formulation of enforcement rules conducted above reflect some of the common practices and best practice in competition law enforcement systems in the context of 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.<sup>19</sup> Also it is the case that 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 which help to expedite the process.<sup>20</sup> Further, a common thread among investigative techniques among 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 the investigation or an imposed remedy. For example, as noted above, several regimes use searches and seizures as a method of evidence gathering and impose criminal penalties or high fines for non-compliance with investigation.

47. The use of coercive measures as tools in investigating competition law infringements, for example, may be reflective of best practice as far as designing competition law enforcement systems are concerned. Similarly information-sharing between competition authorities is becoming more common and is also reflective of best practice in competition law enforcement.<sup>21</sup> However, sometimes the imposition of criminal sanctions whether for non-compliance with investigation or for breaches of the competition legislation, the imposition of unusually large fines and the commingling of the role of investigator, prosecutor and

<sup>19</sup> 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, *The Use of Leniency Programmes as a Tool for Enforcement of Competition Law against Hardcore Cartels in Developing Countries*. Note by the UNCTAD Secretariat, TD7RBP/CONF.7/4.

<sup>20</sup> CARICOM (Revised Treaty and EPA).

<sup>21</sup> OECD Competition Committee, *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations*, October 2005.

adjudicator under the auspices of an administrative authority and a whole host of other functions defined along the lines of international best practice become subject to legal challenge. Best practices therefore have to be subject to testing 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 they do not always guarantee that respect for due process, natural justice and constitutional tenets of every domestic law are locked into the rules that are recommended for adoption.

48. Therefore, the Competition Authority, which is usually defined as an administrative authority in many jurisdictions, can hardly demonstrate a disconnect between the investigation and determination of the facts of the case and a decision reached upon those facts where safeguards are not put in place. Further, it is hard to justify the imposition of criminal sanctions and high levels of fines in a setting in which the Competition Authority must also justify use of resources and its mere existence each year to a Ministry within the Government. Further, it is difficult to guarantee the respondent's fundamental rights (whether those rights arise under case law, a Constitution or a Treaty) when the competition agency is engaged in enforcement multi-tasking.

49. Therefore, while the allocation of certain powers and functions to the Competition Authority may be common enforcement methods, they may not necessarily reflect the best or optimal allocation of powers to the competition agency and therefore are not strictly to be construed as best practice as far as enforcement method is concerned unless certain balance and checks are put in place. The enforcement methods of the Directorate General for Competition and the United States' Federal Trade Commission for example, without more, may not be suitable for use in new and developing competition regimes where the law and legal system is markedly different from that of the EU and the United States. Indeed, a look at competition case law in newer competition regimes like those of Jamaica, and even case law from years ago in the advent of regimes such as Australia, suggest that adhering to common practice or "international best practices" in formulating procedural rules or indeed "copying and pasting" legislation, without more, will not guarantee that the formulated rules themselves are free from legal challenge.

50. A look at "early days" 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 in the context of competition enforcement and many jurisdictions have incorporated information-sharing as part of their competition legislation. However, a number of critical issues can be foreseen in the context of 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 aid in a parallel investigation in the requesting country without being held in contempt of court? Similarly, in the context of regional/community competition law regimes such as that of CARICOM or the South African Development Community (SADC), 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 treated in the early days of the ACCC in *Brambles Holdings Ltd v. Trade Practices Commission and Another*<sup>22</sup>. The case concerned the power of the ACCC under s.155 of the Trade Practices Act 1974 (TPA) to require a person to produce information or documents or to submit to an investigation by the ACCC. The Commission launched an investigation to discover information and documents relating to an ongoing investigation for which penalties and injunctions were being pursued for the alleged breach of s.45 of the TPA. The underlying s.45 proceedings had reached the stage where the matter was being considered before the court. The court found that the matters for which the discovery of evidence was

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<sup>22</sup> (1980) 32 ALR 328

being sought by the ACCC was currently under consideration by the court and since it was the function of the court to determine issues before it, the ACCC's parallel investigation constituted a contempt of court as the ACCC'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.

51. Even the European Community (EC) saw challenges to its procedural rules in the early days of the Council Regulation (EC) 1/2003 which implements the EC's rules of competition and continues to face those challenges. The Community Courts, particularly the European Court of Human Rights, have repeatedly noted that competition law procedures have to respect the basic requirements under Article 6 of the European Convention on Human Rights.<sup>23</sup> Currently, legal practitioners across the EC still voice their dissatisfaction with the multi-functional Directorate General for Competition.

52. The procedures of Council Regulation 1/2003, which also defines the EC's procedures in competition law cases, has not seen any amendments to afford procedural safeguards that are called for time and again in EC competition case law,<sup>24</sup> yet many new and developing competition regimes look to the procedures noted under Council Regulation 1/2003 as possible templates for their procedural rules and, indeed, many of the EC's rules are represented as best practice in competition law enforcement. The outcome of copying best practice or using other regime's rules as a template, unchecked, could prove to be detrimental to a new Competition Authority.

53. For example, a problem of poor delegation of function led to the Jamaican and Barbadian competition authorities becoming "lame duck" institutions awaiting amendments to cure procedural defects in their legislation. In a landmark decision of the Court of Appeal of Jamaica<sup>25</sup> certain structural defects in the set-up of the Jamaica Fair Trading Commission were revealed, including the fact that the Jamaica Fair Competition Act failed to recognize staff other than Commissioners and also does not contain powers of delegation which would enable the Commission to delegate investigative functions to its staff and also erect a "firewall" between those charged with investigation and adjudication within the Commission. Similar problems are faced by the Barbadian Fair Trading Commission as the wording in that country's legislation mirrors that of the Jamaican legislation.

54. 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 branch of the government in different and indeed, separate bodies. Indeed, the doctrine is so entrenched in many legal systems that it is featured expressly in some constitutions. Separating the institutions themselves and properly assigning the right powers to the right institution is, as far as best practices go, the best way to ensure that the citizens' guaranteed fundamental rights are respected within the context of competition law enforcement and ensures that the relationship between institutions are regulated in such a way that rules out arbitrary, discriminatory, prejudicial and results-oriented decision-making.

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<sup>23</sup> See e.g. the judgment of the CFI in case T-276/04, *Compagnie Maritime Belge v. Commission*, para. 66; and the judgment of the ECJ in case C-338/00 P, *Volkswagen v. Commission* [2003] ECR I-9189, para. 97.

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

<sup>25</sup> *Jamaica Stock Exchange vs. Fair Trading Commission*, Supreme Court Civil Appeal No. 92/97.



55. It must be also be noted that the optimal design and allocation of the powers of a Competition Authority go beyond ensuring separation of powers and also concerns issues which require observation of the principles of natural justice. In Australia for example, the case of *Daniels Corporation vs. ACCC*<sup>26</sup> raised the question of whether the legal professional privilege could be subverted under section 155 of the Australian Trade Practices Act such that the intent for which the coercive powers of investigation under s. 155 are conferred is not defeated by grant of legal privilege. The section (s.155) compels the production of information/evidence relating to a matter that may constitute a contravention of the Act. The legal professional privilege is one of those sacred doctrines of the common law (and indeed of civil law and hybrid legal systems of the world) 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 ACCC's investigative power under s. 155 gave no quarter as regards the subversion of the legal professional privilege. Cases like *Daniels* makes it clear that, principles of natural justice and any other rights accruing under the 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.

56. These “early days” cases, such as 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, and also the allocation of power within that structure, can thwart the objective of the authority, even where it has adopted investigative methods that adhere to international best practices in the context of competition law enforcement. Adopting international best practices in the area of competition enforcement, whether it is 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 targeted at maintaining law and order of a State.

57. Therefore, all institutions of the State – 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 violates fundamental rights guaranteed by the constitution, breaches the principle of natural justice and can 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 they execute – 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.

58. Quite a few competition regimes have to now contemplate amendments to their legislation in order for them to be rid of the “lame duck” title 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 the United Kingdom, Canada and Australia to ascertain the right allocation of power and function to the Competition Authority.

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<sup>26</sup> [2002] HCA 49 (7 November 2002).

**Summary of best practices in designating functions and powers of the Competition Authority**

1. The rules of engagement with a Competition Authority should be designed so as to allow a respondent to have an evolving view of the Competition Authority's theory of infringement and should take care to avoid unrealistic time limitations.
2. 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.
3. Where terms of cooperation in the sphere of document and information sharing are being crafted, it is important to ensure that the rights of the defense in each jurisdiction are afforded, as far as possible, mutual recognition and respect by the cooperating parties.
4. 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.