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Workshop on the Appropriate Design and Formulation of Competition Policy and Law in ASEAN Member States

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Foreword

The ASEAN Economic Community (AEC), ASEAN Member States (AMSs) have set themselves the goal of creating an Economic Community and adopting national competition law and policy by 2015. Several ASEAN members have already adopted national competition laws and have made noticeable progress in the enforcement.

However, four countries have yet to finalize their competition law and policy, those include Brunei Darussalam, Cambodia, Lao PDR and Myanmar. The Philippines which has set of provisions on competition law in different legislations and an effective enforcement agency is in the process of adopting a comprehensive competition law.

The workshop "Appropriate Design and Formulation of Competition Policy and Law in ASEAN Member States " organized by GIZ in cooperation with KPPU and the ASEAN Secretariat, seeks to upgrade the skills and the knowledge of representatives from the AMSs, both from within and outside the ASEAN Experts Group on Competition (AEGC) on the best and relevant practices drawn from wide range of jurisdictions.

The material prepared by the UNCTAD Secretariat for this workshop provides a comprehensive overview of the all the relevant issues relating to the formulation and enforcement of competition law and policy in different economic and social contexts that seeks to promote economic growth and development. The issues covered in this monograph are based on the UNCTAD research and recommended best practices arising from the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the five-yearly United Nations Conference to Review the Set on Competition Law and Policy. These issues are:

(a) Formulation of a Competition Policy Framework, National Competition Law and Policy Coherence
(b) Formulation of Competition Law – in Consideration of the Economic and Social Circumstances of Different ASEAN Countries
(c) Independence and accountability of competition authorities
(d) Foundations of an effective competition agency
(e) Prioritization and resource allocation as a tool for agency effectiveness
(f) Knowledge and human-resource management for effective enforcement of competition law
(g) Communication strategies of competition authorities as a tool for agency effectiveness
(h) Criteria for Evaluating the Effectiveness of Competition Authorities
(i) UNCTAD Model Law on Competition - 2013- (XII chapters) See Annexed document.

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Formulation of a Competition Policy Framework, National Competition Law and Policy Coherence

Definition of terms and concepts

A. Competition and competition policy

1. Competition can be defined as the pressure exerted in the market by different players in search of market shares and profits. It is a game of outdoing one another in winning customers, so that customers will purchase a given company's goods or services. Competition is one area of market dynamics which calls for policy design. An UNCTAD study puts it as follows: "Competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop." [1] Competition policy has a broad dimension which includes all other government policies that promote competition in the market. Inter alia, such policies include consumer protection, investment policy, intellectual property rights (IPRs) and industrial policy.

2. When considering the role of competition law and competition institutions, the issue of coherence with other government policies that have a bearing on competition cannot be ignored. The link with other government policies creates a need for competition advocacy, which is an integral part of the enforcement of competition law and a driver towards enforcement coherence with such policies.

3. The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices recognizes the development dimension of competition policy, and urges member States to promote competitive markets as channels towards economic development. In this sense, effective competition can be considered as an important element of an economic development strategy. In an attempt to attain this goal, competition laws in many developing countries capture other policies – for example, the promotion of small and medium-sized enterprises, public interest objectives including formally disadvantaged parts of the population, the creation of employment, the promotion of exports, and exemptions for intellectual property rights (IPRs), to name just a few. The fact that competition laws explicitly encompass other policy mandates that are handled by other government bodies calls for policy implementation coherence. This is in

[1] UNCTAD (2010). The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy. TD/RBP/CONF.7/3.

order to avoid conflicts and duplication of efforts, or unjustifiable weakening of the competition process as the principal driver of economic development.

B. What is policy coherence?

4. Recently, during a high-level plenary meeting,[2] the United Nations Economic and Social Council (ECOSOC) called for "efforts at all levels to enhance policy coherence for development, noting that accelerated progress in achieving the Millennium Development Goals required mutually supportive and integrated policies across economic, social and environmental issues for sustainable development." The United Nations recognizes the importance of policy coherence across all development-supporting sectors. Furthermore, policy coherence is becoming an increasingly important concept in the development agenda of many countries – both in the developed and the developing world.

5. Governments in developing countries – as elsewhere – pursue many objectives which may not always be compatible. Coherence is an increasingly important element of development policy. It requires policymakers, when designing domestic policies, to be aware of the possible impacts – both negative and positive – on their economies. And it requires policymakers, when implementing their domestic policies, to take steps to avoid any negative impacts from inconsistencies in their economic policies on development, and, where possible, to seek to create positive spillover effects. Looking at national government structures, policy coherence issues could occur between different types of public policies, different levels of government, and different stakeholders, and even at the regional or international level.

C. Why is policy coherence ideal?

6. Looking at the development perspective of any nation, policy coherence implies that, while governments pursue national policy goals and objectives in areas such as trade, competition, investment, agriculture and the environment etc., they should try to avoid duplication, tensions and unnecessary conflicts. At the regional and international level, policy coherence entails avoidance of implementation overflows which negatively affect other member States of a regional grouping or other players in the world arena.

[2] Note by the United Nations Secretary-General on coherence, coordination and cooperation on financing for development, from the special high-level ECOSOC meeting held in New York on 10–11 March 2011. See http://www.un.org/esa/ffd/ecosoc/springmeetings/2011/Programme.pdf.

7. However, there are instances where policy coherence may not be feasible. For example, when there are liquidity problems and the government treasury needs to raise more funds to balance the fiscal budget, policy incoherence may arise if the government wants to sell a public enterprise, or if it wants to sell an exclusive concession, where the privatization or the concession may cause the new enterprise to abuse its dominant position, affecting competition. This may result from a failure by the ministry to seek the views of competition authorities, where they exist. Typically, such decisions are political.

8. To promote economic development and the well-being of citizens, governments – while they are designing new policies – should establish mechanisms to examine possible areas of tension, and they should use these as a means of improving coordination and establishing dialogue with the parties concerned. The debate on policy coherence can contribute to the development objectives of a nation in terms of adding value to the process of good governance, by enabling policymakers to identify priorities and areas needing further analysis and action, as is explained below.

D. Types of policy coherence

9. Coherence can be classified as vertical or horizontal, and may have intended or unintended consequences. A vertical relationship exists in cases where in a government ministry, there are two different policies dealing with a related aspect of the market. An example would be if the finance ministry in country A was dealing with competition, insurance and banking policies. A policy clash can occur if there is an anticompetitive banking merger which the central bank wishes to authorize, or if the insurance commission endorses a price-fixing arrangement between the members of the association of insurers. Coherence can be internal, external, or intra. In this example, the minister has to deal with coherence issues arising from the three entities within its vertical relationship, with each institution operating in its own mandate space, while at the same time considering the overall vision of the ministry. This type of relationship between policies administered by the same government organ/ministry is also referred to as internal.

10. Horizontal arrangements can be found in cases where the policies being considered are administered by different ministries. Coherence in such cases is also referred to as intragovernmental. The interplay between competition authorities and sector-specific regulators falls under this category.

11. Coherence between policies that involve external aspects, trade, and foreign policy is known as external coherences. The advent of bilateral, regional and subregional trade agreements containing competition

provisions has created the need for external policy coherences, in terms of how the enforcement of regional competition policies relates to national competition laws, and with other policies contained in the agreements.

12. The factors that affect coherence could be institutional, or they could relate to the way in which policies are implemented, or to the legal mandate – provided by instruments – which brings the policy into action. These instruments could be in the form of acts of parliament, laws, decrees, rules, or regulations that take the form of secondary legislation.

E. Competition and other government policies: What coherence does not mean

13. When examining coherence between competition policies and other policies, the focus should be placed on achieving the development goals of a specific country. This does not mean that all national goals and development objectives are achievable via market solutions. There are many social, political and economic goals that need other solutions in order to enhance total welfare. For example, in order for postal services to reach consumers in remote areas, the government may have to subsidize these services, rendering market forces ineffective in meeting such needs.

14. On the other hand, coherence does not mean that competition policy is the answer to all economic and social challenges. Depending on the circumstances at hand, other policies may be more appropriate. In times of natural disasters and other crises, governments find themselves operating outside their usual business, in an attempt to mitigate the impacts of the crises. At such times, there is a need to re-examine competition policy in terms of the need to accommodate the temporary market distortions, and not to consider these actions as policy incoherence. The response from the United States[3] to UNCTAD's questionnaire states that although competition is vital to the promotion of consumer welfare, it is not the only tool, and that governments have to make decisions as to how the balance between competition policies and other policies is maintained, in order to promote the well-being of their people.

15. To promote proportionality, competition law enforcement agents should lend a listening ear to other policy actors. Competition authorities should look at the whole policy spectrum. As much as they would want to promote competition principles, there should be consideration of other policy objectives of promoting competition in the market, so that they can

[3] See the response of the United States to the UNCTAD questionnaire, at http://www.unctad.info/en/6th-UN-Conference-on-Competition-Policy/

then strike a balance. They should also take up the role of encouraging other regulators to undertake an assessment of regulatory impacts.

II. The role of various policies in promoting economic development

16. There is consensus among many researchers that competition should be geared towards a particular measurable goal. Some scholars have pointed out that competition policy should have as its principle objective the maintenance and encouragement of competition in the market in order to promote economic efficiency and consumer welfare. Since anticompetitive practices exist in all markets, one question that needs to be addressed is: How long should anticompetitive conducts or their effects be tolerated? And how should competition policy be introduced?

17. The necessity for and introduction of competition law should be sequenced among the range of macroeconomic and microeconomic policies that governments need to address from time to time, which varies from country to country. For example, countries restructuring their economies develop all kinds of policies to address the various aspects of the reform process. In most cases, there is no coordination mechanism put in place to guide this process. Shyam Khemani (1997)[4] points out that particular government policy actions are guided by prevailing circumstances, which usually leave governments without many policy choices or room for manoeuvre.

18. Rotmans et al. (2001)[5] add that structural adjustment policies such as liberalization and privatization were the most important economic priorities in the 1980s and 1990s for countries wishing to move from state-controlled economies to competitive private-sector-driven markets. In the transition periods, governments had to come up with regulatory policies and laws – including competition policies to ensure that the process of creating competitive markets was not hampered by anticompetitive practices. The conversion of public monopolies to private monopolies and oligopolies was a major concern during that period. Policies on competition, on investment, and on export promotion were among the regulatory policies that governments introduced. Such sets of policies usually fall within the ambit of different ministers who have specific mandates, goals and visions, and their approach to market regulation is, in most cases, diverse.

19. With this in mind, the government needs to create systems and to establish mechanisms for dialogue and exchange of information among

[4] Shyam Khemani R (1997). *Competition Policy and Economic Development.*

[5] Rotmans J, Kemp R, van Asselt M (2001). More evolution than revolution: transition management in public policy. In: *Foresight.* 3 (1). February.

policymakers and operatives in order to minimize conflict and to promote policy coherence. The dialogue system makes transition less painful to society, as new challenges and bottlenecks are discussed, and with the assurance of support from the government machinery, it can act as a stimulant to the development of new concepts, ideas and processes. New policy initiatives can be interpreted as additional ways of making the market work better, as opposed to taking away territory from existing policies.

A. Regulated sectors and competition

20. In terms of its relationship with other government policies, competition law enforcement interfaces with a broad range of government economic policies affecting competition in domestic markets. These range from policies on telecommunications, foreign direct investment (FDI), international trade, and financial markets, to policies on privatization. The enforcement of these policies will either enhance or impede the development of competitive markets, and will determine how effective the competition law enforcement is. Competition agencies should advocate the benefits to citizens from competitive markets, as well as the benefits to decision-makers.

The case of *Verizon Communications Inc. vs. V. Trinko, LLP*[6]

The need for coherence between competition authorities and sector regulatory bodies is exemplified by the *Verizon vs. Trinko* case, which took place in the United States. This case touched on the application of telecommunications law and whether antitrust law would effectively intervene in the matter on the basis of exclusionary conduct violation. There was also the question of whether the "saving clauses" in the Telecommunications Act, section (601)(b)(1), which state that nothing in the Act should contribute to, "modify, impair or supersede the applicability of antitrust laws", would be appropriate to apply in this case. The United States Supreme Court ruling was that the telecommunications law had implemented the necessary remedies to violations by Verizon on agreements to share interconnectivity with rivals, and therefore the antitrust claims did not have strong enough grounds for refusal to deal or for an exclusionary conduct case to be pursued. The Supreme Court overturned the Court of Appeal's decision to apply section 2 of the Sherman Act to this case. The Supreme Court urged that new systems needed to be created and implemented to address the access problem. The submission from the Department of Justice was in support of the fact that the saving clauses in the Telecommunications Act of 1996 are not violated in this case.

This case further shows the need to clarify the boundary between sector regulation and competition law application. It shows that where there is coordination of policy and law enforcement and sharing of information, an understanding can be reached as to the modus operandi of saving clauses. This can affect courts trying to solve cases related to competition and sector regulatory issues.

III. Potential benefits of coherence between government policies

21. When there is coherence between various government policies, the likelihood of achieving the desired result of promoting economic development and improving the well-being of the people is greater than when there are incoherencies and conflicts between policy enforcers. Governments have to identify their policy niche areas where coherence-enhancing efforts can yield the best results. There is a wide spectrum of benefits that can be derived from policy coherence.

22. Some countries (e.g. the Netherlands and the United Kingdom) have identified, as a key element of enhancing coherence, the need to address the administrative burden created by regulation. A report

[6] *Verizon Communications vs. Law Offices of Curtis V. Trinko, LLP*, often shortened to *Verizon vs. Trinko*. 540 U.S. 398 (2004).
Available at http://www.ictregulationtoolkit.org/en/Publication.1593.html

produced in 2006 in the United Kingdom[7] identifies the following key elements in this process: (a) the removal, reduction, merging and improvement of regulations; (b) the simplification of procedures to comply with regulations; (c) information- and data-sharing; and (d) one-stop-shop systems for stakeholders. These elements can be applied as tools to reduce costs and enhance coherence in policy formulation and implementation. Policy incoherence imposes a cost on society in one way or another. Think of a procurement policy and law with the mandate of issuing tenders for road construction, and a competition law and policy with provisions to combat bid-rigging/collusive tendering. An absence of coordination in the enforcement of the two laws would create conflict in the market, through the possibility of tenders being awarded to a cartel group, thus transferring taxpayers' earnings to private companies.

23. The relevant competences between competition authorities and sector regulatory bodies are a key issue when discussing policy coherence. As spelt out in an UNCTAD study,[8] in many countries the co-existence of competition authorities and sector-specific regulators is evident. Technological and other developments taking place in the market shapes the government's regulatory role in it. As the recent financial crisis has taught policymakers, even in cases where certain sectors exhibit competitive pressure in the market, the relaxation of regulatory principles can be very costly to the world economy.[9] The co-existence of regulators and competition agencies provides some examples of the different approaches adopted by different countries on how the coordination or non-coordination of competition and sectoral regulatory policies has been tackled.

24. In order to ensure the success of market reforms, privatization was followed by the creation of new sector regulators. The most common sector regulators in the world are in the banking, telecommunications, airlines and energy sectors. In many countries, the banking sector regulator is the oldest. The bank (central, reserve etc.) was already in

[7] Ministry of Economic Affairs (Netherlands) (2009). *Regulatory Burdens on Businesses.* May. The United Kingdom's Better Regulation Executive and National Audit Office jointly developed a guidance document in 2006 for those undertaking reviews following the Hampton report, entitled "Reducing administrative burdens: effective inspection and enforcement".

[8] UNCTAD (2006). Best practices for defining respective competences, and settling of cases which involve joint action by competition authorities and regulatory bodies. TD/RBP/CONF.6/13/Rev.1.

[9] The financial crisis has been attributed to regulatory failure in the United States and by extension in Europe. See, for example: World Bank (2009). Is there a need to rethink the supervisory process? Prepared by John Palmer and Caroline Cerruti. See also: IMF (2010). Lessons and policy implications from the global financial crisis. Prepared by Stijn Claessens, Giovanni dell'Ariccia, Deniz Iga, and Luc Laeven. See further: European Commission. Economic Crisis in Europe: *Causes, Consequences and Responses. European Economy 2009.* See further: Mix DE (2010). *The United States and Europe: Current Issues.* CRS report for Congress. 8 December.

existence before privatization, globalization, structural adjustment and liberalization in many economies, and it remains the regulator of the financial sector in many jurisdictions.

25. The OECD identifies four regulatory tasks, namely protection of competition, access to markets, access to essential infrastructure, and economic and technical regulation. Sector regulators usually fall into the category of technical regulation. With regard to sector regulatory policies and their interaction with competition policy, there are visible benefits that derive from enforcement coherence. Co-existence between competition authorities and sector regulators has become commonplace in many jurisdictions. The economic transformations of the 1980s and 1990s changed the spectrum of market operations by increasing private participation, which created opportunities for rivalry and competitive pressure. Competition is continuously being introduced in sectors that were previously dominated by monopolies. Over time, the traditional market setting has been overhauled by technological advancement.

26. However, the role of the government as the overseer of the market has increasingly been appreciated as an important ingredient in the new and emerging trends. Government intervention is needed even in very competitive markets. Particular rules and regulations have to be developed to guide the market towards competition for development.[10] In addition to competition law, sector-specific regulatory laws have emerged in certain sectors of the economy too – namely telecommunications, energy, banking, insurance etc.

27. In many cases, sector regulators and competition authorities have overlapping jurisdiction on certain issues. Mergers in the banking sector, licensing and price-setting in telecommunications, the setting of insurance premiums etc. are some of the areas requiring attention in this regard.

28. In some jurisdictions, some regulated sectors are exempted from competition law. Other legal systems have concurrent jurisdiction with competition authorities. In other cases, both competition and regulatory laws are silent on the possible overlaps. With all the mix, the chance of conflict and lack of coordination exists between competition authorities and sector regulators.

[10] See, for example, UNCTAD (2002). Analysis of market access issues facing developing countries: consumer interests, competitiveness, competition and development. TD/B/COM.1/47.

UNCTAD peer reviews and competition coherence

29. Since 2005, UNCTAD has facilitated voluntary peer reviews for a number of member States.[11] The peer-review reports indicate, among other things, that the issue of coherence between competition authorities and other government policies has featured as an area needing further attention in all the countries examined. While the peer review reports touched on many areas of policy coherence, including exemptions for IPRs, and for research and development and certain strategic sectors, which has made the work of the competition authority very difficult, making the authority ineffective in regulating competition in the market.

30. In Jamaica, the peer review identified a situation which makes coordination with other government policies quite difficult. Only the Telecommunications Act of 2000 recognizes the existence of the Fair Competition Act. Any other government policy containing some competition aspects requires the competition authority to justify the need to uphold competition principles. In addition, major provisions are absent from the competition act, including merger control provisions. This may explain why the Jamaican Competition Authority has devoted most of its resources to consumer protection issues.

31. In Kenya, the design of the competition law and its institutional framework was found to be a major bottleneck to coherence with other policies, and to the ability to effectively tackle anticompetitive practices. The Restrictive Trade Practices, Monopolies and Price Control Act, and its institutional framework, the Monopolies and Prices Commission, were among the first regulatory frameworks established in the Kenyan market (in 1988) after the onset of liberalization. A large number of regulated sectors, including banking, insurance, telecommunications, tea, coffee and energy, are exempt under section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act. The relationship between the Monopolies and Prices Commission and the other regulators is not defined either in the competition law or the regulatory laws. Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act grants exemptions to specific practices which are provided for under specific sector regulatory laws. Although there is a large number of regulated sectors in Kenya – including banking, insurance, telecommunications, tea, coffee and energy – that operate under different laws, their actions are not exempt from competition law if they are not clearly sanctioned in the law.

[11] The peer reviews have covered Jamaica (TD/RBP/CONF.6/7), Kenya (TD/RBP/CONF.6/8), Tunisia (UNCTAD/DITC/CLP/2006/2), the West African Economic and Monetary Union: Benin and Senegal (UNCTAD/DITC/CLP/2007/2), Costa Rica (UNCTAD/DITC/CLP/2008/2), Indonesia (UNCTAD/DITC/CLP/2009/2), and, more recently, Serbia.

32. The Tunisian peer review illustrated areas of opportunity for coherence between the enforcement of competition law and other regulatory policies. There were sectors shielded from antitrust regulation that the competition authority was unable to deal with. The peer review identified the electricity sector – regulated by the Tunisian Electricity and Gas Company – as having a monopoly on the distribution of electricity and a share of the electricity production. In addition, the insurance sector, the financial sector, the stock exchange, and telecommunications were among the sectors with established regulatory authorities with mandates allowing them to overlook anticompetitive practices in their sectors.

33. In Costa Rica, many sectors are exempted from the application of competition law. The peer review report states that "the following are exempted from enforcement of the law: (a) providers of public services by virtue of a concession, under the conditions provided by law; (b) State monopolies created by law; and (c) municipal or local governments, in both their internal regime and their relations with third parties (articles 9 and 72 of the Act and article 29 of the regulations)."

34. In addition, the fixing of fees by professional associations in Costa Rica is exempted from the competition law. Moreover, business chambers and associations are exempt if they are not acting as buyers and sellers of goods and/or services. This exemption appears in the definition of "economic agent". Examples from sector enquires conducted under the UNCTAD COMPAL project show that anticompetitive agreements are prevalent among associations, and competition authorities could not intervene.[12]

35. The West African Economic and Monetary Union (WAEMU) peer review brought out the regional aspect of policy coordination. The allocation of competences between regional and national competition authorities shows incoherence in enforcement and a lack of coordination among regional sector regulators. In a situation where jurisdictional issues occur, as in the case of WAEMU and its member States, the coordination of competition policy with other government policies becomes even more challenging. Some members of the Union were active in handling competition cases before the community rules came into effect in 2003. After the advent of the community rules, Senegal identified six suspected cartels and abuse-of-dominance cases which were tackled neither by the community body nor by the national competition authority. UNCTAD's peer review reports that the lack of sector regulation at the regional level and the approach whereby the WAEMU Commission has exclusive competence on competition cases are major hurdles to the work of national agencies and the regional competition body.

36. The case of WAEMU – as well as certain aspects of other regional bodies in the developing world – exemplifies the complexities of dealing with policy coherence between national and regional bodies on competition

[12] UNCTAD COMPAL Programme (2005). *Strengthening Institutions and Capacities in the Area of Competition and Consumer Protection Policies in Latin America*. Available at http://www.unctad.org/en/docs/ditcclp20043_en.pdf.

enforcement, and by extension, on other government policies. If competition enforcement is not working well, then competition enforcers find it difficult to deal with other policies.

37. Another area where policy coordination would be beneficial to the enforcement of competition law and policy is with industrial policy. Over the years, it has been argued that industrial policy infringes on principles of competition, and that competition policy limits the discretion of state authorities to apply industrial policy. However, many studies have shown the complementarities of the two policies – that coordination can override the negative aspects of this relationship. The recent economic crisis has acted as a confirmation that, from time to time, certain market imperfections will increase the demand for targeted and measured state intervention in the market. Stimulus packages have been rolled out, from 2009 to as recently as the end of 2010. It is a commonly known fact that subsidies may generally obscure efficiency advantages in countries, but what other alternatives were available to mitigate a problem that risked bringing down the world economy? An UNCTAD study states that: "Governments (were) under pressure to provide economic rescue packages for industrial and financial companies. Competition authorities (were) under pressure to relax merger reviews and prohibitions of anticompetitive conduct in competition laws. Economic nationalism, in the form of trying to restrict the benefits of subsidies or state guarantees to domestic companies and consumers, can be glimpsed in some of these measures."[13]

38. The relationship between competition policy and industrial policy has been the most thorny, especially in troubled times. Developing countries and countries with economies in transition face a somewhat different challenge in terms of their ability to offer subsidies and stimulus packages. At the same time, the pressure to attract and rely on FDI may confer special advantages on transnational corporations, placing local companies at a competitive disadvantage. [14] In other instances, foreign companies can be at a disadvantage, when preferential treatment is accorded to domestic firms. An example from the intervention of the United States Federal Trade Commission in the case of the Chrysler Corporation bailout in 1980[15] shows that the competition argument does not always win, and also reiterates the policy balance issue.

39. Lewis (2009) [16] argues that the financial crisis and the consequent economic crisis are factors in regulatory failure. As governments try to address this challenge, the root cause of the problem should not be ignored. The regulatory frameworks – both financial and others, including competition

[13] UNCTAD (2010). The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble. TD/RBP/CONF.7/6.

[14] See, for example, UNESCAP at http://www.unescap.org/tid/publication/tipub2540_chap3.pdf, chapter 3. See also: UNCTAD (1999). *Most Favoured Nation Treatment.* UNCTAD/ITE/IIT/10. Volume 3.

[15] See the United States response to the UNCTAD questionnaire on the UNCTAD website.

[16] Lewis D (2009). The role of competition authorities in the management of economic crises. Global Forum on Competition. OECD. DAF/COMP/GF/WD.

– should work together to ensure that there is no repeat of this situation. Competition was evident in the financial sector long before the crisis, but financial-sector regulation entails adherence to a certain code of conduct to ensure liquidity and the survival of banks. In a nutshell, one could ask, was there policy coherence or incoherence here? And do we need to resort to the competition policy channel to find solutions? Whatever the case, competition policy's core objectives of consumer welfare and preserving the competitive process need not change.

40. For government to establish the difference between anticompetitive and competitive neutral subsidies among its industrial policy tools, it must have access to adequate and timely information, and must ensure coherence between competing demands and objectives.

41. To enhance coherence between the two policies, while governments may overrule competition authorities in times of economic difficulty, as examples from Germany and the United Kingdom have shown, competition authorities should prepare for pro-competitive post-crisis restructuring and redesign of their regulatory formula.[17] From a global perspective, national policies should pay attention to possible spillover effects on other countries, particularly developing countries, from their actions or from their failure to take action. Ideally, countries should harmonize their efforts and interests for the benefit of the global economy. This would be an important aspect in promoting coherence between policies at the international level.

42. Intellectual property rights encourage innovation and thereby promotes economic growth and economic development. However, abuse of IPRs may stifle competition as a process, and therefore balancing IPRs with competition policy is another area where there is a need for coherence. This area of policy has been the subject of debate for decades. Many competition laws exempt IPRs from their scope of application, due to regard for IPRs as an avenue for research and development.[18] However, the so-called cross-licensing can be detrimental to competition if the patent-holders coordinate the prices, as this could raise entry barriers to market access for incoming competitors. The granting of new patents can have anticompetitive overtones when existing patent-holders acquire patents on non-significant improvements on the existing patented product. This evergreening of patents has the result of lengthening the period of exclusive rights beyond its original time. The *AstraZeneca* case in 2010[19] was framed on abuse of dominance by the patent-holder to delay the entry of generic drugs.

43. Coherence issues therefore arise between competition policy and intellectual property rights. Strong interagency collaboration would be necessary in order to avoid inconsistencies in policy regulation and in the enforcement of relevant laws. The development and publication of guidelines, especially by developing countries, on how competition policy

[17] UNCTAD study on industrial policy and competition (2009). TD/B/C.1/CLP/3.

[18] UNCTAD study on competition policy and the exercise of intellectual property rights (2008). TD/B/COM.2/CLP/68.

[19] European Commission case T-321/05 AstraZeneca v. Commission. 1 July 2010.

should interact with IPR policy, pointing out areas where anticompetitive practices are likely to occur, should facilitate the process of protecting IPR while ensuring coherence with competition rules.

44. The promotion and completion of industry standards can provide significant benefits for consumers; these include incentives for innovation, product uniformity, interoperability, longer-life products, lower development costs for standards-based products, efficiency, consumer choice, allegedly higher-quality products for consumers as a result of expert comparisons of competing solutions, increased competition because of lower barriers to entering a specific market with standardized products, lower marketing costs for bringing products to a particular market, and the fostering of public health and safety. In particular, industry standards are accepted as being one of the engines of the modern economy because they can make products less costly for firms to produce and more valuable to consumers, and can serve as a fundamental building block for international trade. On the other hand, a standard may also slow innovation by locking in an inferior technology, and it may reduce consumer choice by reducing the number of differentiated but incompatible products. Advantageously, standardization activities are not immune from antitrust scrutiny, since they can usually be reviewed under the rule of reason.

45. Another area to look at when addressing the issue of coherence between competition policy and other government policies is the relationship of competition policy with the enforcement of complementary policies within the government structure. One such key policy arm is the judiciary and the way in which competition cases are adjudicated as provided by the competition laws. An important element of competition enforcement is its ability to adjudicate cases that arise from the provisions of the law. This brings in the relationship with the judiciary. For the purposes of transparency and due process, decisions made by competition authorities should be open to review through courts, tribunals or any other review mechanism. The relationship with the judiciary for many competition authorities, especially in developing countries, is sometimes difficult, on account of judges' focusing on procedural aspects of the conduct in question. This may be the result of judges having insufficient experience in handling competition cases, or, as in the Trinko case, the judges believing that the sector regulatory law should have addressed the issue. To give a specific example: in a merger case, looking at market definition issues and the substantial lessening of competition test require that the judge have a clear understanding of the economic aspects of competition cases. Competition advocacy and training of judges can address this issue.

46. Another problem area arises when competition laws have created systems where there is no separation of powers between the prosecutor and the judge. The competition institutions perform both functions in many jurisdictions. This scenario is usually looked at with a critical eye, and any review of competition cases is seen as an end process where the judge is looking at the actions of the chief executive or board of commissioners, who could be more knowledgeable in the substance of competition law.

47. UNCTAD, ICN and OECD advocate for separation of powers, where the investigative and adjudicative processes have strictly different roles. In the same sense, the advocacy role of the competition institutions needs to work by establishing channels for training and discussions on matters of competition economics and law. This will enable the judiciary to develop competences in competition matters and will reduce conflict between the judiciary and the competition authority. This will promote an effective way of enhancing coherence and coordination in dealing with competition issues, by having an all-encompassing review of cases.

IV. Strategies for achieving coherence

48. In order to deliver policy coherence, governments need to adopt strategies and principles that promote internal and external coherence in the way they do business. The Netherlands and the United Kingdom have identified five principles which promote purposeful regulation. The United Kingdom's Department for Business Innovation Skills,[20] through the Better Regulation Executive, has been working to simplify regulation by issuing guidelines to stakeholders. The guidelines are aimed at ensuring that regulation encompasses the principles of proportionality, accountability, consistency, transparency, and targeting regulation. Three principles have been adopted and considered as tools to address coherence challenges in developing and enforcing government policies – including their relationship with competition policy. These are transparency actions with some aspects of consistency, and accountability and targeting with some aspects of proportionality.

49. Before discussing the principles in this study, it is important to point out a key issue that can promote policy coherence between competition policy and other government policies. This brings in the important role played by advocacy and sharing of information. Many competition authorities can attest that competition advocacy is an instrumental aspect in competition enforcement. Some scholars have also urged young competition authorities to engage in advocacy activities in their first year, before getting into aggressive enforcement of the substantive provisions of the law. This is seen as a way of making competition law and policy understood by stakeholders, thus enhancing compliance with the law.

A. The role of advocacy

50. Competition advocacy is an important aspect of the work of a competition authority. The UNCTAD peer reviews over the years have consistently contained a recommendation to competition authorities to enhance their effectiveness in enforcing the law as well as their relationship with

[20] See: http://www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery

policymakers within government and with other stakeholders. Public awareness programmes and information dissemination have been identified as key elements in this process. The peer reviews for Armenia, Costa Rica, Indonesia, Jamaica, Kenya, Tunisia and WAEMU all uphold the issue of competition advocacy as necessary to promote effective enforcement and coherence. Member States' responses to UNCTAD's questionnaire uphold the role of advocacy in enhancing coherence (e.g. from Colombia, Japan, Malaysia, Mexico, Morocco, the United States, Zambia and Zimbabwe, among others).

51. Turning specifically to the issue of coherence with other government policies, including sector-specific regulatory bodies, competition advocacy has been identified as a key area needing special attention. Competition authorities have found the promotion of public awareness of competition issues to be a way of promoting a culture of competition and avoiding enforcement duplication and overlaps, and also a major avenue in minimizing administrative burden. Apart from sectoral regulatory authorities, there other entities which require coordination with the competition authorities; these may differ from country to country, but may range from ministries of trade, finance, agriculture, economic planning and health, to consumer associations and chambers of commerce, to cite just a few. In matters of case resolution, the judiciary is also a key policy area for coordination. However, there may be policy incoherences among different policies, and the competition authority has to explain how competition policy fits into the picture. Examples of competition authorities that have used this tool in their endeavour to spread the competition message to stakeholders are South Africa and Turkey.[21]

52. UNCTAD's experience in delivering targeted advocacy and training activities has proved to be very useful to competition enforcement. Specifically, trainings for the judiciary in Egypt, El Salvador, Indonesia, Kenya, Malawi, Trinidad and Tobago, the United Republic of Tanzania, WAEMU and Zambia have been conducted over the years. UNCTAD's training-of-judges programmes address the problem of information asymmetry, and the judges who participated in the courses have provided positive feedback and have appreciated the discussions on the economic analysis of competition cases.

53. One of the challenges that the South African Competition Commission faced in its early stages of operation was incoherence between financial and competition policy. The issue of who has jurisdiction over banking sector mergers came up. The competition law was amended to include the issue of concurrent jurisdiction with sector regulators. A memorandum of understanding was drawn up, spelling out how the concurrent jurisdiction would be affected and how coordination would operate between the two institutions. This established channels of communication between the

[21] ICN report (2010) on the interface between competition policy and other government policies. Prepared by the Turkish Competition Authority and presented at the ninth ICN annual conference in Istanbul.

competition authority and the banking regulator. The South African competition commission has been able to advocate for other memorandums of understanding with the telecommunications, postal and electricity regulator.

B. Transparency

54. Transparency is one of the policy tools that can enhance coherence in policy development and enforcement. It increases the pressure on policymakers to justify interference in the competition process. Since policies are usually formulated under ministerial or other government portfolios, it is important for governments to establish a policy coordination mechanism bringing together policymakers from different ministries or departments, and to create a forum to enable them to share their policy intentions and contents. This would help governments to identify the policy goals that are more likely to be achieved by market-based solutions, and those that are inconsistent with a well-functioning market. As mentioned earlier in this paper, having a one-stop shop for policy coordination and development would be an answer. The United Kingdom's Department for Business Innovation Skills has introduced a system of doing this, by issuing guidelines to government ministries and departments on how to address the administrative burden issues. These guidelines assist policymakers in evaluating their policy proposals and options. The introduction of the Administrative Burden Reduction guidelines report says: "… this document should inform your day-to day work as a policymaker. Reducing administrative burdens on business, the voluntary sector and society as a whole will lead to better policies, better implementation, better compliance, and ultimately, better government." [22] This statement shows that the Government of the United Kingdom has taken the initiative to address policy coordination in various ways through promotion of transparency and exchange of information.

55. In some developing countries, there are established offices that deal with the whole civil service. In Kenya, for example, all ministries report to the head of the civil service on their performance targets and strategic plans. For such countries, a policy coordination unit could be established to deal with policy coherence and coordination issues. This unit would coordinate with the Cabinet office on all matters of policy, and ministries would be required to table their policy proposals for discussions with the relevant stakeholders. In this way, the competition authorities would be in a position to assess proposals for new regulatory policies, to determine whether they raise competition concerns and look for ways of addressing them. This would provide a transparent process for evaluation and determination of the status of regulation in a given country, and would allow competition authorities and other regulatory authorities to discuss and agree on how to deal with anticompetitive effects from specific regulations, including the introduction of

[22] See the website of the Better Regulation Executive at http://www.betterregulation.gov.uk.

sunset clauses, among other options. The responses from member States to UNCTAD's questionnaire gave examples of their governments' efforts to establish consultation channels in the process of policy and law enforcement, including sector regulators.[23]

56. Furthermore, there is a need in policy development and enforcement[24] to have a reasonable amount of predictability in decision-making, especially when it comes to universal service-oriented sectors such as telecommunications, postal services etc. Especially where the licensing of operators and enforcing compliance is concerned, clients must be informed simply and clearly of the conditions of the licence, and the terms should be explained by the regulator.

57. As far as transparency is concerned, regulatory authorities often set higher standards which exclude cheaper potential competitors that may or may not be riskier. For example, they may restrict conveyancing to lawyers, even though persons with a lesser degree of education may be able to perform that task. Another example is setting standards that exclude cheaper options, for example that exclude tourist taxi drivers who are only monolingual. Customers differ in how they value such attributes, so there may be customers who are better-off with cheaper albeit riskier transport options. In some cities, this is solved by having at least two different kinds of taxis, easily identified, in competition. The question is whether such issues should be part of the agenda in coordination meetings between competition and other government agencies.

58. In order to be consistent with competition principles, the conditions should be easily understood and free from ambiguity, so as to attract new entrants into the market, while at the same time being enforceable by the regulator. Transparency also demands that the conditions should be clearly defined regarding when the regulator's role is to advise policymakers and when it is acting as a decision-maker in terms of determining certain conditions, for example issuing operating licences or sanctions.

59. To a considerable extent, the regulator's effectiveness is measured by its ability to accept and include inputs from stakeholders, public policymakers, consumer representatives etc. The regulatory process is expected to be open and participatory. This can be done by publishing the regulator's decisions, the regulation proposals and the rationale behind them from time to time, in order to build confidence and credibility in the role of the regulator. This also enhances coherence with other complementary policy arms of the government.

[23] See responses from Chile, Colombia, Japan, Mexico, the United States and Uruguay at http://www.unctad.org.

[24] http://www.upu.int

C. Accountability

60. Policy coherence can also be enhanced by ensuring that each policy development is accompanied by an accountability statement. A good example is Botswana, where every policy proposal must be presented together with an account of how the policy fits into the macroeconomic framework and the national development plan, and how it impacts on the economy and the people. These proposals are required by the Cabinet before approval is given to the policy and, consequently, to the law. This is aimed at preventing the development of policy for policy's sake. This causes the policy proponents to be driven by an established need, and circumvents policy shopping by vested interest groups.

61. UNCTAD's report produced in 2008 on the independence and accountability of competition authorities [25] points out that although competition authorities are accountable to private sector, both domestic and foreign investors, their enforcement decisions affect the whole economy, they are also accountable to the general public, to consumers and to other stakeholders. The media has its eye on the operations of competition authorities too, and wants to see the outputs and the impact on the economy as a whole. As with other government policies, competition authorities must show accountability in their actions, through coordination of policy development, and through enforcement and other policy actions. This can be done by making policy proposals, enforcement guidelines and legal drafts etc. available to all relevant stakeholders through websites and the press, but most importantly, by sharing information between competition policy enforcers and other government policy proponents.

62. 63. Coherence between different government policy enforcement agencies can be boosted when accountability mechanisms are in place and are followed by each agency. Through information-sharing and the production of annual reports, other agencies will be in a position to point out areas that may be affecting their operations.

D. Targeting

63. Governments should ensure effective policy targeting that addresses their development objectives and needs. Some countries have introduced the concept of multi-sector regulators as a cost-cutting measure. To ensure that such institutions perform effectively, complementary policies are grouped together in a cluster and one regulatory institution comprising different instruments is organized in departments, bureaux etc. Through the "umbrella" regulator, outputs, outcomes and emerging policy impacts can be monitored to ensure that they are realizing their respective policy goals. Proponents of a multi-sector regulatory approach argue that evaluation of policy effectiveness is more feasible, due to the exchange of experiences

[25] TD/B/COM.2/CLP/67.

between sectors, the widened approach to regulation, and the adoption of collective principles. In Latvia, there is a body known as the Public Utilities Commission,[26] which is an "umbrella" regulator for four sectors: energy, telecommunications, the postal sector and the railways. The various sectoral departments operate within the mandates of the respective laws and of government policy.

64. Other examples show that some competition authorities are actually part of a multi-sector regulatory framework. In Zimbabwe, the competition authority also deals with tariff policy issues; in Australia, the competition authority also deals with consumer protection.

65. Another angle of targeting is to consider a situation where, in order to meet the policy objective of infrastructure service to uneconomic consumers, sectoral regulators impose universal service obligations, either by requiring a licensee to supply such consumers, or by charging a fee, or by supplying consumers where the competition is based on a minimum subsidy. These are issues to be considered when discussing coherence.

66. 67. Finally, the core principles of coherence, i.e. advocacy, accountability, transparency and targeting, should be nested within a three-phase framework:

67. (a) *Firstly:* Setting policy objectives and determining which ones are priority objectives, and whether there are incompatibilities between competition policy and other policies. Political commitment expressed at the highest levels and backed by policies that translate commitment into action is critical in order to achieve coherence between competition policy and other government measures. Commitment to coherence also entails working with the private sector, trade unions, consumer associations and educational institutions, among others, to raise public awareness for policy coherence to sustain broader support.

68. (b) *Secondly:* Policy coordination requires working out how policies, or the way they are implemented, can be modified to maximize synergies and minimize incoherence between competition policy and other objectives. These coordination mechanisms should resolve potential conflicts or address inconsistencies between policies, and should allow the politics behind policy decisions to be navigated.

69. (c) *Thirdly:* Effective systems for monitoring, evaluation and reporting would involve monitoring, collecting evidence about the impact of competition and other policies, analysis of the data collected, and reporting back to parliament/congress and the public. This phase provides the evidence base for accountability and for well-informed policymaking and politics.

[26] http://www.sprk.gov.lv

70. Governments in several developed and developing countries have made progress in putting in place a system to achieve coherence between competition policy and other policies. These include Australia, Brazil, Indonesia, the Nordic countries, the Republic of Korea, South Africa and the United Kingdom. For many countries, however, progress on policy coherence between competition policy and other policies has had mixed results – especially countries that do not have a competition law.

V. Issues for discussion

71. A commitment to pursuing policy coherence for development creates challenges and opportunities for developing policy. Listed below are fundamental questions that policymakers have to answer and make hard

choices about, as they seek to enhance policy coherence. These issues need to be looked at in further research and discussions:

(a) What are the best practices in introducing a system that ensures coherence between competition policy and other government policies?

(b) How can the competition agency play a role in promoting coherence between competition law enforcement and competition policy?

(c) How does policy incoherence affect development objectives? Why be concerned with coherence?

(d) Does policy coherence mean that governments should leave markets to regulate themselves? Is there a certain amount of incoherence that is acceptable?

(e) Does coherence mean that all government policies should be in line with competition law and policy? If not, which policies should be in line with the competition law?

(f) How do policymakers avoid industry regulatory capture when formulating policies, and how does the principle on openness and transparency assist?

UNCTAD

Formulation of Competition Law – in Consideration of the Economic and Social Circumstances of Different ASEAN Countries

Introduction

72. Competition refers to rivalry among firms in the marketplace. It also extends to envisaged or potential rivalry. Competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop. Competition policy has two major instruments. The first is a competition law which contains rules to restrict anti-competitive market conduct, as well as an enforcement mechanism, such as an authority. The second major instrument, particularly important in the interface with other economic policies, is competition advocacy.

73. In recent years, there has been a trend towards convergence in the scope, coverage and enforcement of competition laws and policies worldwide. This is due to (a) the widespread trend towards liberalization of markets and adoption of competition policies; (b) greater emphasis upon consumer welfare, efficiency and competitiveness objectives in the provision or application of competition laws; (c) greater similarity in economic analyses and enforcement techniques; (d) the universal condemnation of collusive practices; (e) tightening up of enforcement; (f) a more prominent role for competition authorities in advocating competition principles in the application of other governmental policies; and (g) the strengthening of international consultations and cooperation.

74. However, there remain many important differences among competition laws and policies, including in (a) the priority attached to competition policy vis-à-vis other policies; (b) the importance attached to objectives other than consumer welfare or efficiency under many competition laws; (c) legal approaches to the control of anti-competitive practices; (d) analytical techniques utilized; (e) substantive rules applicable in particular to vertical restraints, abuses of dominant positions, mergers, joint ventures and interlocks; (f) the structure or scope of *de minimis*, intellectual property or other types of exemptions; (g) enforcement capabilities and actual strength of enforcement; (h) the legal doctrines under which competition laws are applied outside national territory; (i) the actual ability to apply them or frequency of application; (j) the extent to which different countries participate in international cooperation in this area; and (k) regulatory restrictions upon market entry.

75. Despite these differences, there are now sufficiently broad similarities in the objectives, content and application of competition laws and policies to form the substantive basis for designing appropriate competition laws that reflect the specific circumstances of developing countries and their enforcement capabilities.

76. Some national laws in developing countries and economies in transition have followed developed country models. A significant number of laws in Central and Eastern Europe, moreover, have replicated the main provisions of the competition rules of the European Union (EU). This is especially so for economies in transition that have entered association agreements with the EU and that aspire to full EU membership. For other countries, the UNCTAD Model

Law on Competition (the Model Law) may provide a model. The Model Law reflects recent trends in competition legislation worldwide and is supplemented by related Commentaries that have proved to be important for the process. The text was also informed by the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the United Nations General

Assembly at its thirty-fifth session on 5 December 1980 by resolution 35/63 (the United Nations Set), and has been revised and redesigned to make it reader-friendly, as called for in the tenth session of the Intergovernmental Group of Experts, which acted as a preparatory meeting for the Sixth United Nations Review Conference.

77. The United Nations Set emphasizes the competition policy goal of promoting economic development, and many developing countries view competition as having this role. In this context, "competition" is an intermediate objective and economic development is a final goal. Other relatively common objectives are the promotion of small and medium-sized enterprises (SMEs), restriction of undue concentration of economic power and ensuring fair competition. Public interest objectives – which may be relevant to development objectives – are fairly widespread among developing countries, but also present in some developed countries' competition laws.

I. The appropriate design of competition policy and law and their institutional framework in developing countries and economies in transition

78. To be effective, competition system design requires careful pre-reform assessment of existing conditions in the country and attention to how the country will implement the competition policy. A careful assessment of initial conditions not only will influence decisions about the substantive content of the competition law, but also will identify weaknesses in supporting institutions and offer plans to enhance their capability.

79. Decisions about the appropriate design of competition policy in developing countries must therefore acknowledge the distinctive features of their economic, social and cultural environment. Available information shows that, in most developing countries, implementation capabilities do not match up the demands of a modern competition system.

80. Concern about the mismatch between institutional capabilities and the demands of an effective competition policy are part of a wider challenge that developing countries face in introducing economic and legal reforms. These include the protection of property rights, setting up a system of enforcing contracts, creating legal frameworks for the establishment and dissolution of business entities and enhancing financial institutions and banks.

81. Institutions – both formal, such as legal frameworks, and informal – are part of the unnoticed but necessary architecture of markets. Institutional architecture

surrounding well-functioning markets (including those for capital and labour) play a critical role for economic development and efficiency. Unlike developed countries, many developing economies do not have well-functioning factor markets – such as stock exchanges and bond markets – and have often been unable to create institutions that support the operation of markets, such as bankruptcy codes, efficient contract enforcement and the like. These "missing markets" and "missing institutions" alter the optimal, and perhaps feasible, policies with respect to competition in an economy. At the same time, these missing markets and institutions have implications for optimal enforcement of competition law.

82. Different countries will apply different approaches according to their circumstances, and it cannot be expected that an approach that works for one country could be imposed on another. The powerful forces that shape nations' competition and regulatory systems are often unique to particular nations, and national differences impose significant limitations on harmonization. However, the experience gained so far with formulation and the enforcement of competition law and policy in developed and developing countries suggests a number of critical issues that seem reasonably certain to apply in most developing countries and economies in transition. These issues are discussed below.

A. Independence of the competition authority

83. There is widespread agreement that independent regulators are at the core of regulatory governance in liberalized economies. Indeed, the UNCTAD Model Law on Competition is formulated on the assumption that the most efficient type of administrative authority for competition enforcement is likely to be one that (a) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (b) provides the possibility of recourse to a higher judicial body.

84. It is generally accepted that decisions by competition authorities should be based on objective evidence, that those authorities should maintain a consistent respect for market principles, and that the decision-making process should be neutral and transparent. The reasoning behind this view is that sound policy outcomes are assured only when decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups. This reasoning is typically translated as a requirement for competition authorities to be insulated from undue political interference. In practical terms, this necessitates a separation of policy implementation from policymaking and a departure from the traditional structure of the machinery of Government. Thus, Government is compelled to cede control over day-to-day functions and decision-making to the authority. As a direct consequence, private interest groups are denied the possibility to lobby ministers and lose the means for gaining favourable treatment.

85. In addition to prescribing the authority's structure, enabling legislation should also give legal meaning to the authorities' operational independence by prescribing functions, powers, the manner in which members of management

and staff are to be appointed, their tenure and removal, and how the body is to be financed. Likewise, how the body shall relate to the executive and legislature should also be prescribed. These attributes assure organizational autonomy and establish the arms-length relationship with political authorities.

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

87. Since the competition authority has a legal obligation to correctly exercise this discretion, it is customary for the legislature to resort to judicial review to police the enforcement actions of the competition authority. The enabling legislation will often prescribe the role and authority of the courts in the enforcement of the competition legislation.

88. It is interesting to note that, in some cases, a competition authority might start out as a ministerial department but later gain more independence (e.g. Tunisia's council and Brazil's agencies) symptomatic of a dynamic and evolutionary process in play. There are also instances where the legal independence of the competition authority has been flouted. The Kenyan Monopolies and Prices Control Commission was part of the Ministry of Finance, but after UNCTAD peer review, a new law was drafted prescribing an autonomous institutional set up for the Commission. The draft bill is in Parliament.

B. Judicial review of competition cases

89. In most jurisdictions, legislators elect to police by judicial review. It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favour a procedural review of competition cases whereby the appeal body confines itself to a consideration of the law, including a review of procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration *de novo* of both evidence and legal arguments. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. Grounds for review will often include lack of jurisdiction, procedural failure and error of law, defective reasons, manifest error of appreciation, and error of fact. In this context, judicial review is generally seen as an end-stage process where judgement is passed on results or actions already taken – i.e. decisions already taken by the competition authority in line with whether decision-making powers are vested in the chief executive, a board of commissioners or a separate quasi-judicial body in the form of a specialized competition tribunal (e.g. Brazil, Peru,

South Africa and the United Kingdom). The International Competition Network (ICN) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated.

90. In the context of judicial review, it is notable that in many countries judicial review is either confined to administrative courts or the administrative court is the court of first instance (e.g. the Bolivarian Republic of Venezuela, Colombia, Croatia, Latvia, Tunisia and Turkey). In some jurisdictions, specialized competition appeal courts have been constituted (e.g. Denmark, Singapore, South Africa and the United Kingdom). There are cases in which the decisions of the competition review can be overturned by the executive in exceptional situations, e.g. Croatia (see TD/RBP/CONF.7/5).

C. Staffing and financial resources of the competition authority

91. Despite the apparent prevalence of autonomous agencies in many developing countries, the less favourable economic and fiscal conditions have exacerbated tensions and brought to light a number of pitfalls related to the creation of public sector bodies in the context of a wide gap between resource need and availability. The pitfalls are linked in the main to skills shortages, low public sector pay, risks of corruption and capture, tensions between the minister responsible for the competition policy domain and the competition authority, and weak accountability.

92. In most developing countries, civil servants are generally paid less than their private sector equivalents. Many developing countries have experienced declines in the real wage paid to public sector employees during recent years. The possibilities of recruiting and retaining highly qualified personnel in the public service, and especially in specialized areas such as competition enforcement, is thus negatively affected. Capable civil servants will tend to exit the public sector when their training and qualifications make them attractive to potential private sector employers.

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

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

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

D. Exemptions and authorizations

96. While “best practice” advice suggests that competition law should apply to all sectors and firms in the economy engaged in commercial activity, in practice various types of exemptions are granted for social, economic and political reasons. The granting of exemptions, however, does not necessarily imply the weakening of competition law enforcement. On the contrary, granting exemptions may further various objectives of competition law and industrial policy. One example is research and development (R&D).

97. In many jurisdictions, certain R&D activities may benefit from exemptions under competition law. R&D may aim at activities ranging from pure research to improving production processes of specific products. These may result in new products and lower prices, which increase consumer choice and consumer welfare. In the

pharmaceuticals and electronics sectors, for example, firms cooperate in R&D but compete vigorously in the pricing and sale of their respective products. In most instances, the exemptions are activity- and time-limited and apply only to the extent necessary for that cooperation. From a development policy perspective, R&D exemptions promote the objective of restructuring the economy towards more technology- or knowledge-intensive industries.

E. Competition advocacy

98. In addition to enforcement functions, competition authorities have advocacy functions. Other than business and the general public, Government as a whole (including other regulatory bodies) is a key target of competition advocacy, particularly as it relates to the shaping of competition policy and bringing about market-friendly reforms throughout the economy. Accordingly, the ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation is another attribute by which the operational independence of competition authorities is assessed. Many laws give competition authorities the responsibility of advising the Government on the impact on competition of proposed new laws and regulations. For example, in India, the Governments have the option to seek the commission’s opinion when considering competition policy matters, while the autonomous government of Andalusia, Spain is obliged by law to seek an opinion. However, the opinions of the commission are not binding on the minister. Similarly, in Tunisia, the minister may consult the Competition Council on all new proposals for legislation and any other competition matters, but the opinions of the council are binding on the minister.

99. Competition advocacy is a tool to enhance voluntary compliance and policy coordination. Advocacy is a core activity, especially for young competition authorities where stakeholders need to be informed of the existence and objectives of a new competition law, and their rights and obligations.

100. Competition issues may arise in the course of economic policy formulation and implementation. Therefore, competition agencies should sensitize policymakers on the possible synergies and/or tensions which may arise from certain policy measures, including but not limited to the creation and/or protection of national champions.

F. Relationship with sector regulators

101. Allowing private sector participation in a country's important sectors is creating increasing opportunities for and promotion of competition. As a result of technological advances, traditional sectors are converging with other sectors and the notion of what constitutes a natural monopoly is being revised. Despite these developments, however, a fair amount of government intervention has proved desirable, notwithstanding competition law. Competition authorities and sector regulators coexist under various conditions. Countries approach the question of regulated sectors differently, but some common choices include excluding some or all regulated sectors from the purview of competition law (e.g. Colombia) or awarding concurrent jurisdiction to the competition authority and the sector regulator over

competition matters in some or all sectors (e.g. South Africa and the. United Kingdom). The variety of approaches can generally be classified into at least five permutations. The dominant pattern of distributing competencies between regulators and the competition authority is rarely one whereby competition authorities replace sector-specific regulators. Similar to competition authorities, it is desirable that sector regulators assume obligations regarding independence and accountability

102. Some areas of the economy remain susceptible to market failures and the role of the sector regulator remains relevant. See below. Despite a common goal, friction may arise as a result of differences in the prioritization of objectives and the methods used by sector regulators and the competition authority. Article 7 of the UNCTAD Model Law on the relationship between competition authority and regulatory bodies, including sectoral regulators, is one source of inspiration for governments grappling with this issue. The Model Law states that competition authorities should assess regulatory barriers to competition incorporated in economic and administrative regulations from an economic perspective, including for general interest reasons.

103. One of the key guiding principles that filters through all the generalizations listed above is that any particular form of regulation should be carried out at the level of governance consistent with regulatory effectiveness. Other principles that can facilitate this application are (a) principles that ensure access to the information necessary for making sound judgements (transparency); (b) the participation by all parties likely to be affected by a regulation (due process, e.g.

competition advocacy); and (c) the elimination of unnecessary costs due to over-regulation (proportionality).

G. Privatization, concessions and competition policy

104. Economic reform in many countries includes the introduction of competition into markets with former government monopolies. There is a temptation to transform public monopolies into private ones. An important function of the competition agency is to advocate for competitive structures and competition-enhancing regulation. It is far easier to impose structural change – such as vertical separation and horizontal splits to create competitors – before privatization than afterwards. Private property owners will resist value-destroying structural change. Thus, starting the reform process with structural change is key.

105. Competition law and policies are necessary to ensure that the potential benefits of privatization are realized. Competition issues need to be taken into account at the various stages of privatization, including its design, the award process and its execution, as well as in the regulatory framework for the markets concerned. Only if potential entrants have to compete against each other will they will be incentivized to offer more favourable conditions.

106. After privatization is completed, potential anti-competitive conduct should be constrained. In particular with respect to infrastructure services, concessions, for example, frequently confer a dominant market position. An infrastructure operator, whether public or private, has little incentive to lower prices or improve quality in such a situation. Competition law and policy, often combined with sector-specific regulation or concession contract terms, help to constrain anti-competitive conduct. Regulation and contract terms typically impose obligations with respect to quality, coverage and investments. Where competition in service provision is possible – as in

mobile telephony – competitive pressure helps to maximize the benefits of private-sector participation in terms of investments undertaken, efficiency gains realized, quality and coverage of the services provided and the tariff level.

107. The design of privatization should allow for as much competition as possible. This means that the competition authority needs to get involved early in the process. It can do so by competition advocacy and by assisting in designing the structure of the privatization to maximize post-award competition. Advice on the most appropriate award criteria or the design of a public auction may be rendered by the competition authority, as well. In Chile, for example, the *Tribunal de la Defensa de la Libre Competencia* intervened in the award of seven licences for the Santiago–Lima air route. In order to enhance competition on that route, the tribunal obliged the concessioning authority not to award more than 75 per cent of the routes to the same bidder in a first round of the public auction. Only if no bidders participated in this first round would that limitation not apply to the second round. Advice on sector-specific regulation may also be required.

H. Public interest and competition policy

108. A number of jurisdictions have devised different procedures to outsource decisions relating to non-efficiency considerations, usually in the form of judicial (e.g. the United States) or ministerial powers to designate exemptions. Alternatively, other jurisdictions have procedures to import non-efficiency considerations in a sanitized fashion articulated in the competition law as public interest provisions that oblige the competition authority to either apply a specific public interest test (e.g. the European Union and South Africa) or grant the minister specific circumscribed powers (e.g. Italy, Jamaica, Singapore and the United Kingdom), frequently in respect of the review of mergers and acquisitions. In many cases, public interest provisions exist in some form or another, but the competition authority or the minister refrains completely from applying them (e.g. Italy) or they are seldom activated.

109. It is also important to recognize that decisions on competition law priorities are not necessarily one-off because countries often adjust their national laws or priorities in line with changing circumstances, including changes in Governments. In this context, some competition laws include a dispensation for the ministry responsible for the competition policy portfolio to issue directives from time to time in the form of general policy guidelines (e.g. Pakistan, Sweden and Zimbabwe). In some jurisdictions, successive ministers have refrained completely from exercising this dispensation (e.g. Zimbabwe).

I. Market size and regulation

110. A frequently cited argument relevant to developing countries and small economies (including developed countries) is that market-driven outcomes do not necessarily guarantee efficient and positive outcomes for consumer welfare because the origins of many competition problems in small markets are structural in nature. This argument reinforces not only the idea that there might be greater reliance on public interest provisions in competition laws in developing and small economies, but also

points to the greater reliance on sector regulation with significant parts of the economy not yet open to free competition.

J. Informal sectors

111. In many developing countries, an important part of productive entities is informal. They are not registered businesses and they do not pay taxes. However, informal businesses often generate a significant portion of output in many sectors. This informality is partly attributed to the existence of cumbersome government regulations, including barriers to entry, and lack of access to infrastructure, banking training, or law enforcement. The inability to access the courts limits them from entering into commercial contractual transactions.

112. The extent to which informality affects competition law enforcement would differ from one competition authority to the other. In a majority of countries, competition laws apply to economic activity carried out by the informal sector. However, the application of the competition law may vary and the results may be diverse. Some competition authorities have taken enforcement actions against what they consider anti-competitive conduct of the informal sector. They have brought enforcement actions against firms that evaded taxes and thus competed unfairly with formal firms. However, enforcement actions by competition authorities to combat the informal sector remain a challenge.

113. To address the problems of informality and the design of a competition law, governments need to adopt strong policy measures for example, advocacy programmes aimed at communicating the benefits of operating in the formal markets. They need, among others, to identify regulations that restrict competition, strengthen tax collection and regulatory enforcement improving access to credit and procurement opportunities. This would enable informal firms to graduate to formal businesses where competition enforcement can be more effectively enforced.

K. Regional groupings and common competition rules

114. Regional economic integration in the developing is characterized by complex and overlapping memberships and subsets within certain groupings.

115. The emerging trend is that more and more regional groupings are looking for ways and means of developing regional competition rules and encouraging their members to enact domestic laws.

116. Decisions adopted by member States of a regional grouping may have cross-border effects. When enforcement is centralized, it may reduce or eliminate externalities. Therefore, there are economies of scale and transaction cost savings due to uniform application of common competition rules by supranational authorities acting as one-stop shops in dealing with anticompetitive cases.

117. There are concerns about the capacity to implement community competition rules. Despite political will at the regional level, institutional weaknesses, small size and the scarcity of human resources in some member States affect implementation capacity. For example, the Caribbean Community (CARICOM) Competition Commission, which was established on 19 January 2008, has nine of its member

States that have yet to adopt a competition law. (Belize, Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines). Because they are very small islands with limited human and financial resources, they decided that the optimum size for a competition agency is a subregional institution representing the Organization of Eastern Caribbean States within CARICOM.

II. Assessing the impact of competition law and policy enforcement on development

A. Impact of competition policy and its enforcement

118.. Developing countries are beset by a number of barriers to competition. There is an urgent need for an effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries. Some of these factors include large informal sectors, problems relating to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints. It is important for each country to tailor its implementation of evaluation initiatives to promote competition while operating within these constraints.

119. These features suggest that uncompetitive markets are an even greater problem in developing countries. The need for effective competition law enforcement is great, but there are serious constraints on effective policy implementation.

120. Evaluation of the impact of competition agency activities can assist in addressing the more severe political economy problems, thereby helping provide legitimacy for the policy system. On the other hand, capacity constraints within developing countries hamper the proper performance of these evaluations. Nevertheless, when conducted appropriately in these contexts, evaluation can help to provide insights into the country-specific constraints to competition in these jurisdictions arising out of the characteristics listed above, as well as suggesting potential remedies.

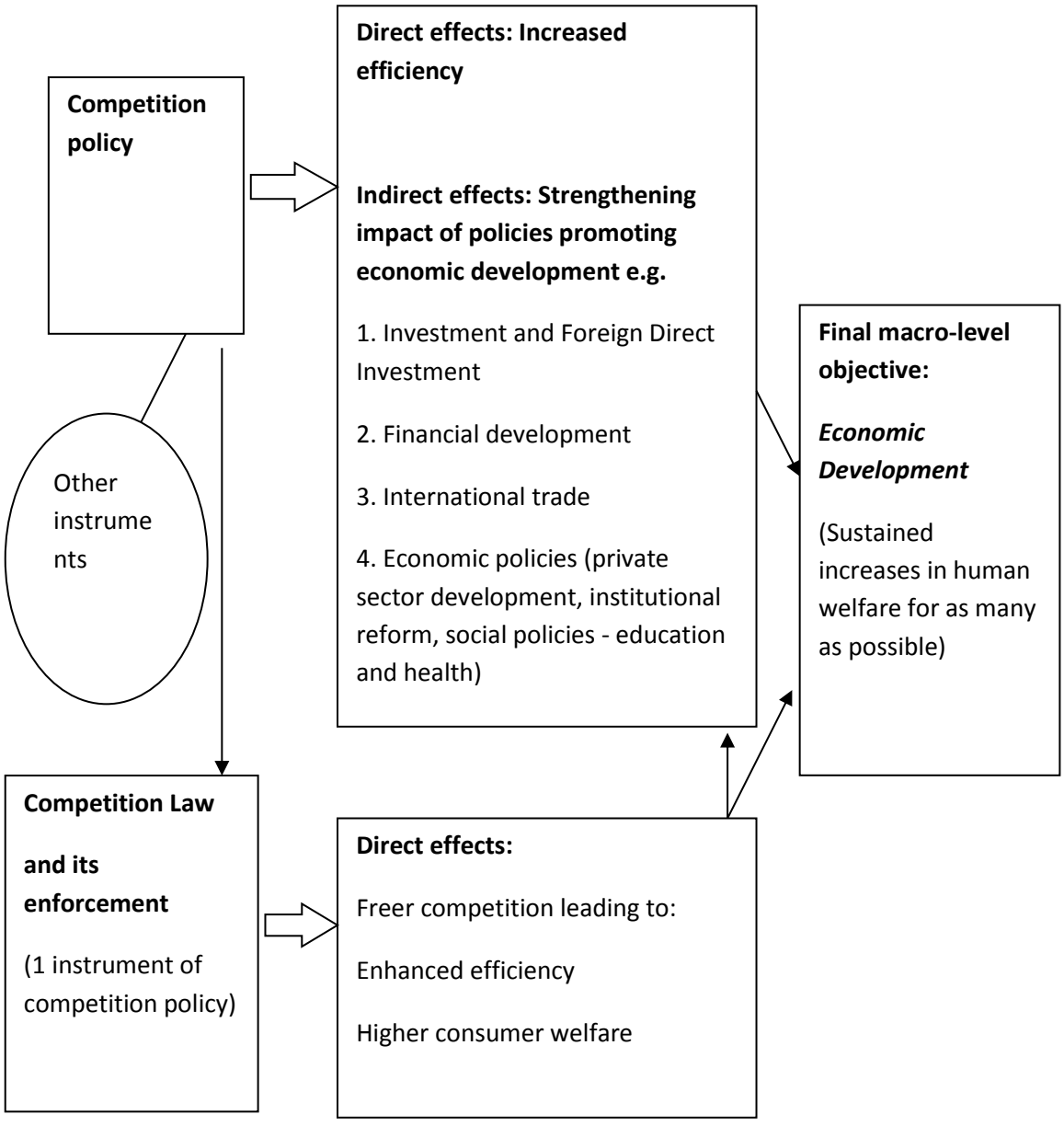
121. Consideration of the various above-mentioned criteria may be an important factor in developing country objectives. The priorities of developing countries may be quite different from those of developed countries. However, there is a risk of asking too much, when other policy instruments may be the most appropriate tools for achieving certain ends. This strengthens the case for evaluation. It is necessary to understand the effects of a country's programme of competition law enforcement in order to determine the potential and limitations of competition policy.

122. It is difficult to assess the impact of regulatory enforcement action on social phenomena as wide-ranging as compliance or non-compliance with competition laws. Empirical research clearly shows that a range of factors beyond enforcement are likely to affect levels of development. It is therefore difficult to disentangle the impact of enforcement action on development from other factors that affect economic

development. Even more difficult is the fact that "development" itself is a complex concept.[27]

Figure 1

Relationships between competition law, competition policy and economic development



[27] Economic development is a process that involves increasing human welfare over time which necessitates among other things, increasing the quantity consumed, quality and variety of consumer goods over time.

123. There is an argument that “competition policy is both a direct contributor in its own right, as well as an indirect contributor through the enhancement of other policies”. Figure 1 shows that CLP can have direct effects on economic development. One of the criteria by which one could judge the success of an enforcement action is the extent to which it helps build a shared understanding between regulator and “regulatee” of what compliance means and how it should be put into practice. In other words, the compliance impact of enforcement action cannot be judged merely by whether the regulator wins a judgment in court. It is argued that enforcement action must be judged by the extent to which it helps bring business norms and practices into alignment with regulatory expectations. Indeed, enforcement action is most successful in terms of its “compliance” impact, if it achieves not only alignment between business and regulatory understanding of what a particular regulatory rule requires in a particular situation but also a shared understanding of, if not commitment to the goals and purposes underlying the relevant regulatory rules. A shared understanding of the goals and purposes of a regulatory regime is more likely to lead to the same interpretation of the rules in different circumstances, and a shared commitment to those same goals creates an opportunity for habitual compliance.

124. The first set of criteria on which one might choose to focus is “input” criteria: These refer to the set of managerial processes and systems by which a country implements its competition regime. In this respect, one might choose to focus on case selection or staff turnover, etc., or other *sui generis* measures of agency effectiveness the authority determines to be significant.

125. Trying to weight the various input criteria by their relative importance requires an understanding of how the various criteria relate to effects on economic outcomes. There is a small body of literature that attempts to devise means of measuring the institutional capacities of competition authorities.

126. Another important criterion for evaluating the effectiveness of a competition policy authority is to compare the outputs it achieves with the stated goals of its competition policy regime. This is normally set out in the preamble of the legislation enacting the country’s competition regime. Accordingly, one yardstick for evaluating the effectiveness of the competition agency would be to examine continuously whether the stated goals of the legislation are being met by the authority’s enforcement activities. This idea was also taken into account in the case of Tunisia, which states that effectiveness can be measured by ascertaining to what extent the authority has been able to fulfil its mission. Consideration has to be given to the impact that the authority’s existence actually has on the competitive situation in the country. If the mission is to improve competitiveness and the market is still dominated by a few companies, it would indeed be legitimate to question the authority’s effectiveness.

127. Accordingly, an agency might instead choose to focus on “output” criteria, which contain some kind of attempt to include quantification of the success of the interventions such as, for example, an effort to quantify the cost savings arising from successful investigations and competition law infringements deterred.

128.The types of study an authority might undertake in this regard can vary from back-of-the-envelope calculation to detailed econometric analysis. The

appropriate extent of quantification varies with the importance of the case and the capacity of the authority, but this does not undermine the fact that some measure of quantification is to be welcomed, if only because it gives the authority an understanding of the orders of magnitude involved. Even a brief calculation can feed into the authority's future enforcement priorities and strategic planning.

129. For example, the EC has reported in its "Merger Remedies Study" that overall effectiveness can be observed by looking at the remedies imposed, as this can reflect the degree of efficiency in reaching the expected results. Here, effectiveness can be quantified in terms of the percentage of remedies that have attained their intended objectives. The study showed that 57 per cent of the remedies analysed were fully active, i.e. they had fulfilled their intended objective, 24 per cent were only partially active and seven per cent were ineffective, as the intended objective was not satisfied.

130. With this type of approach, one would try to estimate the benefit of the competition regime by summing the positive outcomes of individual cases. However, this excludes the deterrent benefits from the possession of competition law, which can be quite sizeable. On the other hand, it also excludes the number of pro-competitive actions that were not undertaken out of fear of wrongful prosecution by means of the competition law. Hence, in jurisdictions where the application of the law is uneven and transparency of decision making with respect to competition is not clear, it can be very difficult to quantify the impact of competition by means of this "bottom-up" approach.

131.. Similar difficulties arise when one tries to estimate the benefits of competition law enforcement at the country level. Again in this instance, it is difficult to isolate the impact of competition law and its enforcement. This is certainly extremely difficult to do at the level of the country competition authority, as many factors may affect the mark-up or level of manufacturing productivity, aside simply from the effectiveness of the competition regime. Nonetheless, there are interesting insights to be gained from the study of partial equilibriums, and suggestive evidence can be adduced from such studies of specific interventions to support its positive impact on economic growth, if not quantify it exactly.

132.. It might be difficult to assess the effectiveness of certain competition authorities due to their recent establishment and the limited number of cases that have reached the execution stage. This is the case with Tunisia, for example, where the importance of objective evaluation of the work carried out by the authority was underscored. This objective evaluation should be linked to certain specific criteria such as, for example, the time-frame in which the cases are handled and the number of undertakings that have been brought into conformity following an intervention by the competition authority.

133.. If a competition authority has been able to make recommendations or submit proposals to the Government concerning competition policy issues that have had a positive impact on the economy, this is also an indication of effectiveness. The competition authority in Tunisia has, for example, played a proactive role and paved the way for various reforms connected to competition legislation.

134. Another potential criterion for determining whether the authority is effective, or is at least perceived to be so, is to consider the attitude of important stakeholders. It is important to note in this respect that determining the relevant "stakeholders" (or at least determining what weights one assigns to their relevant interests) is to some extent determined by the stated goals of the legislation – if the competition legislation gives precedence to consumer interests then this group may be the primary stakeholder. If promoting or protecting small businesses is the purpose of the legislation, then this group is given priority, and so forth.

B. Review of selected empirical studies

1. Monopolization and abuse of dominance

135. A few studies on competition in developing and developed countries are cited in a 2002 UNCTAD working paper. One study using persistence of profits and another study using firm turnover (entry and exit) indicate that the level of competition in developing and transition economies is about the same as in developed economies. A review of manufacturers in developing countries "did not support the notion that LDC manufacturers are relatively stagnant and inefficient", again undermining the idea that competition is less intense in developing countries.

136. The 2007 Global Competitiveness Report pointed out that nations' prosperity increases with their productivity. The report contained indicators that were correlated with per capita gross domestic product (GDP). In summary, for low-income countries, mobile phones, high-quality electricity supply, Internet access, trade barriers, other infrastructure and local competition affect per capita GDP. For middle-income countries, these factors plus patents, the absence of market dominance by business groups, and the effectiveness of antitrust policy affect per capita GDP.

137. The Organization for Economic Cooperation and Development (OECD) has said, "Developing and transition economies may have structural weaknesses that make them particularly vulnerable to private anticompetitive conduct. The following factors, where they are found, are likely to have a negative impact on competitive pressure:

(a) Greater proportion of local markets insulated from trade liberalization measures;

(b) Limited access to essential inputs;

(c) More limited distribution channels;

(d) More dependence on import (basic industrial inputs) and/or exports (for growth);

(e) Greater incidence of administrative/institutional barriers to imports;

(f) Weak capital market."

138.. Transition from State monopoly to competition may generate further scope for exclusionary abuses of dominance. Also according to OECD, "A

former monopolist being challenged by new entrants may have 'inherited' advantages from the former position, like a strong financial position, control of certain network facilities, connections and political support, or established relations to suppliers and

customers. Such a dominant firm or 'incumbent operator' may find many ways to make life difficult for new entrants and in the end exclude competitors effectively. In many countries that have liberalized markets, the competition law enforcer finds itself inundated by endless cases of alleged abuse of dominance resulting from the imbalance between a former monopolist and new entrants." The Indian competition law, article 19 (4)(g) indicates awareness of this issue, a factor that may be considered in determining whether an enterprise that enjoys a dominant position is "monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise".

139. Dutz argues that competition authorities in developing and transition countries should focus their anti-abuse of dominance efforts on abuses that foreclose access to services that are essential to business. The idea is to reduce barriers to new entrepreneurs and SMEs. Examples of local essential inputs are "real estate, banking, transport, distribution warehouses, communications and professional business services".

140. Fox states that, "Anti-competitive practices are rife in areas of physical and business necessity, such as milk, soft drinks, beer, chicken, sugar, cotton, paper, aluminium, steel, chemicals (for fertilizer), telecommunications including mobile services, cement and other construction materials, transportation including trucking, shipping, and port access, industrial gases, banking, insurance, coal and electricity. Many of the practices are local, many are facilitated by the Government, and many others are offshore, resulting in inbound restraints." She argues that intervention against entry-blocking or discriminatory conduct by State-owned or State-privileged enterprises may have more benefits and fewer costs than anti-abuse intervention in developed countries.

2. Hardcore cartels

141. A striking feature of these cases is that many are clustered within a few economic sectors. For example, it seems that cement cartels exist almost everywhere. It is a rare country that has an anti-cartel programme and has not prosecuted one or more cement cartels. More generally, construction materials and construction services seem to be fertile ground for cartel operators.

142. The reasons for the high incidence of cartel activity in these sectors are fairly obvious. Construction materials, especially cement, are homogeneous products. Producers are differentiated almost entirely by price. This homogeneity makes it easier for sellers to agree on the terms of a cartel agreement. Importantly, these products and services are often sold by means of bids or tenders to government or public bodies. These buyers are particularly vulnerable to bid rigging activity, as is discussed further below.

143. There have been a relatively large number of cartel cases and investigations in the petroleum sector, in particular that of petrol (gasoline). There may be several reasons for the high incidence of petrol cases. Petrol is an important consumer product – for many, a necessity. Also, petrol prices have generally risen in the past few years, and while this is doubtless mostly because of increasing demand, the suspicion exists that cartels are at least partly responsible. Perhaps most important, current retail petrol prices are readily visible. This could facilitate an agreement among petrol sellers. It also could alert both consumers and competition officials to the possible existence of a cartel.

144. But here a word of caution is in order. It is axiomatic that mere simultaneous movement of prices, especially for a homogeneous product such as petrol, is not by itself sufficient to prove an unlawful agreement. Such price activity could be equally consistent with active competition. In almost all countries, there must be more evidence than just parallel pricing to support a cartel prosecution. Indeed, in some countries, investigations of possible price fixing in petrol have failed because such additional evidence was lacking

145. Food products also seem to be disproportionately represented in the cases described in this report. Again, a combination of factors may be responsible. Like petrol, food is an important consumer product. It can be a homogeneous product, especially at the producer/processor level. Price information may be more readily available to both sellers and buyers in this sector. Other sectors that appear frequently in cartel cases include transportation services and professional services.

146. But the most frequently occurring common feature in the cases above is bid rigging on sales to government agencies. Government purchasing agents may not recognize suspicious bidding activity, and procedures that they use may lack safeguards against bid rigging. In some cases, there is even the danger that procurement procedures might be subject to corruption. The openness of public procurement can also facilitate the formation and monitoring of cartel agreements.

III. Lessons for the future: how to improve competition policy formulation and enforcement in developing countries and other countries

147. Ways to improve competition policy formulation and enforcement include:

(a) **Develop a tailor-made competition law and policy and its enforcement framework.** Developing countries are beset by a number of barriers to competition. There is an urgent need for an effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries. Some of these factors include large informal sectors, problems relating to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints. It is therefore important for each

country to tailor its competition law and its implementation within these constraints;

(b) **Work to develop a competition culture.** The themes developed above suggest several ways in which competition law enforcement can be strengthened. First is the development of a "competition culture" – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. The process is ongoing; it requires communication with all parts of society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials, and judges – about the benefits of competitive markets to them and to their country's economy;

(c) **Encourage complaint submission.** Educated consumers and businesspeople will be more alert to possible anti-competitive activity and more willing to report it. As was noted above, complaints to the competition agency have been, and in developing countries are likely to continue to be, the most common source of information about previously unknown cartels. It must ensure that the identity of complainants is protected as confidential information to the fullest extent possible;

(d) **Begin to establish a leniency programme.** The word "begin" is important. One cannot expect the mere creation of a leniency programme to produce immediate results for the agency. The competition agency must first establish credibility – that it will discover and successfully prosecute cartels, and that it will severely punish those that are prosecuted. When this credibility is established, properly structured leniency programme will succeed;

(e) **Focus initial investigative efforts on sectors where cartel conduct is most likely.** There is now strong evidence that, while cartels can occur in any economic sector, they are more likely to occur in some sectors than in others, especially in the case of developing countries. The new competition agency should focus its efforts on those sectors. One area in which sector studies could be fruitful, however, is public procurement. A study of bidding behaviour in situations where bid rigging is suspected might identify patterns suggesting customer allocation or bid rotation. Such studies should be conducted with the assistance of a knowledgeable procurement official who can interpret the data correctly;

(f) **Begin to impose strong sanctions against cartel conduct.** An indispensable element of a successful anti-cartel programme is an aggressive sanctioning policy. Sanctions can take several forms, including administrative fines against businesses and natural persons; criminal sanctions, including fines and imprisonment; and recovery of compensatory damages by victims of a cartel. Administrative fines against businesses are the most common. Pecuniary sanctions should be severe enough to eliminate a cartel's gains. Consequently, there is a growing awareness of the need to also assess sanctions against culpable individuals in cartel cases. If they face personal sanctions, whether imprisonment (in a minority of countries) or large fines, they have additional reasons not to participate in cartel activity;

(g) **Educate the public about the harm caused by cartels.** Countries new to competition law enforcement probably cannot immediately begin to impose strong sanctions in their first cases. Some business operators will have been

unaware that their conduct was unlawful, or formation of the cartel may have predated the enactment of the first competition law. Courts may be unwilling to approve strong sanctions when they are unfamiliar with competition policy or competition cases. Building support for strong sanctions in cartel cases requires a programme of education regarding the harm that cartels cause;

(h) **Engage in international cooperation in the enforcement of competition law effort.** The international competition community is working on means of achieving greater cooperation in fighting these secret, multinational agreements. But the effort goes well beyond that. International organizations, including UNCTAD and OECD, have long been active in studying and reporting on hardcore cartels. Also, for the past seven years, representatives of the competition agencies have met annually to discuss anti-cartel enforcement techniques. The International Competition Network has embarked on a programme to address the challenges to anti-cartel enforcement posed by international and domestic cartels. Developing countries will be limited, if only by resource constraints, in their ability to participate in these international forums. But almost the entire work product generated in these forums is publicly available, usually on the Internet. These resources are a rich source of information for the less experienced competition agency;

(i) **Work to develop a relationship with the courts that will hear appeals of cartel cases.** It is inevitable that, as a competition agency becomes more active in prosecuting cartels and other violations of the competition law, some of its cases will be appealed. Experience across countries indicates that it is almost as inevitable that the agency will suffer setbacks in some of these appeals. Competition cases are unique in many ways, and judges will not have had experience with them. Initially, they will tend to avoid deciding cases on their merits; instead, they will concentrate on procedural issues, with which they are more familiar, and reverse some cases on that basis. In particular, in cartel cases, they may be reluctant to uphold large fines assessed by the competition agency;

(j) **Conduct peer reviews.** UNCTAD's Voluntary Peer Review on Competition Policy is dedicated to enhancing the quality and effectiveness of the competition policy enforcement framework in developing countries and economies in transition. It involves the scrutiny of competition policy as embodied in the competition law and reflects on the effectiveness of institutions and institutional arrangements in enforcing competition law. By agreeing to show its work to others, a country/institution that volunteers for a Competition Peer Review engages in a self-assessment that helps pinpoint strengths and weaknesses in an environment that allows for non-adversarial external participation. The inclusive nature of the consultations boosts the confidence of other stakeholders in the reviewed institution and signals an outward rather than inward orientation.

UNCTAD

Independence and accountability of competition authorities

Introduction

The debate on independence and accountability is an enduring feature in the creation and lifetime of a competition authority. It first appears during the drafting of a competition law and the establishment of the authority tasked with implementing and enforcing the law. Thereafter, it makes periodic appearances as the competition authority struggles first to find and then maintain a satisfactory place in the eyes of the Government, domestic public opinion and its peers. The following is a background note intended to assist member States in structuring their discussions around this topic.

II. Overview

Chapter III reviews the current wisdom on what constitutes an independent competition authority and the rationale behind calls for independence. Also reviewed are the criteria of accountability. In chapters IV and V, the various benchmarks used for judging independence and accountability and the principles of each are discussed, drawing on examples from various jurisdictions. Chapter VI explores some tensions around independence and accountability and the pitfalls that might arise as a result of the less favourable economic and fiscal conditions existing in developing countries. Chapter VII concludes by flagging issues for further discussion.

III. Definitions and concepts

There is widespread agreement that independent regulators are at the core of regulatory governance in liberalized economies and a globalized world economy. Indeed, the UNCTAD Model Law on Competition is formulated on the assumption that the most efficient type of administrative authority for competition enforcement is likely to be one that (a) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (b) provides the possibility of recourse to a higher judicial body. Other international organizations – such as the World Trade Organization (WTO), World Bank, International Monetary Fund, regional development banks and the Organization for Economic Cooperation and Development (OECD) – also recommend independent regulators.

It is generally accepted that decisions by competition authorities should be based on objective evidence, that those authorities should maintain a consistent respect for market principles, and that the decision-making process should be neutral and transparent. The reasoning behind this view is that sound policy outcomes are assured only when decisions by the competition authority are not politicized, discriminatory or implemented on the basis of narrow goals of interest groups. This reasoning is typically translated as a requirement for competition authorities to be insulated from undue political interference through the creation of an arm's-length relationship between the competition authority and political authorities. In practical terms, this necessitates a separation of policy implementation from policymaking and a departure from the traditional structure of the machinery of Government. Thus, Government (as represented by a minister) is compelled to cede control over day-to-day functions and decision-making to the authority. As a direct consequence, private interest groups are denied the possibility to lobby ministers and lose the

means for gaining favourable treatment.[28] Thus, the independence of competition authorities is often defined as their distinct legal personality and structural separateness from Government. Accordingly, competition authorities are often statutory bodies established by a specific act of the legislature to fulfil prescribed responsibilities.

In addition to prescribing the authority's structure, enabling legislation also usually gives legal meaning to the authorities' operational (also known as functional) independence by prescribing functions, powers, the manner in which members of management and staff are to be appointed, their tenure and removal, and how the body is to be financed. Likewise, how the body shall relate to the executive and legislature is often prescribed. These attributes are supposed to assure organizational autonomy and establish the arms-length relationship with political authorities.

The legal protection of the independence of competition authorities is common and there is some evidence of policy transfer and convergence, but there are numerous organizational formats across different countries. These divergences point to the fact that independence is a differentiated condition. What has been concluded from historical analyses (Thatcher, 2002; Cukierman, 2005; World Bank, 2000; Wettenhall, 2005; Polidano, 1999; Thatcher and Stone Sweet, 2002) is that political, legal and administrative traditions in different countries play a significant role in shaping the structure and functions of independent regulatory bodies, even as countries have responded to external pressures and learnt from the successful experience of others in setting up independent authorities. It is well known from experience with other regulatory agencies such as central banks that, even when the law is quite explicit, practice may deviate from the letter of the law. Factors such as administrative traditions or the personalities of high officials often shape the actual level of independence serving to either enhance or diminish independence. Informal norms are also known to have resulted in greater actual independence without legislative intervention. The broader location-specific context in which competition authorities are positioned is thus noteworthy, and legal independence is just one important factor that determines the actual independence of competition authorities.

It is generally recognized that any assessment of the independence of competition authorities must necessarily examine both *de facto* independence (what exists in reality) and *de jure* independence (what is reflected in the statutes) because measures of independence vary by country. Thatcher and Stone Sweet (2002) argue that from a political science standpoint, *de facto* independence should be understood as a dynamic process that is characterized by feedback effects between the executive/legislature and the independent institution. Independence is variable and it is often more useful to speak in terms of degrees of independence rather than absolute independence. It is possible to have more or less of it, both in formal terms and actual practice. Consequently, there is no single standard of independence which countries must adopt. Moreover, independence does not mean that competition authorities answer to no one.

[28] Efficiency improvements and the need for technical expertise in public service delivery were also motivating factors behind such reforms. In the context of liberalization, independent regulators were also seen as a way to lock in Governments to their commitment to liberalize. It is generally harder for Governments to achieve a change in legislation, as legislatures everywhere have generally shown themselves to be resistant to changing laws.

These bodies are often created through enabling legislation, which often defines the authority's legal accountability by prescribing performance reporting mechanisms. Many competition laws oblige the competition authority to submit an annual report to the legislature and to place its reasoned decisions on public record. Competition laws are often drafted in such a way as to leave the implementing authority considerable room to exercise discretion. However, since the competition authority has a legal obligation to correctly exercise this discretion, it is customary for the legislature to resort to judicial review to police the enforcement actions of the competition authority. The enabling legislation will often prescribe the role and authority of the courts in the enforcement of the competition legislation.

Where competition authorities are accountable directly to Parliament, whether or not Parliaments have the capacity to exercise effective control becomes an issue of concern. Although the enabling legislation is an important accountability tool for Parliament, competition enforcement is technical and complex. More often than not, it has proved easier to divest administrative controls than to enforce accountability. In many countries, there is the perception that Governments have not paid enough attention to clarifying the roles and responsibilities of those at the helm of independent bodies or putting the machinery of accountability in place. These bodies are thus seen as having acquired independence without paying for it in the currency of performance.[29]

There is thus a trade-off between independence and accountability, with greater discretion counterbalanced by stricter standards of accountability. This trade-off is generally deemed desirable because it ensures that the competition authority does not stray from the agenda set by the legislature. Independence and accountability can also be seen as interdependent, such that where accountability is perceived to be high, there is increased willingness to concede greater discretion and independence. The opposite is also true in that, where accountability is perceived to be lacking, it can be expected that there will be increased pressure on the executive and legislature to exert control. For instance, in Australia, the review of the corporate governance of statutory authorities (also known as the Uhrig Review) – which was commissioned by the John Howard Government in 2002 and required an examination of the relationships between statutory authorities and the responsible minister – was widely seen as an effort to enhance controls on independent regulators.

There is mounting evidence that OECD countries that have delegated a lot of responsibility to arm's-length bodies are faced with the challenges of achieving the best balance between autonomy and control (OECD, 2002 and 2004). A few OECD countries (e.g. Australia, Canada, New Zealand and the United Kingdom) have from the late 1990s put in place umbrella legislation that defines the options for different organizational structures within the public sector and creates standards for their governance. This is aimed at mitigating the attendant risks of reduced transparency of Government for the citizen, and compromised oversight and accountability within Government, which are associated with creating independent bodies outside the core public service.[30]

[29] OECD, 2004.

[30] It should be noted that these public sector reforms have not heralded an abolishment of independent statutory bodies or necessarily called into question the need for their independence.

It is thus clear that, in reality, independence is never absolute. Some would argue that the word "autonomous" is more appropriate terminology, because it reflects the trade-off between independence and accountability. It is also seen as less ambiguous as regards the fact that competition authorities are essentially public sector bodies that render a public service, often staffed by civil servants and wholly dependent on subventions from Government.

IV. Description of independence

The previous chapter dealt with the concepts of legal (formal) independence and accountability. This chapter will review the practice across jurisdictions in awarding independence to competition authorities and managing the trade-off between independence and accountability on the basis of the various elements of independence and accountability identified in the previous chapter.

A competition authority that has formal independence is usually established as an independent institution not physically located in a government ministry. The trend across most jurisdictions in both developed and developing regions is to establish competition enforcement regimes comprising separate institutions that have substantial administrative autonomy from traditionally vertically-integrated ministries. This is the case in most developed economies as well as in the majority of developing countries and economies in transition. There are, however, differences in that, in some countries (for example Brazil, Burkina Faso, Panama, Tunisia and Viet Nam), the investigative arm of the competition authority is established as a department (or departments) in a ministry, and the adjudicative arm of the authority is constituted either as a separate collegiate body in the form of a board of commissioners (Brazil) or council (Burkina Faso, Tunisia, Uruguay and Viet Nam). It might be that jurisdictions differ in terms of the degree of importance they attach to awarding independence across specific functions in competition enforcement. Thus, formal independence is perhaps seen as most critical for the decision-making function and as less of an imperative for the investigative function.[31]

It is interesting to note that, in some cases, a competition authority might start out as a ministerial department but later gain more independence (e.g. Tunisia's council and Brazil's agencies) symptomatic of a dynamic and evolutionary process in play. There are also instances where the legal independence of the competition authority has been flouted, such as happened in Uruguay and Brazil. Uruguay has a very new authority so it is difficult to arrive at a conclusive opinion, but Brazil's Council for Economic Defence has a fair number of years of enforcement experience and, seen from that perspective, the trend suggests that the authority has been successful in maintaining its independence.

The degree of freedom with which the competition authority has in its daily business of enforcing competition law and taking decisions is usually interpreted to mean that the competition authority is not subject to routine direct supervision by Government and has been granted all the necessary power to fulfil its tasks. Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints. It would also have the discretion to decline to investigate cases where it considers the motives of the complainant to be suspect. In this context, ministerial departments

[31] There may be other reasons, as discussed in chapter VI.

are constrained because they would be subject to ministerial priorities and political interference.

The unhindered exercise of competition enforcement is often also interpreted in relation to how countries choose to articulate the objectives of their national competition laws. Views differ widely on what are appropriate competition law objectives. Competition purists eschew all non-efficiency objectives because of the attendant risk of exposing the competition authority's decisions to undue influence and necessitating trade-offs between efficiency and non-efficiency goals. The developmental perspective, while accepting that efficiency objectives are a primary goal of competition enforcement, takes the view that the acute social and economic challenges that confront the developing world oblige Governments to use all policy tools to address these ills. Lewis (2001) argues that there are essentially three approaches to dealing with the trade-off between competition concerns and non-competition concerns (see box below).

Dealing with non-competition criteria

Dealing with non-competition criteria includes:

(a) Pretending the trade-off does not exist and taking non-competition criteria into account surreptitiously (i.e. cloak public interest policy in competition analysis), but this leads to a lack of transparency and proper reasoning;

(b) Vesting the final decision in a politically accountable decision-maker, but a politician may not be best placed to make such decisions, and may be susceptible to the pressures of various interest groups;

(c) Enshrining the public interest criteria in the statute and forcing the competition authority to make the trade-off, which has the twin advantages of transparency and requiring the authority to weigh and explain the consequences of the decision being made.

Source: Whish (2003).

A number of jurisdictions have devised different procedures to outsource decisions relating to non-efficiency considerations, usually in the form of judicial (e.g. the United States) or ministerial powers to designate exemptions. Alternatively, other jurisdictions have procedures to import non-efficiency considerations in a sanitized fashion articulated in the competition law as public interest provisions that oblige the competition authority to either apply a specific public interest test (e.g. the European Union and South Africa) or grant the minister specific circumscribed powers (e.g. Italy, Jamaica, Singapore and the United Kingdom), frequently in respect of the review of mergers and acquisitions. In many cases, public interest provisions exist in some form or another, but the competition authority or the minister refrains completely from applying them (e.g. Italy) or they are seldom activated.

A frequently cited argument relevant to developing countries and small economies (including developed countries) is that market-driven outcomes do not necessarily guarantee efficient and positive outcomes for consumer welfare because the origins

of many competition problems in small markets are structural in nature.[32] This argument reinforces not only the idea that there might be greater reliance on public interest provisions in competition laws in developing and small economies, but also points to the greater reliance on sector regulation with significant parts of the economy not yet open to free competition. It is difficult to pinpoint any economy that is totally free of regulation. Competition authorities and sector regulators coexist under various conditions. Countries approach the question of regulated sectors differently, but some common choices include excluding some or all regulated sectors from the purview of competition law (e.g. Colombia) or awarding concurrent jurisdiction to the competition authority and the sector regulator over competition matters in some or all sectors (e.g. South Africa and the United Kingdom). The variety of approaches can generally be classified into at least five permutations (UNCTAD, 2006). The dominant pattern of distributing competencies between regulators and the competition authority is rarely one whereby competition authorities replace sector-specific regulators. Similar to competition authorities, it is desirable that sector regulators assume obligations regarding independence and accountability.

It is also important to recognize that decisions on competition law priorities are not necessarily one-off because countries often adjust their national laws or priorities in line with changing circumstances, including changes in Governments. In this context, some competition laws include a dispensation for the ministry responsible for the competition policy portfolio to issue directives from time to time in the form of general policy guidelines (e.g. Pakistan, Sweden and Zimbabwe). In some jurisdictions, successive ministers have refrained completely from exercising this dispensation (e.g. Zimbabwe).

It is generally said that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. In addition, it is assumed that competition officials whose terms are not renewable and cannot be removed from office except by legal procedure have less of an incentive to please those who appointed them.

Actual practice is varied. In some jurisdictions, the minister whose portfolio includes competition policy appoints the chief executive of the authority and the members of the commission (e.g. Denmark and Singapore). In others, the minister appoints the board of commissioners with or without endorsement from a higher authority, and the commissioners appoint the chief executive (e.g. Indonesia, Jamaica and Zimbabwe). And in others, the minister submits nominations for appointment by the country's president, prime minister, cabinet of ministers or Parliament (e.g. Burkina Faso, Costa Rica, Czech Republic, Slovakia, Tunisia, Uruguay, Viet Nam and Switzerland). Many other variations exist. For example, in Australia, which has a federal system, each State nominates a member of the commission; it is done similarly in Bosnia and Herzegovina. In the case of Albania, the Parliament, the cabinet and the presidency all nominate members to the board. Similarly, in Italy, nominees to the board of commissioners are vetted by Parliament. In Panama, nominations for members originate from the presidency and appointments are

[32] For example, Canada, in its submission at the WTO discussion on a possible multilateral agreement on competition, stated that Canadian competition policy had traditionally been tailored to reflect the country's special characteristics as a small open economy, and that it would be important to assess the implications of any such agreement for Canadian policy options.

confirmed by Parliament. In Japan, the Emperor approves Parliament's appointments and dismissals of members. In most cases, even though ministers might be the appointing authority, as a check and balance, the members and chief executives cannot be dismissed except with cause stipulated by law.

The conditions of service of members and chief executives may be governed by public service rules (e.g. Denmark, India, Jamaica, Switzerland, Tunisia and Zimbabwe) or general labour laws. In some cases, members are prohibited from exercising any other professional or business activity or holding public office (e.g. Italy), while in some countries, members are appointed on a part-time basis and are not prevented from exercising professional or business activities (e.g. Indonesia, Jamaica, Swaziland, Turkey and Zambia), but are correspondingly often subject to conflict of interest rules. There is no uniformity across jurisdictions in the tenure of members and chief executives either. In many cases, the terms of members and the chief executive are fixed (e.g. Italy), renewable only once (e.g. Slovakia and Uruguay) or more than once but with a maximum number of years stipulated (e.g. Switzerland).

Many competition laws establish (a) the qualifications (e.g. a degree in law, economics or accounting) and other criteria that members should have, including in some cases minimum age requirements (e.g. Brazil and the Bolivarian Republic of Venezuela); (b) the requirement that consumer groups and professional associations be represented on the board (e.g. Denmark, Swaziland and Switzerland) or alternatively prohibitions on affiliations to associations of any kind (e.g. Croatia); (c) the requirement for members to undergo psychometric tests (e.g. Costa Rica and Zimbabwe); and (d) that the individuals be members of the supreme administrative court, court of cassation, university professors or respected business executives of particularly high repute (e.g. Italy).

It is considered important to guard against the use of budgetary restrictions as a way of curtailing or penalizing enforcement. Alternative sources such as user fees or the creation of a fund through the imposition of a levy on new company registrations (e.g. Turkey) are also possible in many jurisdictions, but in others they are not permitted (e.g. Jamaica). In some countries (e.g. Australia, Peru and Zimbabwe), the competition authority is constituted as a multi-function institution that has other regulatory responsibilities from which it can derive revenue to the point that the government budgetary allocation is either nil or a small proportion of the total budget. It is thought that the award by some countries of a portion of the fines they collect in enforcement action might give the competition authority incentive to take inappropriate actions in order to augment its budget or influence the priorities of the authority in a non-optimal way. Few countries seem to take this approach.

It is also important to prevent the use of funding as a vehicle for capture by other interests besides politicians and the executive. Transparent funding of the competition authority helps avoid corruption and thwart the hijacking of competition enforcement by private vested interests. A process whereby the legislature allocates an annual budget to the competition authority, giving it the discretion to apportion it to various uses, is perceived to grant a high degree of budgetary autonomy to the authority. In many cases, competition authorities fall under the portfolio of parent ministries for financial, administrative and reporting purposes, such that the authority's budget request is routed through the parent ministry for approval by the finance ministry and Parliament (e.g. the Bolivarian Republic of Venezuela, Japan, Latvia, Panama, Turkey, Uruguay, Viet Nam and Zimbabwe). In other cases, the

authority submits its budget request directly to the finance ministry or treasury (e.g. Albania, Bosnia and Herzegovina, Bulgaria, Colombia, Pakistan, the Russian Federation, Singapore and Slovakia). In some cases (e.g. Brazil and Tunisia), the authority's budget is part and parcel of the parent ministry's allocation and is released at the ministry's discretion.

In addition to enforcement functions, competition authorities have advocacy functions. Other than business and the general public, Government as a whole (including other regulatory bodies) is a key target of competition advocacy, particularly as it relates to the shaping of competition policy and bringing about market-friendly reforms throughout the economy. Accordingly, the ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation is another attribute by which the operational independence of competition authorities is assessed. Many laws give competition authorities the responsibility of advising the Government on the impact on competition of proposed new laws and regulations. For example, in India, the Government has the option to seek the commission's opinion when considering competition policy matters. However, the opinions of the commission are not binding on the minister. Similarly, in Tunisia, the minister may consult the Competition Council on all new proposals for legislation and any other competition matters, but the opinions of the council are binding on the minister.

V. Description of accountability

In most jurisdictions, legislators elect to police by judicial review.[33] It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favour a procedural review of competition cases (International Competition Network (ICN), 2003) whereby the appeal body confines itself to a consideration of the law, including a review of procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration *de novo* of both evidence and legal arguments. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. Grounds for review will often include lack of jurisdiction, procedural failure and error of law, defective reasons, manifest error of appreciation, and error of fact. In this context, judicial review is generally seen as an end-stage process where judgement is passed on results or actions already taken – i.e. decisions already taken by the competition authority in line with whether decision-making powers are vested in the chief executive, a board of commissioners or a separate quasi-judicial body in the form of a specialized competition tribunal (e.g. Brazil, Peru, South Africa and the United Kingdom). ICN (2003) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated. In this context, the successful constitutional challenge of the lack of separation of the adjudicative functions from the investigative functions under Jamaica's Fair Competition Act is viewed as corroboration.

[33] The judiciary is subject to similar expectations of independence and accountability.

In the context of judicial review, it is notable that in many countries judicial review is either confined to administrative courts or the administrative court is the court of first instance (e.g. the Bolivarian Republic of Venezuela, Colombia, Croatia, Latvia, Tunisia and Turkey). In some jurisdictions, specialized competition appeal courts have been constituted (e.g. Denmark, Singapore, South Africa and the United Kingdom). There are cases in which the decisions of the competition review can be overturned by the executive in exceptional situations (e.g. Croatia). However, in the specific case of Croatia, the particular provision of the General Administrative Proceeding Act will be amended at the request of the European Commission.

As part of the government machinery, and utilizing public funds, competition authorities are also subject to administrative accountability in line with the rules of their countries' public sectors. In some cases, there are specific rules regarding personnel. For instance, in Denmark, there are limits on the proportion of the total budget that can be devoted to personnel costs and, in Turkey, expenditure decisions involving the hiring of new staff and travel abroad are subject to approval by Government.

Competition authorities are also subject to the built-in financial reporting traditions of their countries' public sectors. In this context, the role of the parent ministry and/or the ministry of finance, treasury and/or the auditor general, and ultimately Parliament, are especially important when it comes to accountability in the budgetary process. Accountability mechanisms may be present throughout the budgetary process or at key intervals (i.e. at the point of the submission of the budget request, at each point when disbursement of funds is made, or at the end of the budget year, when a mandatory report on expenditure is required). In some countries, a detailed operational strategy is an additional requirement tied to the authority's budget allocation.

For example, the United Kingdom's Office of Fair Trading and other similarly independent bodies are required to prepare an annual statement of intent that outlines annual objectives and specific deliverables by which their performance will be measured.

In Latvia, the operational strategy covers a three-year period. Similarly, as part of the outcome of the Uhrig Review in Australia, the competition authority is now required to respond with a Statement of Intent to the Minister's annual Statement of Expectation [34] that outlines relevant government policies and priorities that the competition authority is expected to observe in its operations.

Financial audits and annual reports are the main instruments of accountability. However, some countries have recognized the need for more accountability mechanisms to cater for an assessment of the overall effectiveness and impact of competition enforcement. For example, the United Kingdom's Office of Fair Trading is subject to quinquennial reviews that are a recent requirement for all agencies and non-departmental public bodies. This is an important recognition, in particular for developing countries. Crucially, accountability for developing countries is fundamental to development. In this context, Lewis et al (2004) argue that competition authorities have to demonstrate the connection between efficiency and consumer welfare objectives, and the promotion of broader social objectives. To stand aloof from core values, objectives and concerns of society is to jeopardize the

[34] The Statement of Expectation recognizes the independence of the statutory agency.

entire project of competition law and policy. Similarly, Fox (2007) argues that antitrust for developing countries must be seen in a larger context because free-market rhetoric and aggregate wealth or welfare goals is a perspective that has relatively little resonance for the great majority of the poor because of the tendency of free-market policies to disproportionately help the already advantaged.

On a day-to-day basis, the competition authority is accountable to its immediate clientele – the private sector, including foreign investors. However, since the enforcement decisions of competition authorities have a widespread impact on the economy as a whole, competition authorities are also accountable to the general public as consumers and interested parties. In addition, in most societies, competition authorities are subject to scrutiny for performance (outputs) from the mass media and other commentators, such as academics. In this context, transparency is a key facet of accountability. Access to information is a critical dimension to enabling various stakeholders to play their governance role effectively. To this end, it is common across all jurisdictions for competition authorities to make their final decisions – including the normative standards or guidelines that govern the investigative and decision-making functions of the authority – readily available to all stakeholders, usually through their websites and the press.

In the light of bilateral cooperation on enforcement activities and the emergence of international competition networks, competition authority peers increasingly constitute an additional layer of accountability, although this level of accountability can be viewed as “soft” accountability. Stakeholder surveys and peer reviews are examples of accountability instruments in this connection.

VI. Special situation of developing countries

The question of whether there are special circumstances in developing countries that make the concept of independent competition authorities unworkable has to be tackled. Most developing countries are not unfamiliar with the concept of independent public agencies, as such bodies were initiated through policy transfer or as part of a diverse array of reform initiatives, including privatization and civil service or public sector reorganization programmes. These reform initiatives were usually components of broader structural adjustment programmes. These types of reforms have been going on in many developing countries for decades. Of the various reform initiatives, the most common across developing country regions was that of converting civil service departments into free-standing agencies or enterprises within or outside the civil service and with a higher degree of autonomy in financial and personnel matters (Polidano, 1999).

Despite the apparent prevalence of autonomous agencies in many developing countries, the less favourable economic and fiscal conditions have exacerbated tensions and brought to light a number of pitfalls related to the creation of independent public sector bodies in the context of a wide gap between resource need and availability. The pitfalls are linked in the main to skills shortages, low public sector pay, risks of corruption and capture, tensions between the minister responsible for the competition policy domain and the competition authority, and weak accountability.

The public sector in many developing countries is generally plagued by limited human resources. One of the key short- to medium-term challenges in setting up independent competition authorities in developing countries is attracting staff that

has adequate skills or the potential to rapidly acquire requisite skills. Fiscal constraints and competing developmental priorities often mean that Governments do not have the necessary flexibility to address the underlying causes (such as problems in the educational system) of the limited pool of human resources in a systematic and sustainable manner. In addition, under structural adjustment programmes, many Governments were preoccupied with the need to streamline public expenditures and reduce the size of the public sector as a means of managing fiscal deficits. Under these circumstances, creating competition authorities within government ministries can be seen as the more affordable option that allows Governments to make use of skills already available in the public sector and in which the Government has already invested, while maintaining central controls on recruitment.[35]

The general shortage of skills affects not only the competition authority but also the legal fraternity, the business sector, the judiciary and the legislature. Since competition enforcement is not undertaken in a vacuum, this renders competition advocacy by the authority a critical factor in gaining credibility and a constituency. For instance, it is thought that the competition authority is better able to position itself and exert optimal influence on competition policy if it shares a close relationship with Government rather than remaining at arms length. This would seem to suggest at least two things deserving closer examination: that there is a balance to be struck between total independence and some lesser degree of independence as far as advocacy is concerned, and that strict independence may not be particularly advantageous for economies in transition to a free market system. To this end, a less than arms-length relationship with the various advocacy target groups, including the whole of Government, could be more conducive.

Crucially, the skills shortage also has implications for the independence and accountability of the competition authority, which can be compromised by a weak and uninformed judiciary and Parliament that might be unable to effectively carry out their enforcement roles. For instance, skills shortages and a lack of financial resources are among the reasons why developing countries often suffer a backlog of court cases, but the same resource constraints limit the possibility of setting up specialized competition courts. Developing country Parliaments, often comprising representatives of a cross-section of the population of which a minority may have benefited from tertiary education, may not have the capacity to analyse the reporting of the complex and unfamiliar issues around competition enforcement. Hence, a minimum level of accountability, whereby the competition authority is required to report to or through a ministry, might be seen as a workable solution to the accountability problem.

A related problem is the dearth of independent local expertise that developing country competition authorities can call upon from time to time to supplement in-house skills, which might be particularly relevant when undertaking, for example, market inquiries or complex investigations. Resource constraints seldom permit the buying-in of international consultants. Also, academic professors sufficiently versed in competition economics and law are few and the majority of experts in the legal fraternity are often those who act on behalf of defendants in a competition case, and their perspective may often be coloured by this point of view.

[35] One of the major intangible benefits available to civil servants in developing countries is access to scholarships. After training, civil servants are usually bonded to the service for a specified period of time, which has served to somewhat slow the attrition of skilled and professional staff to the private sector.

In most developing countries, civil servants are generally paid less than their private sector equivalents. Many developing countries have experienced declines in the real wage paid to public sector employees during recent years. In lower-growth regions such as sub-Saharan Africa and Latin America, real public sector wages declined drastically as a result of the demands of structural adjustment reforms with wage erosion and salary compression also affecting Central and Eastern Europe, the former Soviet Republics and some South and South-East Asian economies during the 1980s and 1990s.[36] The possibilities of recruiting and retaining highly qualified personnel in the public service, and especially in specialized areas such as competition enforcement, is thus negatively affected. Capable civil servants will tend to exit the public sector when their training and qualifications make them attractive to potential private sector employers. In order to find a way around these problems, independent bodies such as competition authorities are often given exceptions from the civil service regime to offer higher salary scales as well as other attractive benefits. However, this may not be a sustainable strategy given that these special privileges are still funded through fiscal revenues. For the same reason, donor-funded salary top-ups are also problematic, particularly because they can lead to "bleeding stump" arguments (i.e. Government must provide additional resources or face the unthinkable, e.g. accusations of retaliation for competition enforcement decisions or the collapse of competition enforcement). The particular situation whereby competition authorities are recipients of funding from bilateral donors raises the question of such assistance serving as a possible vehicle for diverting competition enforcement to serve foreign vested interests. There is so far no available evidence of this being the case.

It is often possible for independent competition authorities to supplement their budgets by levying fees for their services. Filing fees and service fees accounted for over 70 per cent of revenue receipts of the South African Competition Commission – reportedly one of the best funded in Africa – and financed over 64 per cent of its 2006/07 expenditures.[37] This impressive statistic no doubt reflects the size and level of activity in the South African economy and it may not be possible, at least in the short to medium term, for other lower income countries to achieve the same. In comparison, filing fees accounted for around 30 per cent of the Zambian Competition Commission's 2007 budget (also ranked among the better funded African competition authorities). The South African Competition Commission nevertheless suffers from similar constraints to other developing countries. It continues to experience high levels of staff attrition and has recently completed a pay benchmarking exercise aimed at addressing the differential between commission pay levels and those in the private sector. It has a study loan and bursary scheme in place to encourage staff to upgrade skills, and since its inception has benefited from funding from the United States Agency for International Development for staff training.

For various reasons – such as inadequate accounting and control measures, risk of fraud and corruption or a general reluctance to introduce what might constitute a differential tax on segments of society for public services – some Governments are wary of permitting independent bodies to raise funding from alternative sources. For example, the Jamaican Government has steadfastly denied requests from its Fair Trading Commission to levy fees for some of its services. The Fair Trading

[36] World Bank, 2000.
[37] Competition Commission, 2007.

Commission is constrained in carrying out competition enforcement functions and advocacy initiatives since government subventions are insufficient. Competition authorities in developing countries are often caught in a vicious cycle whereby funding shortfalls affect not only their ability to carry out enforcement activities but also their ability to monitor the impact of their activities, and thus marshal the necessary proof of their worth and raise their credibility, facilitate accountability and provide justification for increased funding. The onus is often entirely on the competition authority to establish credibility, not only with the general public but also with the Government. In this context, initial direct political backing for competition enforcement often sets the tone for the development of future relations between the competition authority and the authorizing environment.

The risk of corruption and capture in developing countries is a troublesome and clichéd issue. The empirical evidence as to whether low public sector pay fosters corruption is mixed and theory does not predict that higher pay will always reduce corruption. [38] Competition enforcement, particularly in jurisdictions that draw members of the board of commissioners from the private sector on a part-time basis, raises some tricky issues relating to members' impartiality and independence. Concerns revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity and the government–industry revolving door. This is a problem also for developed countries, but in smaller and poorer economies these concerns take on a particular significance because there is a relatively smaller pool of individuals of sufficiently high standing to choose from. There is also a greater probability of the appointment of individuals from large companies that are dominant in the economy and as such potentially more likely to fall foul of competition law. The omnipresence of large multinationals in this group adds a further wrinkle to the problem. Even where there are no incidences of impropriety, in the absence of ministerial oversight and effective accountability mechanisms, it can be difficult to manage public perceptions. For obvious reasons, competition policy in developing countries can sometimes be an emotive issue and questions of "fairness" often arise; some things may be judged "unfair" by the public even if economically efficient.

The considerable financial resources commanded by private sector companies that may be dominant in the economy, coupled with the general environment of low public sector pay, can theoretically create conditions that are conducive to corruption. In this context, the staff of the competition authority (as opposed to the chief executive and members) may be at particular risk. However, research for this background note has not uncovered any examples of this in real life.

Tensions between the minister responsible for competition policy and the competition authority may arise from time to time as a result of insufficient clarity on the respective roles and responsibilities of the minister and the management of the competition authority, on how the competition authority is to be responsive to political direction, and on issues related to the streamlining of public expenditures for which the minister or another government department may be held accountable. In addition, the exceptions afforded to independent public sector bodies from the usual civil service pay scales can create gross disparities between staff on the public payroll who undertake similar tasks. Such disparities can foment discontent and can be upsetting to relations between the management of the competition

[38] According to Polidano (1999:23), a weakening of ethical standards was reported following the creation of independent public sector bodies in the United Kingdom.

authority and senior ministry officials. For example, the position of chief executive of the Zambia Competition Authority is ranked at the level of a principal secretary, yet the pay and various allowances associated with this position far exceed that of principal secretaries in Government. Indeed, the chief executive's total remuneration probably exceeds that of the minister responsible for the competition policy portfolio.

In all economies, competition enforcement matters generally attract a lot of media attention and consequently grant high visibility to chief executives of competition authorities. Stewart et al. (2007) make the point that examples such as George Lipimile in Zambia, David Lewis in South Africa and Allan Fels in Australia were instrumental in bringing the work of their respective competition enforcement regimes into the public eye and winning the respect and fear of business while also giving the authority a very high profile. Clearly, much depends on personalities and in this respect it is necessary to view this subject from that perspective. Certainly, the independence of competition authorities is subject to periodic assaults and the personalities of the parties on both sides play a part in determining if such assaults will happen and if they will be successful.

Mechanisms for accountability in developing countries tend to be weak. As already mentioned, Parliaments often do not have the necessary capacity to properly enforce accountability. There is a lack of clearly defined outcomes and indicators. Beyond making their annual reports and final decisions available to the public, there are seldom means for competition authorities to have direct consultation with or obtain feedback from citizens. Some competition authorities do not have the skills and resources to construct and maintain up-to-date websites. In this context, developing countries are enthusiastic about UNCTAD's voluntary peer reviews of competition enforcement regimes which serve not only as a mechanism for assessing enforcement impact and identifying areas for improvement, but also as an independent instrument of accountability.

VII. Observations and issues for further discussions

No competition authority can be completely independent from the government structure of which it is an integral part. It is impossible to identify any competition authorities that conduct their business in splendid isolation. Even competition bodies that are part of ministries can be given substantial operational independence, but legal independence does not guarantee that the letter of the law will be respected. In reality, competition authorities can be said to lie somewhere on the continuum between splendid isolation and the total subversion of efficiency objectives to non-efficiency objectives. It would seem that all countries recognize that it is desirable to prevent the implementation of narrow interest group goals when enforcing competition law and to this end put various checks and balances in place, although nuances and differences necessarily exist across jurisdictions.

It is also clear that competition enforcement cannot be divorced from the broader context in which it operates, and that elements of operational independence encompass a transparent process by which non-efficiency considerations (public interest) is factored into competition enforcement decisions. For developing countries, this may be a critical accountability mechanism. Arriving at a consensus on a definition of what constitutes undue political interference and the qualitative

benchmarks by which it is to be assessed is complicated, as it involves subjective judgments to a greater or lesser extent.

The issues examined in this background note raise a number of questions and points of interest, all of which should be considered bearing in mind the particular situation of developing countries. The difficulty in arriving at a consensus begs the question of whether it is desirable or necessary to achieve a consensus. In the context of independence being a variable, a relevant question might be whether independence can be quantified so that it becomes possible to say how much independence is enough independence. An interesting and related point for consideration would be the weight that should be attached to the overall trend in terms of the demonstrated respect for the independence of the competition authority over the period of competition enforcement experience. Another question is whether operational independence might be more or less important than legal independence for competition enforcement. Regarding accountability, the lack of separation of the adjudicative functions from the investigative functions may have implications for a number of jurisdictions that have taken the board of commissioners' approach to adjudication. It would be necessary to examine the specifics of the Jamaican case and identify if and when structures of decision-making in which the investigative and adjudicative processes are not strictly separated fail to pass muster from the perspective of judicial review. The need for more and strengthened accountability mechanisms also deserves attention.

Foundations of an effective competition agency

Introduction

Competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop. For competition policy and institutions to effectively promote their objectives, they must flourish in the political, social and economic environment in which they exist. Those environments differ greatly. In some countries or territories, businesspersons and government appreciate the goals of competition and respect the institutions, and other objectives of society take competition into account. In others, businesspersons and government officials are learning to adapt to a competition regime and to appreciate its objectives, even if the law remains not quite adapted to the legal, economic and institutional establishment. In yet others, the "barefoot competition office" struggles for recognition and respect, marooned after a high tide of a structural adjustment programme.

The differing environments imply that the design of the competition regime should differ too. However, there are some features that characterize efficient public regulatory bodies. Among these are independence; transparency; accountability; assuring due process; being well funded in proportion to the mandate; being staffed by well-educated, well-trained and non-corrupt persons; and having an appellate process that itself is well structured and non-corrupt. More recent discussion about competition agencies indicates that evaluation is necessary too. Among the internal processes, defining objectives and priorities, appropriately allocating resources, and taking effective decisions are necessary to an effective competition agency. These topics are discussed below.

This paper first addresses how to define an effective competition agency, and the importance of evaluation in that context. The next two sections address different factors that form the foundations of an effective competition agency. Much of the content of the first three sections applies to competition agencies in both developing and developed countries. But the last two sections focus, respectively, on young competition agencies, and on what might be called "barefoot competition offices" – those without significant political or financial support.

The sources of information are the replies by member States to UNCTAD's request for information, a note by Mr. Khalil Mirza,[39] work carried out by the International Competition Network (ICN), and writings by academic practitioners.

I. What is an effective competition agency?

An effective competition agency – tautologically – achieves its objectives by the appropriate use of resources. The design and capabilities of the agency influence the effectiveness of the agency's decisions and its ability to obtain compliance with sanctions and remedies. Nonetheless, a competition agency is but one actor in an environment where other government ministries and agencies, the judiciary, the business community, non-governmental organizations (NGOs), the media and the

[39] Summary of the "Foundations of an effective competition agency" round table discussion held at the 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, 8–12 November 2010.

general public are taking actions towards their own objectives. The effectiveness of an agency is affected by the environment in which it is placed, and part of its effectiveness can be judged by how it modifies its environment.

Effectiveness can be examined by answering two questions: (a) Did the agency's interventions produce good results, according to the objectives of the competition law? and (b) Did the agency's processes lead to an appropriate allocation of resources to promote the realization of the law's objectives? [40] Examining effectiveness, by unravelling exactly where deficiencies lie (and how they might be remedied), requires repeated, regular examination of both process and outcomes. The evaluation of performance is itself a part of effectiveness.

Evaluation is particularly important for competition agencies, for several reasons. Firstly, their decisions are made under conditions of incomplete information and uncertainty. Some decisions, therefore, are to some extent experimental – testing whether hypotheses are true – and evaluation is needed to understand whether a given enforcement policy in fact leads towards the law's objectives. Experimentation is necessary in order to get the right enforcement policy in a given environment. Secondly, given the fact that third parties have less information than the agency and that the parties involved in the competition matter, publication of the agency's own evaluation facilitates third parties' evaluation of the agency. Thirdly, evaluation may generate new hypotheses in economics, and thereby contribute to the development of the foundations of competition policy.

It is not appropriate for enforcement actions to be the only focus. The actions and inactions of other parts of government can aid or hinder the achievement of competition law and policy objectives, but are often beyond the reach of competition law. However, studies, hearings, and submissions to their hearings can influence the thinking and thus actions of other governmental actors. Far more enterprises refrain from engaging in anticompetitive conduct than would ever be prosecuted. And the success in persuading judges of the correctness of the competition agency's decisions under judicial review directly affects whether the agency's decisions stand. Thus, measuring effectiveness through outcomes includes an evaluation of the persuasive effect of the competition agency's studies, of its comments submitted to hearings, its speeches, and its other persuasive efforts. However, a significant risk of penalties being imposed on cartels does appear to be necessary to achieve compliance in that respect.[41]

Evaluation can be carried out as part of the process of developing the annual report, but also through a "peer review" by other competition agencies and through ex post assessments. For example, the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the OECD Competition Committee and Global Forum on Competition conduct voluntary peer reviews. Parliamentary committees and audit offices can perform evaluations.

[40] Kovacic WE (2005). Using evaluation to improve the performance of competition policy authorities. In: *Evaluation of the Actions and Resources of the Competition Authorities.* DAF/COMP(2005)30. Available at http://www.oecd.org/dataoecd/7/15/35910995.pdf. Also: UNCTAD (2007). Criteria for evaluating the effectiveness of competition authorities. TD/B/COM.2/CLP/59.

[41] Parker C, Ainsworth P and Stepanenko N (2004). ACCC enforcement and compliance project: The impact of ACCC enforcement activity in cartel cases. Working paper of the Australian National University Centre for Competition and Consumer Policy.

Ex post assessments generally focus on a specific aspect of the activities of an agency. The *Merger Remedies Study*[42] by the staff of the European Commission's Directorate-General for Competition is an example. Its purpose was to "review with the benefit of hindsight" the remedies it had imposed or accepted in connection with mergers, "so as to identify areas where further improvements […] may be necessary in future." A total of 40 cases and 96 remedies were reviewed, at least three to five years after they were imposed. But a difficulty of ex post assessments is identified in another study on merger control[43] carried out by consultants for the European Commission, namely: "What is the right counterfactual?" In this case, the consultants decided that the right counterfactual was "to rely on the expectation that some qualified market players had formed on how the market would have evolved had the proposed merger happened," and used questionnaires and stock market returns. Their study suffered from low response rates from businesses – because they had no obligation to respond, they saw no advantage in responding, and they were concerned about granting access to confidential business data. Smaller ex post assessments can be more frequent and less costly. For example, when a case is lost, a debriefing can identify what went right and what went wrong, and the lessons learned can be incorporated into the internal manual. Indonesia and South Africa can both provide examples of evaluations of an "outcome" rather than of an enforcement activity. The competition agencies in these countries have made recommendations or submitted proposals to government on competition policy issues, which have paved the way for various reforms connected to competition legislation, thus positively impacting on the economy.[44]

Replying to the questionnaire, Brazil and Colombia pointed out that effectiveness could be measured by ascertaining the extent to which the authority had been able to fulfil its mission. Consideration needed to be given to the impact that the authority's existence actually had on the competitive situation in the country. If the mission was to improve competitiveness and yet the market was still dominated by a few companies, to what extent, or after how long a delay, would it be it legitimate to question the authority's effectiveness?

It may be difficult to assess the effectiveness of some competition authorities because they have only recently been established and because of the limited number of cases that have reached execution stage. This is the case with Pakistan, for example, where the importance of objective evaluation of the work carried out by the authority has been underscored. Although it may be appropriate in some instances to measure particular specific criteria, such as (for example) the time frame in which cases are handled, a focus on the number of undertakings that have been brought into conformity following intervention by the competition authority can risk being a focus on "inputs" or "activity" rather than on whether the "outcomes" have fulfilled the strategic objectives.

Most respondents to UNCTAD's questionnaire provided information on their ex post evaluations. Pakistan and Slovakia, for example, indicated that they monitored undertakings found to have infringed the competition law in the past, and the markets in which anticompetitive actions had been found in the past. As was illustrated by a

[42] European Commission (2005). Merger Remedies Study. Available at http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf.

[43] LEAR study for the Directorate-General for Competition, European Commission (2006). *Ex Post Review of Merger Control Decisions.* Available at http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf.

[44] UNCTAD (2011). The importance of coherence between competition and government policies. TD/B/C.I/CLP/9.

submission from Turkey, though, market participants can be expected to submit another complaint if the problem in the affected sector persists after a competition enforcement action.

While many annual reports give the number of cases initiated, this may not be a particularly good indicator of effectiveness. Some small, low-profile cases can be more important for the development of competition law than headline-grabbing cases. In addition, other activities (e.g. advocacy for competition, and the development of institutional, analytical and procedural capabilities) can improve effectiveness as well, or more so, than cases.

Evaluation is fed back into setting future priorities and determining future internal changes. To summarize, an effective competition agency is one that achieves its objectives by the appropriate use of resources. Two questions are relevant: Did the agency's interventions produce good results? Did the agency's allocation of resources promote the realization of these results? The environment and level of resources are set exogenously; with effectiveness determined by the agency's choices. Evaluation is the tool to examine the outcomes of these choices. Evaluation of cases, studies, submissions to hearings, communications, and other advocacy efforts helps to identify which choices to make to improve effectiveness in the future.

II. Institutional design

The most effective design for a competition agency includes (a) elements of legal status; (b) status within the broader government machinery and with businesses and consumer representatives; and (c) internal processes designed to maintain the high quality of the work performed. The different elements are not free-standing; rather, they work together in mutual support to ensure – inter alia – due process and proper outcomes in terms of the objectives. In addition to the elements reviewed below (independence, transparency and accountability, sufficient powers and funding in proportion to the mandate, and being staffed by well-educated, well-trained and non-corrupt persons), beyond the boundaries of the competition agency there needs also needs to be an appellate process that itself is well qualified and non-corrupt.

A. Independence

In the legal and institutional framework, a balance is needed to ensure that the competition agency is independent but is also responsive to the broad policies of the government, and that its decisions are subject to review, generally judicial review. Independence from political interference, especially on a day-to-day or decision-by-decision basis, is required in order to ensure that an agency's decisions and advocacy efforts are not politicized, discriminatory, or implemented on the basis of narrow goals of interest groups. The competition agency should also be independent from business influences. "Independent" agencies are expected to be subject to government oversight and a system of checks and balances. Enabling legislation should give legal meaning to the authorities' operational independence by prescribing functions; powers; the manner in which members of management and staff are to be appointed, and their tenure and removal; and how the body is to be financed. Likewise, how the body shall relate to the executive and the legislature should also be prescribed. These attributes assure

organizational autonomy and establish the arm's-length relationship with political authorities.

Several formal safeguards have been employed to achieve a balance between independence and accountability, such as:

a) Providing the competition agency with a distinct statutory authority, free of day-to-day ministerial control;

b) Prescribing well-defined professional criteria for appointments;

c) Involving both the executive and the legislative branches of government in the appointment process;

d) Appointing the director-general and the board/commission members for a fixed period and prohibiting their removal (subject to formal review), except for clearly defined due cause;

e) Where a collegiate (board/commission) structure has been chosen, staggering the terms of the members so that they can be replaced only gradually by successive governments;

f) Providing the agency with a reliable and adequate source of funding. Optimally, charges for specific services can be used to fund the competition agency to insulate it from political interference via the budget process;

g) Exempting the competition agency from civil service salary limits in order to attract and retain the best qualified staff and ensure adequate good governance incentives; and

h) Prohibiting the executive from overturning the agency's decisions, except through carefully designed channels such as new legislation or appeals to the courts based on existing law.

Today, increasing numbers of competition authorities around the world are institutionally independent from ministerial control; fewer than half are dependent agencies. Competition authorities have been established by 112 countries,[45] and more than half of these authorities are separate from the ministries. There has also been a steady rise in the number of autonomous competition agencies over the last 20 years. Twenty-two of the independent agencies are in developing countries and transition economies.

Financial independence can go a long way towards ensuring independence of objectives and activities. One possible funding arrangement can be self-financing by means of a small fee, as has been adopted in Turkey. Dependence on uncertain budgetary allocations, especially during periods of fiscal austerity, can weaken capacity and increase the potential for political influence.

B. Accountability

. The independence of the competition agency must be balanced with accountability. Politicians, the media, the public and the business community must know who is responsible for a decision, and the reasoning behind it. Interested parties must be able to provide relevant input to decisions, through

[45] See the UNCTAD Guidebook on Competition Systems, available at http://www.unctad.org/en/docs/ditcclp20072_en.pdf.

consultation processes. They must be able to obtain redress easily and quickly if the competition agency has acted arbitrarily or incompetently. These types of safeguards produce a balance between independence and accountability. Several formal safeguards have been employed to achieve this balance, such as:

(a) Publishing the competition law and statutes of the competition agency, which clearly specify the duties, responsibilities, rights and obligations of the agency; in addition, differentiating between primary and secondary regulatory goals where there are multiple goals;

(b) Ensuring that the decisions of the competition agency are subject to review by the courts or some other non-political entity, although some "threshold" should be established to deter frivolous challenges that simply delay the implementation of decisions;

(c) Requiring the competition agency to publish annual reports on its activities, and requiring a formal review of its performance by independent auditors or oversight committees of the legislature;

(d) Establishing rules for the removal of members of the Board if they show evidence of misconduct or incompetence;

(e) Allowing all interested parties to make submissions to the competition agency on matters under review; and

(f) Mandating that the competition agency publishes its reasoned decisions.

C. Transparency

149.22. Transparency enhances the confidence of interested parties in the effectiveness and independence of the competition agency and strengthens its legitimacy. Consequently, all rules and policies, the principles for making future regulations, and all regulatory decisions and agreements should be a matter of public record.

150.23. Transparency can be as much a boon for the competition agency as for the public and for companies. Publishing decisions and justifications and holding public consultations and hearings can help competition agencies to build consensus around their decisions and to inoculate themselves against charges that they have rendered arbitrary decisions behind closed doors.

151.24. Transparency is an important contributor to good governance in general. Importantly, transparency reduces the probability that interested parties – especially those adversely affected by a competition law decision – will believe that decisions are biased, arbitrary or discriminatory. The reasoning behind competition law decisions, including the principles and evidence that guided them, will be apparent when they are clearly presented in the public record. Discriminatory or corrupt decisions will become evident and more difficult to substantiate once transparent processes are in place.

152.25. On the other hand, transparency has to be limited. Much of the information on which decisions on cases are made is commercially sensitive,

and must be protected from competitors, suppliers and customers. Information released to the public must be screened to protect business secrets. Premature release of information may also affect the success of some of the activities of competition agencies, such as cartel investigations.

153.26. A successful market that attracts investors requires legal certainty. Independent competition agencies are predictable if they adhere to the rule of law. The most important features of the rule of law are respect for precedent and the principle of stare decisis, particularly in common law jurisdictions. Respect for precedent means that competition agencies do not reverse policy decisions unless there is evidence that those decisions have led to significant problems or that new circumstances warrant a change in the rules. The principles of stare decisis require that cases with the same underlying facts be decided in the same way every time.

D. Enforcement powers

154.27. The competition agency must have teeth. That requires not only a clear, formal delineation of its enforcement powers, but also the ability and willingness to exercise its authority and enforce its decisions. Competition agencies need to have the powers available to them in order to be able to investigate effectively, such as having the power to gather information in a timely manner, and the power to impose – or sue to impose – sanctions for non-compliance. They need the power either to order certain conduct to restore competition and to impose sanctions, or to sue in court for the court to order certain conduct or impose sanctions. Many competition agencies have the power to commit not to impose sanctions, which is important for implementing leniency programmes that can provide incentives for cartel reporting.

E. Staffing and financial resources

155.28. Skills shortages, low public-sector pay, and risks of corruption and capture threaten the effectiveness of competition agencies, particularly in developing countries. Skills shortages occur in all areas of the enforcement of competition law, and also where economics is new to the competition case handlers – even in middle-to-advanced competition agencies. Targeted training, and, in the longer run, relationships with the universities, are the methods used in some countries. Civil servants are generally paid less than their private-sector counterparts. Many developing countries have experienced declines in the level of real wages paid to public-sector employees over recent years. This has predictable effects on the recruitment and retention of highly qualified personnel in the public service, and especially in specialized areas such as competition enforcement.

156.29. The risk of corruption and capture in developing countries is a troublesome issue. The empirical evidence and theory as to whether low public-sector pay fosters corruption is mixed. The practice in some jurisdictions whereby competition commissions include part-time board members drawn from leading members of the private sector can raise tricky issues related to

impartiality and independence, not all of which can be solved by withdrawing from cases where a conflict of interest might exist.

157.30. Financial resources are rarely seen as sufficient for the mandate of the competition agency. While filing fees for, say, mergers above a notification threshold may be seen as means to increase financial resources, this can also subject the agency to unpredictable variations. Receiving a share of fines imposed can raise questions about conflicts of interest. Reliance on subventions from a ministerial budget can raise questions of independence from ministerial direction. There are, in practice, wide variations in the annual budgets of competition agencies, although it is difficult to compare them since they have varying mandates – for example, the inclusion or exclusion of consumer protection or state aid policy areas.

III. Internal processes

158.31. Setting objectives and priorities, allocating resources accordingly, and ensuring that activities are effective to meet those objectives have been identified as major processes for an effective competition agency.[46] The overall objectives of the agency are generally set out in the legislation, but the agency usually has to identify more specific objectives in order to help guide its staff's consistent resource allocation decisions and to permit the political and business communities to understand and critique the choice. Examples might be to liberalize certain sectors or to substantially reduce the anticompetitive conduct in certain sectors, to substantially increase awareness among the business community of the merits of competition, or a "push" against cartels. These objectives then form the framework for a work programme, which broadly allocates resources among activities, and sets priorities.

159.32. Prioritization is performed differently by different agencies. Thresholds for merger review or to open an investigation, and choosing specific sectors on which to concentrate efforts for a period, are two methods. Another method is to perform a modified cost/benefit analysis, considering (a) the effects on consumer welfare in the market in which the intervention will take place; (b) the strategic significance of the work; (c) the likelihood of a successful outcome; and (d) resource costs. It can be difficult, however, to estimate beforehand which activities will, in the long run, have the greater significance. Where agencies have a high proportion of obligatory enforcement activity, such as merger notifications or complaints, they tend to develop tools to deal in a more cursory way with matters that clearly pose no competition issues. Legally binding deadlines can impose efficiency in some areas.

160.33. Young and small competition agencies may have particular difficulties in setting strategies and priorities. They may lack resources, investigatory powers, and a business environment with a competition culture; they may also be more subject to political pressure. On the other hand, the small number of activities facilitates monitoring by management.

[46] ICN Competition Policy Implementation Working Group (2009). Seminar on competition agency effectiveness. This is the main source for much of the material in this section.

161.34. Resource allocation is related not only to prioritization (i.e. “Which advocacy or enforcement efforts do we undertake, and which do we not?”) but also to the allocation of individuals to different roles for motivation and development.

162.35. Competition agencies need highly qualified staff, but cannot compete with private-sector salaries. They therefore motivate and retain their staff using other inducements, such as high-quality training, the opportunity to engage in academic work, and a superior work–life balance. Excess turnover can leave the agency with a surfeit of inexperienced graduates, resulting in a “structural personnel advantage” for law firms against agencies in litigation; however, insufficient turnover can lead to stagnation. Training in areas such as project management, procedure, and communication and advocacy techniques may complement the more academic educational background of the lawyers and economists who dominate many agencies.

163.36. Evaluation of the effectiveness of – inter alia – decisions, advocacy, studies and guidelines, in order to identify improvements, was the third major internal process identified in the ICN’s seminar. In most jurisdictions, legislators choose to police by judicial review. It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favour a procedural review of competition cases whereby the appeal body confines itself to a consideration of the law,[47] including a review of the procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration de novo of both evidence and legal arguments. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. Grounds for review will often include lack of jurisdiction, procedural failure and error of law, defective reasons, manifest error of appreciation, and error of fact. In this context, judicial review is generally seen as an end-stage process where judgement is passed on results or actions already taken – i.e. decisions already taken by the competition authority according to whether decision-making powers are vested in the chief executive, in a board of commissioners, or in a separate quasi-judicial body in the form of a specialized competition tribunal (e.g. Brazil, Peru, South Africa and the United Kingdom). ICN (2003) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated. In this context, the successful constitutional challenge to the lack of separation of the adjudicative functions from the investigative functions under Jamaica’s Fair Competition Act is viewed as corroboration.

164.37. In the context of judicial review, it is notable that in many countries judicial review is either confined to administrative courts, or the administrative court is the court of first instance (e.g. in Colombia, Croatia, Latvia, Tunisia,

[47] ICN (2003). Building credible competition authorities in developing countries and transition economies. Report prepared by the ICN Working Group on Capacity-Building and Competition Policy Implementation. ICN Second Annual Conference. Mérida, Mexico. 23–25 June.

Turkey and the Bolivarian Republic of Venezuela). In some jurisdictions, specialized competition appeal courts have been constituted (e.g. in Denmark, Singapore, South Africa and the United Kingdom). There are competition cases in which the decisions of the competition review can be overturned by the executive in exceptional situations (e.g. Croatia). However, in the specific case of Croatia, the particular provision of the General Administrative Proceedings Act will be amended at the request of the European Commission.

IV. Special challenges for young competition agencies

165.38. A survey[48] conducted by ICN highlighted the following difficulties for young competition authorities:

(a) Legislation was inadequate in terms of not properly addressing the anticompetitive conduct actually engaged in in the domestic economy, and in terms of not allowing effective enforcement by the agency;

(b) Cooperation and coordination with particular government ministries and other regulatory bodies was not sufficient;

(c) Budget was not large enough for the agency to operate effectively;

(d) There were too few skilled professionals; they were either not present in the country or were not attracted to the agency given the civil service salary structures;

(e) Judiciary was unfamiliar with competition law and its economics;

(f) A "competition culture" among the business community, government, media and general public had not developed.

166.39. Many of these issues are related. For example, the lack of a "competition culture" understandably leads to inadequate legislation, lack of cooperation by other parts of government, a wholly inadequate budget, and an untrained judiciary.

167.40. The survey found that practically all of the competition agencies surveyed were seeking to amend or had already amended legislation to address the practical and specific issues of domestic business practices. Insufficient cooperation and coordination was seen, in the survey, as stemming from the recent introduction of competition law without the requisite clauses to address conflicting prior legislation. Responses ranged from (a) negotiation to (b) lobbying through memorandums of understanding between regulatory agencies to (c) getting the requisite changes in legislation. Low budgets were addressed variously by streamlining case handling, by limiting ex officio cases, and, where permitted, by charging fees for work done. The turnover of skilled staff was addressed by training programmes, often with the help of technical assistance programmes by donor agencies, however some agencies had experienced

[48] ICN (2006). Lessons to be learnt from the experiences of young competition agencies. Competition Policy Implementation Working Group, subgroup 2. Available at http://www.internationalcompetitionnetwork.org.

periods of seriously depletion. Some agencies, albeit generally those in developed countries, had developed sustained training programmes in collaboration with the local academic community. Training of the local judiciary's public prosecutors had been carried out by means of seminars and workshops. The development of a competition culture had been addressed by various means of educating and persuading – particularly via the media, but also via speeches, seminars and websites. The survey stresses that "it is important to note that all the successful programmes have sought to embrace the media quite substantially."

168.41. A review of the experience of young competition agencies in reforming countries[49] highlights the continuing importance of individuals in determining the success or otherwise of newly created agencies. Nevertheless, the sustained effectiveness of a competition agency requires that the departure of charismatic individuals should not significantly harm the institution. Although competition regimes can prescribe the qualifications of the people appointed to such roles, as well as the safeguards they enjoy, the decision-making processes they must adopt, and the resources they may deploy for competition goals, it is impossible to eradicate the human element completely. However, in the long run, an agency's legitimacy should be institutional and should not depend solely on that leader's personal qualities, no matter how good. Otherwise, there is a risk of losing effectiveness when strong and charismatic leaders leave.

169.42. Young competition agencies typically face more severe challenges than established agencies, particularly when they are set up as part of a broader reform programme that includes privatization and deregulation. In such cases, all the personnel of the agency will usually be new to the task of enforcing competition rules, and will lack established practices or precedents to build on; unlike established agencies where there are at least a few "old hands". In many developing countries, reliable data and performance information about the firms and industries will often be non-existent. The competition agency may be required to adopt unpopular decisions at a time when privatization remains contentious, and consumers may have unrealistic expectations about the timing of lower prices and tangible service improvements. At the same time, the notion of an "independent" competition agency will be novel in many societies, which will create additional challenges in establishing the role and the legitimacy of the agency and its decisions. Competition advocacy is critical for gaining credibility and a constituency, since the legal fraternity, the business sector, the judiciary and the legislature have little or no background in competition. In these circumstances, a competition agency may be better able to positively influence government policy if it shares a closer than arm's length relationship with government, but that risks excess political interference including business lobbying.

170.43. Funding can be particularly tight for young competition agencies in developing countries. For various reasons – such as inadequate accounting and control measures, risk of fraud and corruption, or a general reluctance to introduce what might constitute a differential tax on segments of society for public services – some governments are wary of allowing independent bodies to

[49] See UNCTAD peer reviews on competition policy available at http://www.unctad.org/Templates/Page.asp?intItemID=4163&lang=1.

raise funding from alternative sources. For example, the Government of Jamaica has steadfastly denied requests from its Fair Trading Commission to levy fees for some of its services. The Fair Trading Commission is constrained in carrying out its competition enforcement functions and advocacy initiatives as government subventions are insufficient. Competition authorities in developing countries are often caught in a vicious cycle, whereby funding shortfalls affect not only their ability to carry out enforcement activities, but also their ability to monitor the impact of their activities and therefore to marshal the necessary proof of their worth; if they could do so, they could raise their credibility level, facilitate accountability, and provide justification for increased funding. The onus is often entirely on the competition authority to establish credibility, not only among the general public but also within the government. In this context, initial direct political backing for competition enforcement often sets the tone for the development of future relations between the competition authority and the authorizing environment.

171.44. Based on significant experience in talking and working with new and old competition agencies, Kovacic has produced a summary[50] of the major tasks of a new competition agency in its first decade:

(a) To establish credibility and a "presence" through enforcement, as well as through advocacy, publicity, and a good process;

(b) To obtain and sustain good leaders and staff;

(c) To control expectations and demands;

(d) To attain autonomy in prosecution/decisions, but not isolation from the political process;

(e) To persuade the courts, including with respect to the scope of the law;

(f) Information-gathering and sanctioning powers;

(g) The adequacy of the administrative process;

(h) To build links to other institutions, such as sectoral regulators, consumer organizations, business organizations, universities and the media; and

(i) To create business and social awareness of competition law.

172.45. Crucially, the skills shortage also has implications for the independence and accountability of the competition authority, which can be compromised by a weak and uninformed judiciary and parliament that may be unable to effectively carry out their enforcement roles. For instance, skills shortages and a lack of financial resources are among the reasons why developing countries often suffer a backlog of court cases, but the same resource constraints limit the possibility of setting up specialized competition courts. Not all members of parliament may have the capacity to analyse reporting on the complex and unfamiliar issues around competition enforcement. Hence, a minimum level of accountability,

[50] Kovacic WE (2010). The first decade: challenges facing new competition agencies. Presentation given in Belgrade. 26 June.
Available at http://www.ftc.gov/speeches/kovacic/100626belgradecompeition.pdf.

whereby the competition authority is required to report to or through a ministry, might be seen as a workable solution to the accountability problem.

173.46. A related problem is the dearth of independent local expertise that developing-country competition authorities can call upon from time to time to supplement in-house skills; this expertise may be particularly relevant when undertaking, for example, market inquiries or complex investigations. Resource constraints seldom permit the buying-in of international consultants. Also, there are few academic professors sufficiently versed in competition economics and law, and the majority of the experts in the legal fraternity – often – are experts who act on behalf of defendants in competition cases, and their perspective may often be coloured by this point of view.

174.47. The risk of corruption and capture in developing countries is a troublesome and clichéd issue. The empirical evidence as to whether low public-sector pay fosters corruption is mixed, and theory does not predict that higher pay will always reduce corruption. Competition enforcement, particularly in jurisdictions where competition commissions include part-time board members drawn from the private sector, can come up against some tricky issues relating to members' impartiality and independence. The concerns revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity, i.e. the government–industry revolving door. This is a problem for developed countries too, but in smaller and poorer economies these concerns take on a particular significance because there is a relatively smaller pool of individuals of sufficiently high standing to choose from. There is also a greater probability of individuals being appointed from large companies that are dominant in the economy and as such potentially more likely to fall foul of competition law. The omnipresence of large multinationals in this group adds a further wrinkle to the problem. Even where there are no incidents of impropriety, in the absence of ministerial oversight and effective accountability mechanisms, it can be difficult to manage public perceptions. For obvious reasons, competition policy in developing countries can sometimes be an emotive issue, and questions of "fairness" often arise; some things may be judged "unfair" by the public even if they are economically efficient.

175.48. Mechanisms for accountability in developing countries tend to be weak. As has already been mentioned, parliaments often do not have the necessary capacity to properly enforce accountability. There is a lack of clearly defined outcomes and indicators. Beyond making their annual reports and final decisions available to the public, there are seldom means for competition authorities to have direct consultation with citizens or to obtain feedback from them. Some competition authorities do not have the skills or resources to construct websites and keep them up to date. In this context, developing countries are enthusiastic about UNCTAD's voluntary peer reviews of competition enforcement regimes, which serve not only as a mechanism for assessing enforcement impact and identifying areas for improvement, but also as an independent instrument of accountability.

176.49. Developing countries and countries with economies in transition are beset by a number of barriers to competition. There is an urgent need for effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much

harder to implement competition law and policy in developing countries than in developed countries. The challenges faced in developing countries include large informal sectors, problems related to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints. It is important for each country to tailor its institutional design to suit its circumstances while operating within these constraints.

177.50. These features suggest that uncompetitive markets are an even greater problem in developing countries. The need for effective competition law enforcement is great, but young competition agencies face serious institutional, political, human and financial constraints, which hamper effective implementation of competition law.

178.51. It is also clear that competition enforcement cannot be divorced from the broader context in which it operates, and that elements of operational independence encompass a transparent process by which non-efficiency considerations (public interest) are factored into competition enforcement decisions. For young competition agencies, this may be a critical accountability mechanism. Arriving at consensus on a definition of what constitutes undue political interference, and on the qualitative benchmarks by which this is to be assessed, is a complicated matter, as it involves subjective judgments to a greater or lesser extent.

179.52. Consideration of the various criteria mentioned above may be an important factor in developing countries' objectives. The priorities of young competition agencies may be quite different from those of mature competition agencies. However, there is a risk of asking too much from young competition agencies, when other policy instruments may be the most appropriate tools to achieve certain ends. This strengthens the case for prioritization and evaluation. It is necessary to understand the effects of a country's programme of competition law enforcement in order to determine the potential and the limitations of a competition agency.

A. Benchmarking institutional profiles

180.53. Developing credible, effective competition regimes takes time and much iteration. As policymakers in developing countries and countries with economies in transition attempt to improve the performance of young competition agencies, they can turn to international best practice to benchmark the institutional profiles of competition authorities and their ability to undertake effective enforcement.

B. Developing a competition culture

181.54. The lack of a competition culture can be a significant impediment to the effective implementation of a new competition law. It is therefore important to develop strong communication capability within a young agency, so that both the nature and the effect of the authority's interventions can be understood and appreciated. This can provide some justification for conducting ex post evaluations, so that effects can be roughly quantified and disseminated.

C. Updating and amending laws, guidelines and procedures

182.55. The benchmarking process can provide a diagnosis for major procedural and administrative changes that are necessary for the optimum functioning of the authority and the law. One important example in recent years has been the effective implementation of a corporate leniency policy. External peer reviews, in a variety of jurisdictions, have also helped generate the political impetus to effect the requisite changes.

183.56. In its submission, the European Commission notes that the Directorate-General for Competition regularly undertakes reviews of legislative acts, such as the Block Exemption regulations, in the period in which they come up for amendment. Such reviews typically employ case studies and surveys to determine their effect and effectiveness, with a view to possible amendment. General fact-finding exercises can be conducted through hearings, questionnaires and consultation. This can feed into the policy process and inform the drafting of green papers and white papers that eventually lead to the amendment stage.

D. Evaluation as a tool for the efficiency of interventions

184.57. The most obvious reason for evaluation is to find means of improving interventions. Due to the resource constraints that most authorities face, it is important to reflect on the processes and practices, and to maximize the potential effectiveness of a given agency's resources. Furthermore, this is particularly valid in the context of competition policy, where it is not possible to simply transpose a set of "best practice" laws and processes. In competition policy, while much can be learned through comparison and benchmarking, one size does not fit all, and each jurisdiction needs to find the methods that are best suited to its needs.

185.58. Evaluation can assist in addressing the more severe political economy problems, thereby helping provide legitimacy for the policy system. On the other hand, capacity constraints within developing countries and countries with economies in transition hamper the proper performance of these evaluations. Nevertheless, when conducted appropriately in these contexts, evaluation can help to provide insights into the country-specific constraints on competition in these jurisdictions arising out of the characteristics listed above, and can suggest potential remedies.

E. UNCTAD/OECD peer reviews

186.59. Peer reviews by UNCTAD and by the Organization for Economic Cooperation and Development (OECD) are an important way for countries to benchmark institutional design suitable to their circumstances and management processes, and to receive feedback on the appropriateness of their criteria for intervention and on possible impediments to the effective implementation of their competition regimes.

187.60. The peer review process can also contribute greatly to the development of a country's competition regime. Peer reviews have become an appreciated feature of the work in competition law and policy carried out by UNCTAD, and also by OECD. At a recent conference, a speaker from Brazil noted that participating in various peer review processes as a donor had also been found to be very thought-provoking and helpful.In its submission to the round table, Turkey noted that the value of the peer review lay in the fact that it was prepared by "experts who had consulted third parties, such as practitioners, academics, members of business associations, and government officials working for various governmental agencies, in addition to the officials of the Authority." In that country, it had helped provide impetus for development of the leniency programme, for modifications in merger control, for increases in maximum fines for violations, for procedural changes for consent agreements, and for increases in legal and economic expertise at the Turkish Competition Authority.

188.61. Another forum providing some external discussion of processes and standards is the ICN, which assists in developing informal cooperation and knowledge-sharing between agencies, and can further soft (non-binding) cooperation and harmonization and help provide useful peer insights into the workings of a country's competition regime.

189.62. Young competition authorities should seek assistance from international organizations and from their counterparts in other countries. For young authorities, cooperation, particularly on a regional level, was considered vital. They should also maximize the use of informal interactions with competition authorities from other countries. Technical cooperation could also be addressed in this framework.

V. Barefoot competition offices

190.63. A competition law and office is sometimes part of a structural adjustment package, and not an organic product of the political and economic situation of a country or region. Not a recipient of meaningful political or economic support, it is staffed by a handful of well-meaning but underresourced officials. Can such an office influence events towards the objectives in the competition law? One expert, noting that requirements for the competition law to be useful and meaningful can be difficult to fulfil, wrote that, "If crucial elements are missing, wise policymakers might choose not to adopt antitrust at all."[51]

[51] Fox E (2008). Antitrust, economic development and poverty: the other path. Paper presented at the Ad Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development. 15 July 2008. Geneva. Available at: http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0003_en.pdf and based on an article of the same name in the Southwestern Journal of Law and Trade in the Americas, vol. 13, p. 211. Her list about how to make a competition law useful and meaningful included the following requirements: that the scope of coverage of the law be sufficient; that the competition agency be independent; that it be well funded and sufficiently staffed by educated and trained, non-corrupt personnel; that the appellate channels themselves be well qualified and non-corrupt; that due process be assured in all proceedings; that all institutions operate transparently and accountably, with published decisions and judgments; and that the agency use advocacy.

191.64. A weak competition office in unpromising circumstances has few options. From the discussion above, it is clear that enforcement – a resource-intensive activity – is best left to others. Unfortunately, that immediately removes any deterrence to cartels and other anticompetitive conduct. Advocacy for competition can be targeted toward powerful agencies with competition-friendly mandates and perspectives. For example, the telecommunications regulator may favour increased competition in mobile telephony, or the central bank may favour opening the banking sector to more competition. Another strategy for advocacy could be to identify potential beneficiaries of (in particular) lower barriers to entry, and to carry out studies to characterize their gains and explain to the potential beneficiaries in a way that they understand the benefits to them of competition. It is not necessarily the excluded who would benefit the most; sometimes it is, instead, the powerful entities that control the inefficient, uncompetitive services or goods, such as enterprises that require transport.

192.65. Cooperation with other competition agencies may allow sharing in capacity-building and in technical assistance. Although taking account of the foreign effects of enforcement actions is likely beyond their mandates, there may indeed be positive cross-border effects, and highlighting them may help in domestic advocacy.

193.66. In sum, the limited resources available for advocacy and studies in weak competition offices should be deployed as strategically as those of well-resourced agencies, with progress and setbacks evaluated and the results fed back in to revise the strategic choices. While the foundations for effectiveness may be absent, good governance practices can avoid discrediting the competition office, and a focus on strategic objectives and on an intelligent choice of activities may be able to advance competition.

VI. Issues for discussion

(a) In a jurisdiction where the idea of competition is contrary to historical or traditional values, what steps may be taken to ensure that the mission of a competition agency will be accepted by society at large?

(b) The skills needed to implement an effective competition policy may not be readily available to governments doing so for the first time. What strategies may be employed to attract the necessary skills and talents to the agency?

(c) In a society that has been characterized by dominant firms, an agency that does an effective job of encouraging competition is likely to attract political opposition. What strategies may be used to ensure the continued effectiveness of the agency?

(d) How can capacity-building contribute to the effectiveness of young competition agencies? What are best practices in upgrading the skills of staff?

(e) Formulating a set of priorities in the first years of operation and evaluating the impact of competition decisions.

Prioritization and resource allocation as a tool for agency effectiveness

Introduction

1. The topic of priority setting and resource allocation is part of UNCTAD's work on agency effectiveness. The paper draws on previous works conducted by UNCTAD, the more experienced competition agencies, and other international and non-governmental organizations. The paper is based on responses provided by selected competition agencies to an UNCTAD's questionnaire.[52] The paper identifies challenges faced by young competition agencies in applying priority setting and resource allocation as relevant tools for their effectiveness.

2. The paper is structured as follows: section I explains why priority setting and resource allocation are essential tools for agency effectiveness. Section II defines priority setting, the criteria used by competition agencies and experiences of mature competition authorities based on a secretariat survey. Section III discusses how the institutional design shapes priorities and resource allocation. Section IV addresses how the resource allocation can be used efficiently to meet priorities and reviews best practices, including staff recruitment and retention, simplifying procedures and learning from other case law. Section V looks at the life cycle of the competition agencies and the development of priorities and agency performance. Section VI identifies issues for further discussion by associating both priority setting and resource allocation and providing recommendations on how to strengthen this key part of the day-to-day business of competition authorities, in particular for young and small competition agencies.

I. Setting priorities and allocating resources are critical processes for agency performance

3. Priority setting and resource allocation are vital parts of the internal effectiveness of a competition agency.[53] While interventions may be chosen to maximize specific objectives of the institution or organization, they all are constrained with respect to practical and budgetary issues. This is the type of challenge that young competition agencies are not typically well equipped to solve rationally unaided. Young agencies tend to use heuristic or intuitive approaches to simplify complexity, and in the process, important information is ignored. Moreover, young competition agencies may be pressured to select interventions for political motives. This underlines the need for a rational and transparent approach to priority setting.

[52] Responses to the questionnaire were received from Brazil, Costa Rica, France, Germany, India, Indonesia, Mauritius, the Republic of Korea, the Russian Federation, Serbia, Turky and Ukraine.

[53] In 2008, the International Competition Network (ICN) carried out a survey with twenty competition agencies and two non-governmental advisors from seventeen jurisdictions. In 2012, the Organization for Economic Cooperation and Development (OECD) secretariat conducted a survey on the evaluation of the enforcement and advocacy activities of OECD competition agencies (see OECD 2012). Part of the questionnaire was devoted to assess how competition agencies set their priorities.

4. Priority setting is performed differently by different competition agencies depending on functions and powers set out in the law and the environment in which the agency operates (see section III). As such, young and small competition agencies may have additional difficulties in setting strategies and priorities as they often lack resources, investigatory powers, and support from business, regulators and other public bodies.

5. Over the past decades, a number of approaches to priority setting have been developed, including cost-effectiveness and equity analyses. While these approaches concentrate on a single criterion, in day-to-day life competition agencies need to make choices taking into account multiple criteria simultaneously.

A. Concepts and definitions of priority setting

6. The term priority setting describes the process whereby the competition agency determines which task should receive the highest priority and which should receive the lowest according to their available resources. Resource allocation depends on priority setting, availability of adequate human resources, contractual status of staff and knowledge management, among other factors.

7. The concept of priority setting refers to a process of deciding what type of activities, enforcement actions, advocacy initiatives, or in general competition policy measures a competition agency might pursue in a given period of time. Normally, where a strategic plan is adopted, competition agencies translate this plan into operational priorities. This exercise allows the competition agencies to establish an optimal portfolio of activities and to realize the objectives set out in its strategic plan.

8. From a performance point of view, priority setting seeks to maximize the effectiveness and make use of the time, ability and resources available. In this sense, the use of an analytic hierarchy process to prioritize different forms of resources can help the institution to maximize the scarce resources for a project or activity. Various forms of information and resources and their associated activities may critically affect the project, which have to be carefully dealt with for enhancing the project performance. Essentially, when some of these forms of information/resources have to be produced and managed by more sophisticated information technology, the more that is known about their importance level, the better the investment in the project can be allocated.

9. The competition agency’s limited resources should be focused on high-impact or high-significance projects and sectors. Although both impact and significance can be interpreted through various proxies (for example, direct economic impact on consumers, indirect deterrence effects, precedent-setting value), a diligent approach to priority setting and use of resources will improve the agencies performance and effectiveness. Setting priorities, however, does not mean the competition agency should neglect the sectors or areas that are not high priority in its work plan.

B. Objectives of priority setting

10. The main objective of priority setting is to ensure that resources are not too spread out, which would have the consequence of many objectives being pursued but of low or no impact. In their replies to the secretariat questionnaire, competition agencies identified the following objectives:

11. In Ukraine, priority setting allows for proper coordination of the Anti-monopoly Committee's structural divisions' and territorial branches' work. This in turn leads to achieving the overall goals of competition policy, improving the efficiency of the committee's work, and optimal resource allocation. In France, priority setting allows the Competition Authority to define its overall position in the economy and society. For instance, sector inquiries enable the competition authority to give a general overview of the competition operation of a market and to identify potential sources of growth or innovation.

12. In South Africa, priority setting targets activities that have a high impact on people's welfare. Furthermore, prioritization was also identified to significantly reduce internal stress and improve productivity.[54] As a result, priority setting is identified as an effective tool for using limited resources effectively and to protect the market economy system. Indonesia priority setting is viewed as a tool to provide a public service as efficiently as possible. In Mauritius priority setting is crucial because it helps to ensure that the resources of the Competition Commission are not too spread out, which would have the consequence of many reports being issued but of a poorer quality. Setting priorities by the Serbia Competition Commission is important because of the small number of employees and its plan to realize the goals of the competition protection with minimum costs.

C. The powers of competition agencies and the process of priority setting

13. The powers of the competition agencies to set priorities and allocate resources vary with respect to the competition law mandate itself, degrees of consistency and predictability and are influenced by the objectives of the law and how clearly they are articulated.

14. Priority setting can be established by law to constitute a legal obligation as in the case of India, Indonesia, Malaysia, Mongolia, Serbia, Turkey and Ukraine, among others.[55] It can also be formally set within the strategic planning of the agency, as in the case of the United States of America Federal Trade Commission (FTC) and United Kingdom of Great Britain and Northern Ireland Office of Fair Trading (OFT).

[54] OECD (2013). Competition and poverty reduction. Competition and poverty reduction. Contribution from South Africa to the Global Forum on Competition. DAF/COMP/GF/WD(2013)23. Paris. 22 January.

[55] Responses obtained in questionnaires sent by competition agencies responding to the UNCTAD survey carried out between December 2012 and February 2013.

15. In the United States of America, the FTC reported that in addition to internal planning processes, strategic planning is required at one level by a government-wide requirement that all agencies report on their objectives and performance measures under the Government Performance and Results Act. The FTC addresses problems it has observed in the market through a mix of law enforcement, competition advocacy, and industry and policy studies, as appropriate. The latter are part of a larger competition policy research and development effort to inform itself and relevant stakeholders about how well markets are working and what obstacles to competition exist.

16. Brazil, Colombia, Costa Rica and Spain, among others, reported that priority setting is informally agreed and defined and then communicated within the agency on a year-by-year basis. They also indicated that they engage in some form of priority setting, as would be expected in environments with limited resources and (in theory) unlimited demand for intervention.[56] In the case of Colombia, priority setting is determined within a strategic plan since the competition agency has a broader portfolio of mandate. However, in the case of Costa Rica, where the agency is located in a ministry but reports to both the ministry and the Competition Commission, priority setting is more challenging and may be subject to conflicting objectives set out by the two structures.

17. Some competition agencies indicated that, within the agency, priorities are set by the leadership (the head of the agency and/or the board). In some other agencies, for example the OFT, the leadership makes the final decision, but only after extensive discussions with staff. In Brazil (the Secretaria de Direito Econômico), Mexico, Peru, Spain and the United States of America (the Department of Justice), the setting of the priorities is carried out with the direct participation of the staff. In general, the UNCTAD survey shows that priority setting is never defined by one person; all respondents indicated that there was some form of collective consultation or decision-making.

18. The process of deciding whether or not to grant priority to an individual project or activity varies from agency to agency. In addition, there are a number of factors the competition agencies consider when determining decision-making for priority setting:[57]

19. (a) What dictates the priority-setting process?

20. (b) What is the proper scope of the agency's priority-setting process? Should it involve division-by-division planning, or should it be an agency-wide exercise?

21. (c) Should priority setting be centralized within the agency? For example, should there be a research panel or board within the agency to oversee the process?

[56] Responses obtained to the UNCTAD survey from Brazil, Colombia and Costa Rica.

[57] ICN (2010). Strategic planning and prioritization. In: *Agency Effectiveness Handbook*. ICN. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf (accessed 22 April 2013).

22. (d) Should there be specific procedures in place to develop priority-setting criteria? Or can priority setting take place more informally? For example, should the economist's division take the lead in identifying issues, with ad hoc groups within other divisions gathering to address these issues and ultimately going to the agency head without proposals?

D. Criteria for priority setting

23. In practice, the way priorities are set varies across jurisdictions. Some competition agencies select areas on which to focus over a given period of time (which can range from one to five years), while others turn these priorities into specific, more measurable objectives to be achieved or into specific actions to be undertaken. Twenty-nine out of 40 competition agencies that set priorities make them public in their annual report, or in other publications, or through speeches and presentations.

24. Prioritizing matters and complaints that are economically significant or that would yield significant precedent is a criterion that a number of competition agencies use. A degree of discretion of the agency is required. For example, the Competition Commission of Mauritius reported that it performs regular review of all complaints to assess whether they would potentially constitute a breach of the law. If all allegations are upheld, the agency then seeks additional information prior to making a decision on how to proceed.

25. Nonetheless, the degree of discretion of the agency can be limited by law. For example, under the provisions of the Competition Act of India, the Competition Commission has to examine all the complaints and does not have authority to prioritize examination of complaints.[58] Similarly, in Indonesia the anti-monopoly agency Komisi Pengawas Persaingan Usaha (KPPU) focuses its activities on four high-impact sectors, namely: (a) sectors that are closely related to the society's way of life; (b) highly concentrated industry; (c) markets where prices are highly sensitive; (d) public infrastructure and services. The determining factors depend on the importance of the market for the overall economy and the availability of human capacities within the KPPU to investigate the case.

26. In the Republic of Korea, the priority is the eradication of cartels. In the same vein, sanctions against abuse of market dominance and unfair trading practices that harm people's daily lives is one of the main functions of the Fair Trade Commission (KFTC) of the country. In addition, the KFTC focuses on promoting a market environment favourable to business and to consumers.

[58] In the case of India, statutory obligation, as given under the Competition Act, 2002, speaks sufficiently about duties and goals of the Competition Commission of India. These statutory mandates are taken into consideration in identification of priorities. However, in case of ex officio investigation (*suo moto*) the Commission has discretion to prioritize. The Commission has been largely focusing on competition concerns related to cartels in central sectors of the economy as well as those which affect the ordinary citizen most.

27. In Germany, the Bundeskartellamt´s approach to priority setting and resource management can be best described as “specialization”. Strategic priority setting is performed by the leadership of the authority, whereas operative priority setting lies with the divisions.

28. The Competition Commission of South Africa, through a multi-year plan, focuses its resources on those sectors that provide products and services that make up a significant proportion of the expenditure of poor households and also those sectors that have been earmarked by government as important for the generation of employment and the provision of infrastructure. The poverty reduction imperative is also reflected in the merger assessment regime, which incorporates public interest provisions that focus the Commission’s attention on issues with a bearing on poverty and development, such as employment and small business development.

29. In Turkey, it is a statutory obligation to respond to every complaint and notification. Likewise, the Turkish Competition Authorities (TCA) do not have any discretion in cases where there is a complaint. The majority of the TCA’s proceedings are initiated through complaints. Therefore, in terms of enforcement, there is very little room for the Authority to prioritize. However, in the area of advocacy, the TCA can set goals and prioritize more freely. Overall, the TCA sets its priorities according to a strategic plan and annual work plans, which are prepared by the newly established Department of Strategy, Regulation and Budget and finalized by the top management and the Competition Board.

30. Three criteria are generally used by agencies when setting up their priorities: first, whether the project/activity is linked to a potential impact on consumer welfare or the economy; second, whether the project/activity constitutes a key sector of the economy; third, factors linked to institutional and procedural considerations.

31. In Peru, the National Institute for the Defense of Competition and the Protection of Intellectual Property prioritizes ex officio investigations based on the likelihood of funding and the extent of case impact on the economy. The Ukrainian Competition Commission takes into consideration three main criteria in setting its priorities: first, a need to strengthen certain areas of the Committee’s enforcement practices; second, identification of certain functional problems in a product market in Ukraine; third, orders from the country’s leadership.

32. In the United States of America, the Department of Justice, in its discretionary power, considers the likelihood of finding a violation and whether the matter is significant. Determining which matters are significant is a flexible, matter-by-matter analysis that involves consideration of a number of factors including the volume of commerce affected, the geographic area impacted, the impact of the investigation, whether the conduct affects the federal government, and, if the case is criminal, the degree of culpability of the conspirators and the deterrent impact.

33. Priority setting in the United Kingdom's OFT[59] takes into account: the direct and indirect effect on consumer welfare in the market or sector in which the intervention will take place; the strategic significance of the work; the risks (the likelihood of a successful outcome); the resource implications of engaging in the enforcement or advocacy work.

34. In France, the key criteria for priority setting are: first, the likely outcome for the competition authority, consumers, businesses and the European Union and international competition community; second, the balance between costs and benefits, including market impact (spurring compliance through deterrent enforcement or through advocacy) and non-market impact (for example, leadership, communication); third, the strategic importance of the sector for the French or European economy; fourth, the consistency with the broader portfolio of the Competition Authority's initiatives and past track record; fifth, the information gathered through formal or informal complaints; sixth, public expectations (including parliament, government, consumers and other stakeholders including sectoral regulators).

35. In Mauritius, priority setting has been implemented in an informal and non-systematic manner through senior management discussion at monthly meetings where decisions on which matters to pursue are taken.

36. Overall, the benefits of applying priority-setting criteria include the following:

37. (a) The benefits of competition policy provide objective grounds for justifying the priority setting of particular projects;

38. (b) Priority setting contributes to the legitimacy of the agency's activities by providing a clear and explicit framework – as opposed to implicit rules of thumb – for taking decisions on priorities;

39. (c) The criteria appear particularly helpful for smaller competition agencies in allocating their resources.

II. The institutional design shapes the way the agency sets priorities

40. The life cycle of a "standard" competition agency (see below) is complex. A number of external factors as well as the institutional design determine how agencies go about setting priorities and allocate resources over the life cycle.

41. An important external factor is the institutional design of the agency. In this sense, there are at least three types of agency models:[60]

[59] See the OFT's website, www.oft.gov.uk.

[60] See Fox EM and Treblicock MJ (2013). *The Design of Competition Law Institutions: Global Norms, Local Choices*. Law and Global Governance Series. Oxford University Press. Oxford. See also UNCTAD (various years). *The Model Law on Competition*. United Nations publication. TD/RBP/CONF.7/8 and more recent individual chapter versions. New York and Geneva.

42. (a) The integrated agency model, which describes a regime where the competition agency is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies;

43. (b) The bifurcated judicial model, which describes a framework where the competition agency is empowered with investigative functions, and must bring enforcement actions before courts of general jurisdiction;

44. (c) The bifurcated agency model consists of a regime where the competition agency is empowered only to investigate cases and bring cases before specialized competition tribunals.

45. The institutional design, the powers and functioning of the competition agencies and the way these are articulated determine the degree of freedom and the extent to which a competition agency can set priorities and use resources to meet its objectives. Five critical features of the institutional design have a bearing on the design of the strategies, including priorities and their processes. These are: independence, enforcement powers, accountability, transparency and the portfolio of the agency (cooperation with other agencies to design a portfolio of activities).

A. Criteria for agency performance, priority setting and resource allocation

1. Independence and priority setting

46. The independence of a competition agency is a crucial issue because it ensures that priority setting and any decision made by the competition agency is free from political and business influences. Independence can be further divided into three categories: (a) independence in decision-making; (b) budgetary independence; (c) priority setting and resource allocation. UNCTAD's survey reports that although more and more competition agencies are independent from politicians and businesses in all aspects of their work, independence is a relative concept. For example the competition agency of Mauritius reported that it does not take into account other governmental policies when it sets priorities, but the Indonesian KPPU reported that in setting priorities it must take into account other governmental policies so that the competition policy is enforced in harmony with other governmental policies. A similar case takes place in Ukraine – the Antimonopoly Committee is a government body with a special status and is part of the executive branch. Because of this, government policy on entrepreneurship, antitrust regulation, competition development and market structure greatly affect the way the Antimonopoly Committee sets its priorities.

47. Thus, independence and autonomy are relative. Competition agencies are subject to government oversight and their decisions are subject to judicial review. In that sense, independence means in this context that the agency may enjoy autonomy in making plans, that is, priority setting, and making decisions on anti-competitive matters, and yet it is accountable for its action, impact and use of scare resources (see below).

48. The table below shows the relationship between the five criteria for agency performance and effectiveness and the degree of freedom in setting priorities and allocating resources.

Criteria for agency performance and priority setting

Criteria for effectiveness	*Priority setting and resource allocation*
Independence	Provides high degree of freedom
Enforcement powers	Determines the scope of application of the law and, indirectly, priority setting
Transparency	Requires communication on priorities and resource allocation
Accountability	Constrains the degree of freedom
Portfolio of the agency	Provides high degree of freedom and requires coordination with other institutions

Source: UNCTAD secretariat's own elaboration.

2. Enforcement powers and priority setting

49. The best expression for this heading is that "the competition agency must have teeth". A competition agency that has limited enforcement powers is most unlikely to select and target meaningful priorities such as cartels. However, while most competition agencies do possess enforcement powers, they differ greatly in the scope of this power and its use. For instance, the competition agency of Colombia has powers to investigate and sanction the interested parties, while the Conseil de la Concurrence of Morocco has no power to initiate investigation.[61] In Costa Rica the investigative powers are delegated to the Technical Service Unit while adjudication of cases is in the hands of the Commission. In the case of Chile, investigation and sanctioning are handled by two different entities: the Economic National Prosecutor Office (Fiscalia Nacional Económica) and the Competition Tribunal.

3. Accountability and priority setting

50. Accountability provides check and balance against the independence of the competition agency and forces the agency to focus its priorities on its mandate and activities that yield benefits to consumers and business and to report on them. Agencies are accountable for the use of their human and financial resources and for the impact of their actions. To the extent that agencies factor in these elements, accountability and priority setting are synergy enhancing.

4. Transparency and priority setting

51. Another closely related topic to the above is transparency, where the decisions, reasoning and policies of the competition agency are made

[61] The new draft competition law gives full powers to the competition agency.

public. This enhances the public understanding of the priority setting of the competition agency's objectives and the way it intends to apply the law.

52. As stated above, competition agencies usually communicate their priorities and actions at the beginning of each period of implementation. Communication is a vital element of competition advocacy and enhances transparency. By communicating to business, consumers, regulators and government on how the agency intends to enforce the law and which sector or areas it intends to focus on, the agency reinforces its legitimacy and promotes a common understanding of the law and the benefits it can yield.

53. In addition, effective communication is an essential feature of priority setting as it allows management and staff to understand what the priorities of the agency are, what priority-setting criteria are used to select priorities, and why particular ongoing projects have priority status. The benefits of effective communication usually include improved buy-in from staff, more focused and better organized projects, and higher quality output.

5. Portfolio of the agency

54. As discussed above under the objectives of priority setting, competition agencies often set themselves a portfolio of projects, which include inter alia institution building, advocacy, market enquiries, focus on cartels, bid rigging, anti-competitive mergers, and the like. The challenge in meeting multiple objectives requires good priority settings that take into account a number of criteria discussed above and particularly the impact of the performance of the agency and the benefits it will have for consumers and businesses.

55. One of the major challenges is to work together with other government bodies and sector regulators in areas where there are overlapping competencies and where competition concerns may not be given priority. Experiences from more mature competition agencies indicate that priority was placed on dialogue, coordination and allocation of interventions.

B. External factors that influence the way priorities and resource allocation are set

56. A number of significant external factors can influence the way priorities and resource allocations are set for the competition agency. These factors may include:

57. (a) When competition law and policy are not part of the historical or traditional values in a given society, priority should be given to explaining the benefits of competition and the mission of the competition agency so as to ensure its acceptance by society at large;

58. (b) If the skills needed to implement an effective competition policy are not readily available, the agency should employ ad hoc strategies to attract the necessary skills and talents (see below);

59. (c) If the society is characterized by dominant firms and oligopolistic structures, it may happen that an effective agency doing a good job of encouraging competition is likely to attract political opposition; special strategies may need to be developed to ensure against budgetary cuts to avoid lobbying before parliament and the executive branches.

III. Efficient use of resources to meet priorities

60. The choice of priorities by competition agencies is based on different criteria and sources of information, but there is one key factor that constrains competition agencies' ability to opt for one or another approach – human and financial resources.

61. The challenge is even more critical for young competition agencies in developing countries where human and financial resources are extremely limited. This underlines the importance of making good use of the scarce resources to enhance agency performance and effectiveness.

62. Competition agencies need therefore to focus on those interventions that are most needed and/or are likely to have highest impact. As a logical consequence of a good priority-setting exercise, an effective competition agency would achieve its objectives by developing strategies and procedures that simplify processes, such as merger review, hire and retain staff with the right mix of skills as well as allocate resources to these priorities. Moreover, resource allocation is related not only to priority setting (that is, which advocacy or enforcement efforts are undertaken, and which are not) but also to the allocation of staff to different roles for motivation and career development.

A. Recruitment and retention of staff

63. The most valuable asset of a competition agency is its staff. For many young competition agencies, there are challenges to recruit and retain highly qualified staff due to budgetary constraints and lack of experts in antitrust issues. Many young competition agencies need highly qualified staff, but are unable to compete with private-sector salaries. Moreover, several young agencies are part of line ministries where staff are recruited through civil service procedures, which limits the agencies' freedom to select suitable candidates and to retain them. Young competition agencies have remedied this situation by motivating and retaining staff by means of other inducements, such as high-quality training, the opportunity to engage in academic work and a superior work–life balance. Training in areas such as project management, procedure and communications, and advocacy techniques may complement the academic educational background of the lawyers and economists who dominate many agencies.

64. Furthermore, experience shows that there is a need for human resource management in competition agencies to create programmes on retention of the knowledge held by staff. Such a knowledge management strategy would preserve the most valuable asset of a competition agency – the staff. Such a strategy should address, inter-alia, the following issues:

65. (a) What are the crucial areas of knowledge for the organization's future success?

66. (b) Which are most valuable areas of knowledge?

67. (c) Which are most at risk of loss through staff loss and turnover?

68. (d) Which areas could be easily replaced if lost and which are irreplaceable?

69. The most irreplaceable fields of knowledge that are at risk from high staff turnover are where the competition agencies' knowledge-retention efforts need to be focused. It is important to identify exactly what knowledge a person has, and to grade it accordingly, with the person's help and with input from colleagues. This knowledge can be codified by information and communications technology (ICT)-based or manual systems that store and disseminate knowledge and allow it to be reused. These systems should manage the institutional memory of an organization. For competition agencies with that are financially strong, investing in an ICT system that can store and allow the reuse of knowledge is critical. For competition agencies without strong financial capabilities, simple databases can be used to manage and share knowledge – such as keeping manuals and registers, setting up documentation centres and making use of the Internet. The following box details some examples of retention of knowledge through knowledge management and sharing systems.

Selected examples of knowledge retention through knowledge management and sharing systems

Both the KFTC and the South African Competition Commission have ICT-based knowledge management systems that support the registration, evaluation, accumulation and sharing of knowledge. In the case of the KFTC, knowledge evaluation is where the junior advisory board evaluates the quality of registered knowledge based on relevance, utility and creativity. The registered knowledge is then organized and accumulated by category on a "knowledge map" of the knowledge management system and is regularly updated. This process is known as knowledge accumulation. Consequently, employees are able to access the acquired knowledge that they need.

Source: UNCTAD (2012). Knowledge and human resource management for effective enforcement of competition law. TD/B/C.I/CLP/15/Rev.1. Geneva. 22 June.

70. As indicated above, one of the advantages of administrative independence is that Human resource management can also offer attractive compensation and rewards. Reward systems indicate that the organization values and shapes individuals' behaviour. For example, it is important to reward and recognize knowledge-sharing behaviours. Rewards address the universal question of "what's in it for me?". They also help to communicate what is really important for the organization. Employees should be rewarded for sharing what they know, and departments should be rewarded for

fostering collaboration. Best practice organizations see rewards and recognitions as a way to acknowledge the value of sharing knowledge, to appreciate the contributions that employees make, and to increase awareness of teamwork.

71. For example, KFTC has a system of rewards to maintain the vitality of its knowledge managment system through knowledge registration, evaluation, accumulation and sharing. The rewards system takes the form of a “knowledge mileage programme”, where miles are given based on the number of registrations, referrals, evaluations and comments. At the end of the year, a monetary or non-monetary award is given to employees based on the miles they have earned. The KFTC also organizes a “knowledge contest” where, for a limited period, every employee provides one piece of knowledge. All the information is evaluated, and the employees selected as providers of outstanding knowledge are presented with an award.

B. Simplifying procedures to make better use of resources

72. An evaluation of the current work process allows agencies to identify the flaws or inconsistencies in the system. By identifying redundancies in the process agencies can eliminate without sacrificing the quality of the process. Experimenting with a simplified procedure allows for testing out in a real situation to determine if the new procedure is effective. Performing the specific task both the old way and the new way to compare the time it takes and the results obtained, as well as to work out the flaws or further simplify the task, will make better use of time and resources.

C. Learning from other case laws

73. One way to gain a useful understanding of the competition law and its enforcement is to examine the existing relevant case law handled by both mature and young competition agencies and higher courts. Some of the insights that might be gained from the various interpretations of competition principles, design of appropriate remedies and sanctions could be useful to young competition agencies in handling similar cases for the first time. This should not imply, however, the direct application of these interpretations and approaches by young competition agencies, because different laws reflect different objectives and legal and administrative traditions in different countries. The insights gained can be of great value in avoiding mistakes and using resources sparingly to handle cases.

D. Effect of resources on priority setting

74. It is hard to imagine how a competition agency can set priorities without adequate resources. In fact, replies to the UNCTAD survey indicate that several competition agencies face difficulties in implementing their work plan because of resource constraints and the uncertainty surrounding budgetary appropriation, particularly in times of economic difficulties. One

agency reported that the contractual status of its staff was changed in 2013 to a lower level and the technical secretariat is to be absorbed by a ministry.

75. Although budgetary constraints apply to all agencies, young competition agencies face the hardest challenge in enforcing competition law where it is most needed and where countries are lagging behind in establishing well-functioning markets.

76. Besides its legal statute, the effectiveness of a competition agency depends on the human and financial resources at its disposal. Indeed, an effective agency needs adequate financial resource to recruit and retain highly qualified personnel to achieve its mission. The lack of adequate budgetary resources and expertise can undermine performance and effectiveness.

77. In Indonesia, human resource allocation and priority setting become priority for the KPPU due to the high number of complaints. The solution included a new regulation, Regulation N°2/2008, regarding the secretariat's authority in handling the cases. This regulation created a mandate to prioritize bid-rigging cases (under Rp 10 billion) without supervision from the commissioners and to allocate staff to these tasks while the commissioners focus on the adjudication of cases. The second KPPU Regulation N°1/2012 provided further guidance on priority setting and resource allocation. Internal factors such as staff profile, and cooperation with regulators and the police are also taken into account by KPPU in micromanagement to obtain better allocation of resources.

78. Some agencies reported that setting priorities and allocating resources should be at the forefront of a competition agency in their operation. However, rigid priority setting can also become a harmful discipline, particularly when it is inflexible, when it can lead to underenforcement. For example, priority setting might lead an authority to say it is going to focus on big cases with low risk in sectors that affect retail products, thus leading the authority to wait for cases that fall into the desired priority setting and low-risk areas, rather than simply considering complaints to represent valid cases under the competition law, and to investigate on that basis. The underenforcement that could come from priority setting is a real risk. One approach to priority setting, then, might focus on how to allocate resources to different areas of activity. This, for example, could be for an authority to note that, before priority setting, it observes that investigations are roughly one third merger, one third abuse and one third cartel. The authority might accept that this a reasonable allocation. But there is still substantial room for useful priority setting related to resource allocation. The following citation illustrates such an example:[62]

> One story might go something like this: cartel cases take more resources per case, so they will get, say 45 per cent of resources. Merger cases require speedy and instant progress, let's say by law, while abuse cases can have variable speeds, so we will combine staff for both types of cases (like the reorganization of Directorate General

[62] Interview with Mr. Sean Ennis. former Executive Director of the Mauritius Competition Commission.

of Competition of the EU, DG COMP, in 2003). At the same time advocacy is an important activity with rewards that can substantially outweigh costs. So we will maintain resources for advocacy that would lie within the realms allowed by parliament. This might yield 10 per cent for advocacy and, by elimination, 45 per cent for the joint merger/abuse area.

79. In France, the parliament adopts the budget of the Autorité de la Concurrence within the framework of a global budget programme (including competition enforcement, competitive regulation of markets, economic protection of consumers and safety of consumers) and assesses in a general way the work done by the Autorité. Within the framework of human resource management, the General Rapporteur identifies the priority cases and sets up objectives to launch ex officio investigations. In this respect, a strategic planning is established that has implications for the collective and individual remuneration of staff and for their evaluation.

80. In the Republic of Korea, the KFTC allocates resources to intervene in market activities according to its priorities that are set annually reflecting economic conditions at home and abroad, changes of market structure, the general public's needs, and the like. This annual plan is made public. The KFTC operates five regional offices and regional issues have many disparate natures from nationwide issues. Rather than competition law enforcement affecting industrial landscape nationwide, regional issues often involve disputes between private parties, such as multi-level marketing practices and funeral insurance. For this reason, the regional offices put more resources on unfair trade practices instead of abuse of dominance or merger control, and support the enforcement by the headquarters. Based on the performance system cited in section A, and internal/external assessment systems, the KFTC allocates its enforcement resource first on areas with a high possibility of undermining enterprise competitiveness and consumer welfare. If any unexpected policy demand arises, the KFTC manages flexibly according to the situation. Regarding its budget, the KFTC consults with the Ministry of Strategy and Finance and sets up a five-year financial management plan by April of each year. Within the five-year mid-term plan, yearly budget plans are fixed at the governmental level after adjusting the amounts further according to business priority. The Republic of Korea's National Assembly then confirms these plans for the next year during its September regular sessions. If policy priority changes, the KFTC analyses organizational and personnel efficiency and amends relevant rules such as office organization through consultations with the Ministry of Public Administration and Security to keep its personnel management system optimal.

81. In Germany, optimal priority setting in terms of resource efficiency, risk reduction and social welfare is often found to differ per industry sector. Therefore, priority setting is the responsibility of the respective decision division that has specific knowledge of the concerned markets. However, all decision divisions meet regularly once a week, together with the heads of the agency and the general policy division to discuss ongoing work as well as the setting of priorities.

IV. Priority setting and resource allocation are closely related to the life cycle of the agency

82. The development and performance of competition agencies seem to follow a life cycle: (a) developing an institutional framework for the implementation of the law; (b) recruiting key staff, acquiring premises and logistics; (c) developing a work plan and setting priorities for the first years; (d) expanding the third phase to include investigation of complex cases, and international cooperation in enforcement.

83. The priorities and resource allocation in the first three phases often focus on advocacy activities including reaching a common understanding of the objectives of the law and voluntary compliance with the law.

84. The first stage relates to the establishment of the competition agency. This normally involves drafting the guidelines, setting up the organizational structure, the recruitment and training of high-skill staff, the necessary information technology platforms and knowledge management for smooth functioning of the competition agency.

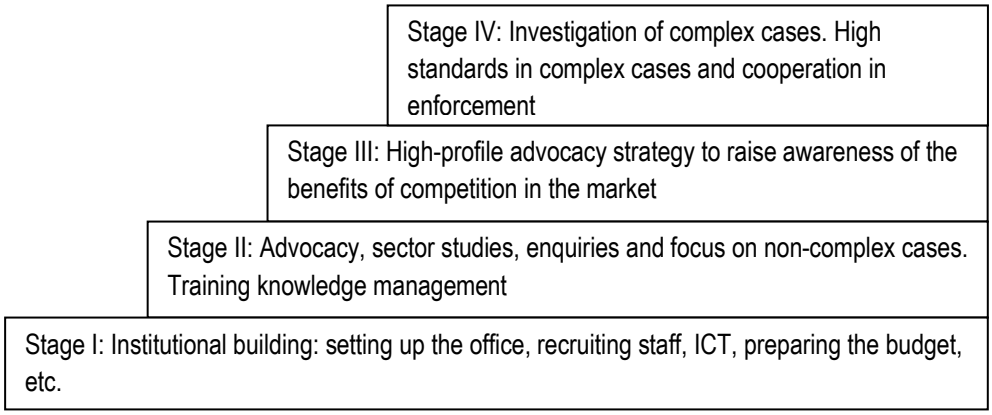
85. The second stage focuses on advocacy activities and non-complex cases. This phase may also include developing working relationships with regulatory bodies and other government institutions in charge of market organization. In this phase advocacy activities are usually strengthened so as to gain legitimacy of the agency actions. This phase is a permanent feature of the agency's work.

86. The third phase involves a high profile advocacy strategy to raise awareness of the benefits of competition in the markets. Sector market studies play a pivotal role in assessing the competition conditions in key sectors of the economy and use the findings and recommendations of these studies for advocacy programmes of the competition agency. This phase may last for up to five years and in some cases even longer.

87. The fourth stage begins when the competition agency launches investigations on complex issues such as cartels or unilateral conduct. These actions complement the activities that are part of the first and second phases described above. During the third phase of the cycle the competition agency refines its priority setting by drawing on its experience, knowledge of the market and capabilities to acquire and implement international best practices.

88. The time needed for each of the phases described above will depend on the type of institutional design of the competition agency, the availability of human and financial resources and the criteria for effectiveness that the agency may have set for itself at the outset of its operations. The following figure summarizes the stages of the life cycle of a competition agency.

Priority setting and the life cycle of a competition agency



V. Recommended practices for priority setting and resource allocation

89. In light of the above, priority setting and resource use can play an important role in the performance and effectiveness of a competition agency's interventions. Because of the different institutional settings and the way competition agencies are structured, strategic planning and its setting of priorities may be a big challenge for young competition agencies.

90. Competition agencies should adopt a flexible approach to setting priorities by focusing on those objectives that can be achieved within existing human and financial resources. These may include competition advocacy, advisory opinions to government and regulators on the benefits of competition policy and coherence; and working together with public procurement agencies to prevent and prosecute bid rigging. In later stages, the competition agency may focus on complex cases including cartels, monopolization and anti-competitive mergers.

91. The various factors discussed above are important in developing countries' objectives and the setting of priorities. The priorities of young competition agencies may be quite different from those of mature competition agencies. However, there is a risk of asking too much from young competition agencies, when other policy instruments may be the most appropriate tools to achieve certain ends. This strengthens the case for narrow priority setting and evaluation. Moreover, choices of priority are, to an important extent, a function of the competition law objectives and the country history, and its legal, political and economic culture.

92. Taking into account the life cycle of the agency discussed above, the following points may be useful for setting priorities and using resources to enhance agency performance:

(a) Develop clear policy objectives and enforcement strategy including priorities and resource allocations;

(b) Determine whether the agency is the best institution to handle the competition case;

(c) Evaluate the benefits to consumers and businesses that would arise from this intervention in any particular case;

(d) Assess the deterrent effect and the economic importance of the specific case;

(e) Assess the resources needed to achieve this outcome, including the type of evidence required and the likelihood of success;

(f) A good corporate leniency policy can contribute to the successful investigation and prosecution of cartels. It would also be important to consider whether national, international, or major regional participants are involved in the matter and therefore whether to include provision for cooperation in the leniency programme;[63]

(g) Consider the aggravating factors which may strengthen or weaken the need to take action in any particular case;

(h) Consider the precedent or policy value of the case;

(i) Consider the likelihood of success – whether the case lead to the desired outcome;

(j) Simplify, test and evaluate procedures to make better use of resources;

(k) Design an effective knowledge management system;

(l) Develop a sustainable staff training and retention programme;

(m) Draw on expertise and experience of more advanced and young competition agencies and international organizations, including the use of case law and precedents;

(n) Put in place a regular evaluation system to assess priority setting and resource allocation.

VI. Issues for discussion

93. Delegates may wish to consider the following issues for consultation during the round table:

(a) Regardless of the legal statute of a competition agency, is there a universal standard to devise the appropriate way by which a competition agency should set its priorities and allocate its scarce resources?

(b) What type of technical assistance is needed to assist young competition agencies in developing countries and economies in transition to set their priorities and allocate their resources in order to enhance their performance and effectiveness? What can international cooperation do in this area?

[63] See UNCTAD report Modalities and procedure of cooperation (forthcoming).

(c) What can young competition agencies learn from each other and from more mature competition authorities in setting up their priorities and allocating their resources?

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

Introduction

1. 1. In its report entitled “Foundations of an effective competition agency” (TD/B/C.I/CLP/8),[64] UNCTAD identified knowledge-management and human-resource issues as part of the pillars of an effective competition agency. The effectiveness of a competition agency depends on the appropriate use of internal resources. The design of the human-resource functions and other capabilities of the agency influence the effectiveness of the agency’s decisions and its ability to fulfil its mandate. The sources of information for this paper are replies by member States to UNCTAD’s request for information, work carried out by the International Competition Network (ICN), and writings by academic practitioners, in particular the extensive work carried out by Chris Harman and Sue Brelade in this subject area.

I. Knowledge management and human-resource management: definitions and objectives

A. Definitions

1. Knowledge management

2. 2. According to Harman and Brelade (2007): “Knowledge management is the acquisition and use of resources to create an environment in which information is accessible to individuals and in which individuals acquire, share and use that information to develop their own knowledge and are encouraged and enabled to apply their knowledge for the benefit of the organization.”[65]

3. 3. The above definition highlights the “multidisciplinary approach necessary within organizations committed to KM. It emphasizes that successful knowledge management is more than just implementing new technology and new systems. It has to create a culture – an organizational climate – in which the knowledge workers actually want to apply their knowledge for the benefit of the organization.”[2]

2. Human-resource management

4. 4. Human-resource management (HRM) can be defined as the administrative discipline of hiring and developing employees so that they become more valuable to the organization. HRM includes (a) conducting job analyses; (b) planning personnel needs, and recruitment; (c) selecting the right people for the job; (d) orienting and training; (e) determining and managing wages and salaries; (f) providing benefits and incentives; (g) appraising performance; (h) resolving disputes; and (i) communicating with all employees at all levels.

[64] Document TD/B/C.I/CLP/8 was presented during the eleventh session of the Intergovernmental Group of Experts.

[65] Harman C and Brelade S (2007). Managing human resources in the knowledge economy. United Nations Seventh Global Forum on Reinventing Government. June.

5. 5. This paper discusses how HRM can manage the "knowledge worker". The term "knowledge worker" was first defined by Drucker (1959) as "one who works primarily with information or one who develops and uses knowledge in the workplace".[66] Knowledge workers in today's workforce are individuals who are valued for their ability to act and communicate with knowledge within a specific subject area. They will often advance the overall understanding of the subject matter through focused analysis, design and/or development. They use research skills to define problems and to identify alternatives. Fuelled by their expertise and insight, they work to solve those problems, in an effort to influence institutional decisions, priorities and strategies.

6. 6. The majority of knowledge workers are employees who have a good academic background and experience, and are considered as people who "think for a living". They include – among others – doctors, lawyers, economists, and financial analysts. The majority of the staff in competition agencies fall under the scope of "knowledge workers", and HRM can develop staff so that they become more valuable to the organization. However, this paper does not exclude other support workers, who make an important contribution to the running and execution of the work of the competition agencies. They are an integral part in the KM process.

B. Classification of knowledge management

7. 7. Knowledge management is about developing, sharing and applying knowledge within the organization to gain and sustain a competitive advantage. It has been argued that knowledge is dependent on people, and that HRM activities, such as recruitment and selection, education and development, performance management, and pay and rewards, as well as the creation of a learning culture, are vital for managing knowledge within organizations.

8. 8. The most common classification of knowledge is either explicit or tacit (implicit). In this classification, explicit knowledge is considered to be formal and objective, and can be expressed unambiguously in words, numbers and specifications. It can therefore be transferred via formal and systematic methods in the form of official statements, rules and procedures, and is easy to codify. Tacit knowledge, by contrast, is subjective, situational, and intimately tied to the knower's experience. This makes it difficult to formalize, document, and communicate to others. Insights, intuition, personal beliefs and skills, and using a rule of thumb to solve a complex problem are examples of tacit knowledge.[67] It is the ability of people to know how to use, relate to, and interpret explicit information such as documents, and the ability to know how to take effective action in response to the agency's environment and various elements within that environment. Tacit knowledge can be shared in relational situations, such as mentorships and coaching, and through in-house trainings, where experienced employees are encouraged to share their experiences with their colleagues.

[66] Drucker P (1996*). Landmarks of Tomorrow*. Transaction Publishers.

[67] Edvardsson I (2003). Knowledge management and creative HRM. Occasional paper 14. Department of Human Resource Management. University of Strathclyde.

9. 9. Knowledge can also be classified as individual or collective. Individual knowledge is the knowledge harboured by an individual in an organization.[68] For example, in the course of work, an individual may undertake a new organizational task, or even a common task but in a new way, which may yield the same or better results. If this knowledge is not shared with other employees, the organization can neither multiply nor leverage on the value of this expertise, and it can be lost permanently when the individual leaves the organization. However, if the individual knowledge is shared with other employees, it becomes collective knowledge.

10. 10. Collective knowledge is, therefore, the knowledge held commonly by a group of members of an organization.[69] It includes organizing principles, routines, practices, and a degree of organizational consensus on past experiences, goals, missions and results. Collective knowledge is more secure and more strategic, and by comparison with individual knowledge is less volatile and less easily affected by staff turnover.[70]

11. 11. Collaborative knowledge-sharing practices within a competition agency will facilitate the interaction of many people's knowledge, which is then tested, enriched and redefined to create a greater body of collective knowledge which can be retained in the organization's memory.

12. 12. Knowledge management is important for understanding:

(a) What an organization knows;

(b) The location of the knowledge – for example, in the mind of a specific expert, in a specific department, in old files, with a specific team etc.;

(c) In what form this knowledge is stored – in the minds of experts, on paper, in notes etc.;

(d) How to best transfer this knowledge to the relevant people, so as to take advantage of it and ensure that it is not lost; and

(e) The need to methodically assess the organization's actual know-how versus the organization's needs and to act accordingly – for example by hiring, or promoting specific in-house knowledge creation.

13. 13. KM is useful because it places focus on knowledge as an actual asset, rather than as something intangible. In so doing, it enables an organization to better protect and exploit what it knows, and to improve and focus its knowledge-development efforts to match its needs.

14. 14. Consequently, KM (a) helps organizations to learn from past mistakes and successes; (b) helps organizations to better exploit existing knowledge assets by redeploying them in areas where the organization stands to gain something – for example, using knowledge from one department to improve or support another department; (c) promotes a long-term focus on developing the right competencies and skills and removing obsolete knowledge; (d) enhances

[68] Chua A (2002). Taxonomy of organizational knowledge. Singapore Management Review. 24 (2): 69–76.

[69] Ibid.

[70] Ibid.

the organization's ability to innovate; and (e) enhances the organization's ability to protect its key knowledge and competencies from being lost or copied.

15. 15. Effective KM accomplishes the organization's objectives by structuring people, technology, and knowledge contents. It considers (a) creation, codification, storage and dissemination of knowledge; (b) sharing knowledge as a way to promote learning and innovation; and (c) technological tools and organizational culture and routines.

16. 16. While the corporate sector organizes its KM strategies around increasing its productivity and lowering costs, young competition agencies have as their ultimate aim to make markets pro-poor. It is important for young competition agencies to establish their baseline – such as consumer welfare, delivering goods and services to all, and better delivery of the regulatory functions, among other things. The baseline when creating KM strategies would be grounded and bound by the competition legislation.

17. 17. Young competition agencies face challenges in recruiting and retaining knowledge workers. Such agencies require specialized knowledge workers such as economists who have a knowledge of industrial organization, econometrics and economic regulation, as well as lawyers, and experts who are dual-qualified in economics and law to handle cases. Young competition agencies also require skills in drafting regulations, application guidelines, notification forms and other types of documents. Knowledge of investigations and case handling, and design of remedies, is also important. There is a need to manage the knowledge workers effectively, so as to retain and share the knowledge within the young competition agencies.

C. Human-resource management

18. 18. HRM is the organizational function that deals with issues related to people, such as compensation, hiring, performance management, development of the organization, safety, wellness, benefits, employee motivation, communication, administration, and training. It is the process through which the personnel are accorded their rightful position in the organization, for the mutual benefit of the employer and the employee.

19. 19. Competition agencies aim at regulating the market for the benefit of the consumer. In order to achieve this objective, HRM systems should be geared towards ensuring a well-motivated staff that is provided with the opportunity to utilize its potential and talents to improve the delivery of service to clients. Staff skills improvements and learning programmes are key to this process, as are competitive remuneration packages to minimize staff turnover.

20. 20. HRM is also a strategic and comprehensive approach both to managing people and to managing the workplace culture and environment. Human resource functions are moving away from the traditional personnel, administration and transactional roles, which are increasingly being outsourced.[71] HRM is now expected to add value to the strategic utilization of

[71] For example, many multinational corporations outsource payroll and administrative personnel functions.

employees and to put in place employee programmes that impact the institution concerned in measurable ways.

21. 21. According to Harman and Brelade, current HRM trends are moving "towards policies that respect and recognize the requirements of knowledge workers as individuals… HRM attempts to meet the expectations of knowledge workers through policies designed to facilitate differing 'lifestyle choices' such as flexible work programmes, by actively articulating the organizational values, supporting involvement, and respecting diversity."[2]

22. 22. Harman and Brelade state that success in competition agencies "will be seen in the creation of a culture that supports the sharing of knowledge and information, creates fluid organizational boundaries and focuses on bringing resources together creatively to deliver social outcomes."[2] For example, it has been recognized that there is a need to use economic analysis in order to solve competition cases. High turnover and difficulties in attracting qualified staff can limit the availability of knowledge (e.g. the use of economics and econometrics in competition cases).[72] There is a need for HRM to design structures that will facilitate access to and sharing of knowledge, as well as its retention within the agency.

D. Objectives and benefits of joint strategies in knowledge and human-resource management

23. 23. KM is a process of learning and reviewing existing processes with the aim of fulfilling the goals and objectives of the organization. Among the challenges faced by young competition agencies, particularly those from developing countries, is that of setting up joint KM and HRM processes, and maintaining and utilizing them to enhance their management and other roles in order to fulfil their legislative and policy mandates.

24. 24. Researchers have been working on KM issues for over two decades. Collison and Parcell[73] outline KM strategies that embrace issues ranging from multicultural recognition to the use of information and communications technology (ICT) tools, with the aim of enhancing intra and extra communication, and of sharing information, collaborative and networking systems, staff profile exchanges, and talent management. The types of KM and HRM strategies to implement for effective enforcement and implementation of the agencies' mandates is the prerogative of each organization, and will depend on its culture of doing business, its operating environment, and its systems for realizing mandates and goals.

25. 25. There is a need for joint KM and HRM strategies in competition agencies to support (a) exchange of information within the agencies; (b) comity considerations; and (c) the exchange of confidential information with other competition agencies. One of the constraints faced by many competition agencies with regard to sharing information under comity considerations is the

[72] See UNCTAD document TD/B/C.I/CLP/4 entitled "The use of economic analysis in competition cases", which was presented during the tenth session of the Intergovernmental Group of Experts.

[73] Collison C and Parcell G (2001). *Learning to Fly: Practical Lessons from One of the World's Leading Knowledge Companies.* Capstone. Oxford.

extent to which case-specific information of a confidential nature can be shared without hurting business interests. This has hampered the implementation of competition-related provisions within regional economic communities.

26. 26. Limits on the exchange and flow of information within competition agencies and between different competition agencies serve to limit the effective enforcement of competition laws. Joint KM and HRM strategies will create and enhance information flows within competition agencies and between stakeholders to support the effective enforcement of competition law and policy.

27. 27. Competition agencies' joint KM and HRM strategies should aim at influencing policymaking for the following two reasons: (a) as a way of influencing policies that promote competition and consumer welfare in their countries and regions; and (b) to create understanding of competition agencies' work for budget support purposes.

28. 28. Another objective of competition agencies' joint KM and HRM strategies is to influence businesses' policies in support of a competitive market. The strategies should target the building of capabilities within agencies to communicate and advocate for the business community's understanding of the benefits of competition. The strategies should also create ways and means of engagement with the business community to reach an understanding of the role of competition law and its institutions in preserving the business environment.

29. 29. Joint strategies in KM and HRM should be a priority for "barefoot" and young competition agencies in developing countries. Joint strategies in KM and HRM will create an organizational culture where there is free flow of information, cohesiveness, and teamwork. In this way, young competition agencies will be able to carry out their mandates effectively.

II. Common challenges for effective knowledge and human-resource management in competition law enforcement

A. Recruitment and retention of staff

30. 30. For many developing countries' barefoot and young competition agencies, there are challenges in recruiting and retaining highly qualified staff, due to budgetary constraints. Many young competition agencies need highly qualified staff, but are unable to compete with private-sector salaries. They therefore motivate and retain their staff by means of other inducements, such as high-quality training, the opportunity to engage in academic work, and a superior work–life balance. Training in areas such as project management, procedure and communications, and advocacy techniques may complement the academic educational background of the lawyers and economists who dominate many agencies.[74]

31. 31. Young competition agencies also need to be administratively independent. Independent status allows the agency to compete with the private

[74] See UNCTAD document TD/B/C.I/CLP/8.

sector for the best talents, to offer competitive salaries and benefits, and to avoid civil servant employment conditions.[75]

32. 32. There is a need for HRM in competition agencies to create programmes on retention of the knowledge held by staff. Before embarking on such a programme, the following question needs to be asked: "What is the key knowledge that needs to be protected by the organization?" An organization requires a KM strategy that addresses this. If an organization does not have a KM strategy, then there needs to be an assessment of the following:

(a) What are the crucial areas of knowledge for the organization's future success?

(b) Of these, which are most valuable?

(c) Which are most at risk of loss through staff loss and turnover?

(d) Which could be easily replaced if lost and which are irreplaceable?

33. 33. The most irreplaceable, high-risk fields of knowledge that are at risk from high staff turnover are where competition agencies' knowledge-retention efforts need to be focused. It is important to identify exactly what knowledge a person has, and to grade it accordingly, with the person's help and with input from colleagues. This knowledge can be codified by ICT or manual systems that store and disseminate knowledge and allow it to be reused. These systems should manage the institutional memory of an organization. For competition agencies with that are financially strong, investing in an ICT system that can store and allow the reuse of knowledge is critical. For competition agencies without strong financial capabilities, simple databases can be used to manage and share knowledge – such as keeping handwritten registers and setting up documentation centres, and making use of the Internet.

Box 1. Selected examples of KM retention and sharing systems

Both the Fair Trade Commission of the Republic of Korea (KFTC) and the South African Competition Commission have ICT-based KM systems that support the registration, evaluation, accumulation and sharing of knowledge. In the case of the KFTC, knowledge evaluation is where the Junior Advisory Board evaluates the quality of registered knowledge based on relevance, utility and creativity. The registered knowledge is then organized and accumulated by category on a "knowledge map" of the knowledge management system and is regularly updated. This process is known as knowledge accumulation. Consequently, employees are able to access the acquired knowledge that they need.

[75] See UNCTAD document TD/B/COM.2/CLP/67 entitled "Independence and accountability of competition authorities".

34. 34. In addition, the circumstances under which an employee is leaving will have a direct impact on the organization's knowledge retention capabilities. An exit/knowledge retention interview is important for the purposes of extracting knowledge. Handing over notes is not sufficient for the purposes of knowledge retention. It is important to start the interview by addressing the topics of highest priority for the organization. The interviewee should be helped to identify broad areas of successes and challenges in these topic areas, as this tends to provide the most learning points and is a good place to start. The interviewee should be asked questions such as: "What are the key factors that make this a success?" Or, "what are the common pitfalls?" Or, "what are some of the things your successor should be aware of?" As the interviewee talks, it is important to make a list of these factors and then to start probing for detail and advice, and to record the feedback.

Box 2. South African Competition Commission KM exit interview process

In the South African Competition Commission, when a staff member leaves a position, case file "handover" sessions take place, where the exiting staff member will discuss details of the case with his or her manager and team members. This is part of a formal KM exit process, which is included as part of the Commission's termination policy. It supplements a human resource exit process, and focuses only on information and knowledge transfer. The KM exit standardizes the activities relating to staff who leave, with specific requirements for knowledge transfer interactions, a checklist for information types to be transferred, and standard questions to be asked in a KM exit interview. The exit interview is conducted by the KM coordinator. It further supplements the divisional management process and the ongoing use of the KM system to ensure effective knowledge transfer.

Source: Submission by the South African Competition Commission.

35. 35. Further, with the agreement of the interviewee, one can:

(a) Analyse their diary: Look for the activities and when they happen, and find out how they approached the activity.

(b) Discuss their contact list: Who do they interact with, why and when, and how do they best work with these people?

(c) Reference their filing cabinet and online files: What are the sources they use? What are the documents they refer to? What are the slide sets, programs, spreadsheets etc. that they use? What are the things they keep in their bottom drawer?[76]

36. 36. In some competition agencies, the knowledge is concentrated in just a few employees. Such agencies could easily be crippled if the employees exited for their retirement or by resignation. Harnessing such knowledge involves creating good relationships, and encouraging employees to discuss their

[76] Young T (2006). Implementing a knowledge retention strategy. *Knowledge Management Review*. November/December: 5–9.

experiences, to train other staff, and to codify the information by recording it manually or by ICT. Good relationships are crucial to accessing individual knowledge.

37. 37. One of the ways to address the challenge of retention of staff is by competition agencies doing more than most public sector employers do to motivate and retain staff. This includes applying strategies such as high-quality training, opportunities to engage in academic work, flexibility about working times and locations, encouraging work–life balance, bonuses, awards for top-performing employees, as well as being given credit for significant pieces of work.[77] For many knowledge workers, having free time to work on knowledge-building projects or to go to conferences, or spending time on interesting projects, may be as motivating as monetary rewards.

38. 38. On the other hand, a certain level of staff turnover is healthy, to ensure development and growth opportunities for those who remain, and to avoid stagnation. Maintaining good relations with the organization's alumni is beneficial, as they may have useful information and contacts that the organization could rely on.

39. 39. It is important to note that building an interactive culture and creating time for informal discussions between staff as a regular process of work is the best way to share knowledge. Exit/retention interviews should be an addition to the ongoing processes of information-sharing.

B. Knowledge-sharing

40. 40. Many young competition agencies report the lack of a knowledge-sharing culture, with individuals keeping knowledge to themselves. There is a need to build a knowledge-sharing culture in order to add value to staff in competition agencies and other institutions. The discipline of knowledge management is about creating and managing the processes to get the right knowledge to the right people at the right time and to act on information to improve organizational performance.[78] People – not technology – are the key to knowledge management, because sharing and learning are social activities which take place among people. Technology can capture descriptions and information, but only people can convey practices. To ensure that practices are not only shared but transferred effectively to other staff in a competition agency, one has to connect employees and allow them to share their deep, rich, tacit knowledge. Once employees start helping one another and sharing what they know, the effort becomes a self -perpetuating cycle leading to a knowledge-sharing culture.

41. 41. Competition agencies should create institutional structures that promote knowledge-sharing between departments and provide the opportunity for staff to meet with their peers and management to share information on their assignments. Staff retreats and team-building events are good forums for

[77] ICN (2009). Seminar on competition agency effectiveness. Summary report. January.

[78] O'Dell C and Hubert C (2011). Building a knowledge-sharing culture. *Journal for Quality and Participation.* July: 34.

sharing information on what the agency is doing. This will create cohesiveness among staff in the agency, and leads to knowledge-sharing.

42. 42. Agencies should build a culture in which learning from day-to-day practice is valued, encouraged and supported, by providing time, and public and private spaces, for learning, by providing learning resources (information centres, virtual universities), and by rewarding sharers and learners. There is a need to establish avenues to allow for flows of information within the agency.

43. 43. According to Harman and Brelade, "typical practices in the public sector of the United Kingdom that are designed to share knowledge and information include:

(a) Staff forums – where senior managers meet with staff and explain decisions or communicate policies and strategies in an informal setting;

(b) Electronic bulletins – weekly updates circulated electronically to all staff;

(c) Traditional printed organizational newsletters and newspapers;

(d) Regular formal meetings with staff representatives at departmental and corporate levels;

(e) Regular briefings cascaded verbally via managers throughout an organization;

(f) Open access to minutes of meetings/agendas via an intranet;

(g) Podcasts [79] of presentations and speeches by senior managers/political leaders."[2]

44. 44. Harman and Brelade note that with the practices listed above, "the emphasis is to move away from secretive and 'need to know' approaches and to create an open environment where information flows freely."[2]

III. Possible strategies and tools to address knowledge management and human-resource management challenges within a young competition agency

45. 45. How, then, is KM related to HRM? HRM is expected to add value to the strategic utilization of employees; likewise, employee programmes are expected to impact the institutions in measurable ways. It has been argued that knowledge is dependent on people, and that HRM issues – such as recruitment and selection, education and development, performance management, pay and reward, as well as the creation of a learning culture – are vital for managing knowledge within firms.[80]

[79] Podcasts are now commonly used for organizational announcements and meetings in large organizations.

[80] Edvardsson I (2008). HRM and knowledge management. Employee Relations. 30 (5): 553–556.

46. 46. There is a need to incorporate KM in fulfilling HRM functions such as recruitment and selection, training and development, performance management, rewards and recognition, career management, and improving the work environment.

A. Selection processes

47. 47. In recruiting and selecting staff, the interview and selection processes should gather evidence about individuals' knowledge-building behaviours. In recruitment and selection processes, new questions need to be asked, such as: (a) how have they helped develop their colleagues or teams?; (b) how do they keep their own knowledge up to date?; and (c) what are their professional networks, in terms of membership and involvement in professional associations? There is also a need to assess a candidate's willingness and ability to work in groups and share knowledge. The ability to generate innovative thoughts and to communicate are important abilities for the new employee to have.

48. 48. The role of HRM in recruitment would therefore mean identifying talent, and furthermore, as noted by Harman and Brelade, "recruiting talent and allowing jobs to develop around the person."[2] Functions should be based on the knowledge capabilities of the individuals and encourage multi-skilling depending on the capabilities of individuals.

49. 49. Not all knowledge workers generate the same level of value to an organization or have the same impact on organizational development or growth. This means that competition agencies may adopt techniques and approaches from large corporations, whereby different earnings levels are ascribed to different individuals based on contribution and value added. This will require agencies to communicate, to the governments and authorities that fund their budgets, the need to ascribe different compensation levels depending on the contribution and value added that knowledge workers make to the agencies.

50. 50. Once an employee is recruited, a "friendship system" needs to be developed, whereby the new employee is attached to an experienced staff member for a short time (such as one month) and is helped to settle in. This is done by introducing new employees to their colleagues, showing them around the organization, and making them feel welcome by introducing them to key members of staff, such as departmental heads. This helps the recruited staff member to become part of the KM system within the institution. This will contribute to building knowledge capabilities in the newly recruited staff member and will enable him/her to settle in quickly and contribute to the organization's goals effectively.

B. Training and development

51. 51. It is important for there to be continuous professional development, in order for the staff of competition agencies to stay at the forefront of their professional fields. Staff need to participate in activities that offer opportunities to further their professional development.

52. 52. Staff attachments and study tours to competition agencies with strong institutional structures are an important component of professional training and development where knowledge is transferred to develop institutional capabilities. In some countries such as Kenya, the civil service regulations provide that government staff who undergo specific types of professional training and attachments are bonded for one to three years, depending on the length and nature of the training, so as to transfer knowledge and utilize the knowledge within their institutions. This is to prevent the exit of staff immediately after receiving training.

53. 53. Trainings should be planned and designed to reinforce the organization's objectives. Sometimes, training is too oriented to academic issues of good competition law, and neglects the basics, such as good procedure, communication, advocacy techniques and other practical aspects of competition law enforcement. Participation in local and international events – such as trade fairs, UNCTAD meetings, ICN workshops and OECD global forums – is also a beneficial component of staff training and knowledge.

54. 54. Competition agencies can also create coaching and mentoring programmes to encourage the sharing of personalized knowledge. Coaching is the practice of supporting an individual, through the process of achieving a specific personal or professional result. The coach and coachee work together towards specific professional goals.

55. 55. Mentoring is crucial, as it supports and encourages people to manage their own learning and work in order to maximize their potential, develop skills, and improve performance. Mentoring is the long-term provision of guidance to someone less experienced in order to support their general development at work.

56. 56. Coaching and mentoring is critical for the passing on of individual and tacit knowledge from more experienced staff members to less experienced ones. The main reasons why organizations need coaching and mentoring activities are as follows:

(a) To maximize knowledge transfer: Coaching and mentoring leads to transfer of knowledge within the agency and contextual learning.

(b) To increase skill levels: Coaching and mentoring leads to transfer of core skills. Customization of skills in relation to the agency's mandate and cross-training of staff can be achieved. It allows workers to learn new skills, makes workers more valuable, breaks routines, and combats worker boredom.

(c) For succession planning: Coaching and mentoring enhances the ability of the agency to identify "fast track" candidates and prepares them for new jobs. It also ensures continuity of performance when key workers leave the organization because core skills have already been transferred.

57. 57. Objective-setting for individual staff members, and evaluation, should flow naturally from the strategic plan. Deadlines and targets for staff members should be clear. Internal communication with staff (regarding goals, objectives, priorities etc.) is important so that staff can own the vision and objectives, strategies and goals of the competition agency.

58. 58. Staff participation in training and development programmes and in coaching and mentoring should form an integral part of the performance appraisal. In this case, employees will be required to account for their contribution to the competition agency, and to their own development, in any of the above areas.

C. Performance management

59. 59. Performance management identifies who or what delivers the critical performance with respect to the organizational strategy and objectives, and ensures that performance is successfully carried out. Performance management needs to consider the different ways in which individuals contribute knowledge. Managers need to consider:

(a) Knowledge acquisition: What knowledge has the individual brought into the competition agency?

(b) Knowledge sharing: How has the individual applied his/her knowledge to help others to develop?

(c) Knowledge reuse: How frequently has the individual reused existing knowledge and what has been the outcome?

(d) Knowledge development: Has the individual actively developed his/her own knowledge and skills? How well has the individual applied his/her learning?

D. Compensation and rewards

60. 60. As indicated above, one of the advantages of administrative independence is that HRM can also offer attractive compensation and rewards. Reward systems indicate that the organization values and shapes individuals' behaviour. It is important to reward and recognize knowledge-sharing behaviours. Rewards address the universal question of "what's in it for me?" They also help to communicate what is really important for the organization. Employees should be rewarded for sharing what they know, and departments should be rewarded for fostering collaboration. Best practice organizations see rewards and recognitions as a way to acknowledge the value of sharing knowledge, to appreciate the contributions that employees make, and to increase awareness of teamwork.

61. 61. For instance, the Fair Trade Commission of the Republic of Korea (KFTC) has a system of rewards to maintain the vitality of its KM system through knowledge registration, evaluation, accumulation and sharing. The rewards system takes the form of a "knowledge mileage programme", where miles are given based on the number of registrations, referrals, evaluations and comments. At the end of the year, a monetary or non-monetary award is given to employees based on the miles they have earned. The KFTC also organizes a "knowledge contest" where, for a limited period, every employee provides one

piece of knowledge. All the information is evaluated, and the employees selected as providers of outstanding knowledge are presented with an award.[81]

E. Change in management roles

62. 62. Harman and Brelade state that in order for KM and HRM to be effective for the enforcement of competition law, management roles have to change from the roles of managers as controllers to managers playing roles of coaches, co-workers and facilitators. Harman and Brelade note that "experience indicates that the effective manager in a knowledge environment supports the acquisition and sharing of information and expertise by:

(a) Encouraging individuals to use their knowledge and expertise;

(b) Facilitating innovation and creativity and encouraging new ideas;

(c) Representing the interests of the team/individuals to the organization;

(d) Supporting the work of teams, both physical and virtual."[2]

63. 63. Harman and Brelade further note that "the management of virtual teams exhibits a less controlling approach to the management task. It emphasizes skills such as project management, prioritizing and planning, setting objectives, and monitoring outcomes."[2] An example of management of virtual and multidisciplinary teams in enforcement of competition law is the UNCTAD-led Competition and Consumer Protection for Latin America (COMPAL) programme[82] – a technical assistance programme on competition and consumer protection policies for Latin America. This programme is supported by Switzerland's State Secretariat for Economic Affairs (SECO). The programme assists the Plurinational State of Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru and Uruguay, to strengthen their capacities and institutions in the areas of competition and consumer protection laws and policies. The teams are composed of people from a number of different organizations – government, competition and consumer protection agencies, university research professors and private-sector companies, as well as individual experts.

64. 64. The COMPAL lead team in Geneva has clear targets and deliverables, and less direct control over the team engaged in the project. According to Harman and Brelade, "the use of web-based technology has meant that teams [have] worked as virtual teams."[2] The managers "deliver results without the traditional tools of 'command and control'." Motivation is "based on the intrinsic motivation in the work, and the role of the managers [is] to facilitate"[2] and coach, as co-workers and not through control. This has led to tremendous reforms in COMPAL countries, where all countries have competition and consumer laws in place. At the outset, only Costa Rica and Peru had competition laws and authorities in place. There has been capacity-building in the countries in the form of free flow of knowledge.

[81] Moon J (2011). Knowledge management system in the KFTC. Presentation for the tenth Annual ICN Conference. The Hague.

[82] http://compal.unctad.org.

65. 65. The above model can be replicated by young competition agencies in different regions, which could work together towards similar outcomes of capacity-building and enforcing competition law and policy within their regions. The Competition Programme for Africa (AFRICOMP) is an example of such an effort; it is aimed at helping African countries to develop appropriate administrative, institutional and legal structures for effective enforcement of competition and consumer laws and policies. UNCTAD has been working with development partners to extend the concept to the establishment of two training centres in French-speaking and English-speaking Africa.

66. 66. The virtual partnerships between competition agencies will help to develop an integrated approach towards competition law enforcement in their regions. They will be able to "share information, knowledge and resources across organizational [and national] boundaries. For human resource managers in competition agencies, this will involve:

(a) Encouraging collaboration;

(b) Making ideas accessible;

(c) Exploring (and resolving) conflicts;

(d) Encouraging dialogue;

(e) Encouraging a sense of community, common interest and trust."[2]

67. 67. Harman and Brelade note that "at the individual level, it will involve suspending judgment on some occasions and being tolerant of different viewpoints."[2]

68. 68. Harman and Brelade further note that "for managers to succeed in this type of environment, human resource departments' activities need to encourage and equip managers to:

(a) Challenge their own assumptions;

(b) Understand how their actions can help or hinder creativity and innovation;

(c) Learn to trust, accept and productively manage 'maverick' behaviour;

(d) Structure work to maximize learning opportunities;

(e) Accept that some mistakes will occur;

(f) Coach and mentor others as an intrinsic part of the work;

(g) Redefine problems as learning opportunities;

(h) Recognize and reward innovative contributions."[2]

69. 69. "For managers, this involves understanding individuals and teams, and having a willingness to be open to new ideas and development."[2]

F. Values and ethics

70. 70. Harman and Brelade note that "for individuals to actively contribute in a knowledge environment, there should be a balance in HRM polices and

practices that has an ethical basis that can be recognized and accepted. This is more clearly seen in situations of knowledge transfer, such as collaborative projects, mergers and acquisitions, and the transfer of skilled workers from one country to another. In knowledge transfer, knowledge workers are being asked to pass on their knowledge to others or facilitate the competition agency in encapsulating and encoding what they know. This can be a threatening exercise for individuals if they perceive that their value is based on what they know."[2] Individuals may feel that if they share whatever knowledge they have, their positions will be in jeopardy.

71. 71. "Cooperation in knowledge-sharing is readily obtained where there is an ethical framework based on recognizing the mutuality of interest. Three principles that have been found to be common in successful knowledge transfers are (a) reciprocity (a mutuality of benefit for the individual and the organization, whether economic, social or developmental etc.); (b) recognition (i.e. an acknowledgement that there is shared ownership of the knowledge between the individual, the organization and the wider society); and (c) utilization (that the result of the knowledge transfer will be a wider sharing and use of the knowledge)."[2]

72. 72. "Incorporating the idea of social ownership of knowledge is particularly relevant to knowledge transfer. Society has invested in the education and development of the individual and the framework within which both the individual and the competition agency exist and operate."[2] UNCTAD has created a Research Partnership Platform on Competition and Consumer Protection (RPP).[83] This is an initiative that aims at contributing to the development of best practices in the formulation and effective enforcement of competition and consumer protection laws and policies so as to promote development. The RPP brings together research institutions, universities, competition agencies, business and civil society, and provides a platform where they can undertake joint research and other activities with UNCTAD, and exchange ideas on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries and countries with economies in transition. This incorporates the idea of social ownership of knowledge to develop society and will help build human resource capacity in competition law and policy in universities, competition agencies and other institutions.

G. Culture and change

73. 73. This paper has adopted a working definition from Harman and Brelade, and reflects on its implications for "organizational culture". Experience indicates that a culture conducive to knowledge management is one that values (a) networking and broad contacts externally and internally; (b) respect for individuals; (c) creativity and innovation; (d) trust; (e) sharing of ideas and information; (f) sound underlying systems and procedures; and (g) continuous learning and development."[2]

74. 74. Harman and Brelade assert that in order to initiate changes that affect the way people think and to evolve new systems of beliefs, competition agencies

[83] http://www.unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Research-Partnership-Platform-on-Competition-and-Consumer-Protection--.aspx.

need to allocate resources and adopt modern ICT systems. This also has a bearing on the culture of the specific organization. Harman and Brelade call this alignment of “culture” and “knowledge economy”.

75. 75. Competition agencies should design tailor-made KM and HRM systems geared towards addressing the various needs of their clientele and stakeholders, including those of the business community, policymakers, consumer associations, academia, and sector-specific regulators. There should be a culture of information flow from the agencies to the stakeholders. In addition, internal KM systems should adequately create synergies between staff and management (including the chief executive and board members), which should also extend to other stakeholders such as the courts and appeal tribunals. A holistic approach to application of KM is recommended when considering effective enforcement in a competition agency.

76. 76. Harman and Brelade note that “where such change programmes are more successful, there is usually observable evidence of conscious working with the existing culture. The change is based on understanding and building on those values inherent within the existing culture that are conducive to effective KM… Building a culture for KM using this approach requires changes to systems and processes and changes to the ways of doing things.”[2]

77. 77. In addition, when considering KM and HRM strategies for competition agencies, it is important to consider the local environment in terms of priority sectors, market distortion areas, and major stakeholders, and to build capabilities in staff to handle the challenges of the local environment. Cultural values should also be considered when designing KM systems in different regions, especially in cases where best practices from one region are being applied in another. In KM and HRM matters, there are no “one size fits all” solutions. Transplanting systems from other competition agencies, jurisdictions and regions is not always a perfect fit. Alignment to local conditions is necessary in order to produce the desired results. Identification of local knowledge bases should act as the springboard towards designing effective KM and HR systems, especially in the South.

IV. Knowledge management strategies that can be applied to human-resource management

78. 78. Researchers have indicated that organizations do not adopt a uniform approach to knowledge management.[84] They outline two distinct strategies utilized when selecting a KM approach. The strategies are: (a) codification, centred around ICT systems and processes; and (b) personalization, centred around human resources.

79. 79. Codification strategy refers to the classification of explicit knowledge that is formal and objective and can be expressed in words, numbers and specifications. Knowledge such as cases, legal precedents, peer-agency approaches and outcomes, and peer, academic and judicial critiques, tends to be stored in databases where it can be accessed and used readily by anyone in

[84] Hansen MT, Nohria N and Tierney T (1999). What’s your strategy for managing knowledge? *Harvard Business Review.* 77 (2): 106–116.

the competition agency. Competition agencies can invest in ICT for projects such as intranets, data warehousing and data mining, knowledge mapping (identifying where knowledge is located in the firm), and electronic libraries.[85] This increases effectiveness and growth, as the reuse of knowledge saves work, reduces communications costs, and allows the competition agency to take in more work/projects. It is therefore closely related to exploitative learning, which tends to refine existing capabilities and technologies.

Box 3. The South African Competition Commission's KLM system

The South African Competition Commission has recently completed an upgrade to Sharepoint 2007, coupled with a workflow component (K2 Blackpearl) to better support collaboration and management information tracking. The system is available to all members, and teams are allocated areas per case, within which they are required to store and reference all case-related material. The system also has divisional and non-case areas for the retention and retrieval of general information that is useful for executing its mandate and supports casework more broadly.

Through the KM system, users can upload and store information and outputs on the electronic system. Hard copy information is archived at an off-site document management service provider.

Source: Submission by the South African Competition Commission.

80. 80. Personalization strategy refers to personal development of tacit knowledge that is based on insights, intuition and personal skills for solving complex problems. Such knowledge is mainly shared through direct person-to person contacts. Employees who collaborate and share knowledge are better able to achieve their work objectives, carry out their assignments more quickly and thoroughly, and receive recognition from their peers and mentors as key contributors and experts.

81. 81. Communities of practice are among the techniques that have to be used in order to facilitate knowledge-sharing. A community of practice is group of people who share similar interests (e.g. a craft or a profession) and is created with the goal of increasing knowledge related to their field. Communities of practice can exist online through "discussion boards" or "newsrooms", or in real groups that meet at work. It is through the process of sharing information and experiences with the group that the members learn from each other, and have an opportunity to develop themselves personally and professionally. Competition agencies should create communities of practice where staff learn from one another; these can be online or real groups that meet regularly for knowledge sharing and transfer.

82. 82. Personalization and explorative learning are closely related. Explorative learning is associated with basic research, innovation, risk-taking, and more relaxed controls. For personalization strategies to succeed, there is a need for flexibility, investment in learning, and the creation of new capabilities within a competition agency. The more experienced staff must be encouraged to share their knowledge with other staff, and there should be a strong focus on on-the-job knowledge transfer and learning.

[85] Edvardsson I (2008). HRM and knowledge management. *Employee Relations.* 30 (5): 553–561.

83. 83. The ICN survey on effective KM found that most responding agencies (80 per cent) do not have methods of organizing work that facilitate knowledge-sharing, such as project teams mixing junior and senior staff or newly recruited staff with experienced staff; 75 per cent have an a training induction course that includes training on how to use the agency's KM system; 56 per cent have materials on how to use the agency's KM stored on its KM system that staff can access easily; and 77 per cent carry out informal training on the job or mentoring. Some agencies have introduced an in-depth training and coaching system and assigned experienced employees to mentor and tutor newcomers.[86]

84. 84. When codification and personalization strategies are implemented together, the institution's KM capabilities are strengthened. For example, since 2005, the National Economic Prosecutor's Bureau of Chile has developed and used an electronic system of case follow-up, first in the Economic Analysis Division and then in the rest of the organization too. It is used in several areas of work, and includes tools for planning, reporting, and storage of reports. The Bureau has also set up a specialized library that holds an up-to-date collection of titles on competition law, and economic and other relevant subjects for competition analysis, with access to main electronic sources including "econlit" full texts, legal references and several databases. In the area of HRM, the Bureau has built capacity in hiring high-profile young staff, and offers internal performance assessment mechanisms and incentives that aim to reward the alignment of individual performance with institutional goals.[87]

85. 85. The codification and personalization strategies in KM help to frame the management practices of the organization as a whole.[4]

86. 86. The above discussion links both KM and HRM to the competitive strategy of the organization, that is to say, it is not knowledge itself but the way that it is applied to the strategic objectives of an organization that is the critical ingredient for competitiveness and success. This is likely to bring multiplier effects to the effectiveness of the operations of competition agencies and, therefore, successful implementation of competition policy and law within a country.

87. 87. Finally, Harman and Brelade note that "effective KM facilitates the acquisition of knowledge by individuals and encourages them to apply their knowledge for the benefit of the organization so that competitive advantage and service excellence are achieved."[2] Making knowledge workers productive requires changes in attitude, not only on the part of the individual knowledge worker, but on the part of the whole organization.[88]

V. Issues for discussion

(a) In the first years of competition agency operations, which areas of KM and HRM should be given priority in order to create maximum impact?

[86] ICN (2012). Effective knowledge management. *Agency Effectiveness Handbook:* 3.

[87] Submission by Chile.

[88] Drucker P (1999). *Management Challenges for the 21st Century*. Butterworth-Heinemann. Oxford: 156.

(b) How can young competition agencies include KM and HRM strategies into their organization's procedures?

(c) In cases where competition agencies are a department in a government ministry, how can the agencies influence government policy to include KM and HRM strategies that are oriented to their needs?

(d) What strategies can mature competition agencies adopt in order to share best KM and HRM practices with young competition agencies in developing countries?

Communication strategies of competition authorities as a tool for agency effectiveness

I. What is a communication strategy?

1. 1. An effective competition authority may be defined as one that achieves its objectives by using its available resources in the most efficient and appropriate manner. However, a competition authority is only one of many stakeholders in a competition environment, where other government ministries and agencies, the judiciary, the business community, non-governmental organizations and the general public all take action to achieve their own aims. The effectiveness of a competition authority is naturally affected by its place in this complex environment and indeed its effectiveness may be further defined by the manner in which it interacts with and modifies this environment.

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

3. 3. A key element of any communication strategy is the use of media to carry out advocacy activities. Accordingly, this note explores the communication strategies of competition authorities in the context of media advocacy activities. The importance of advocacy is discussed, both briefly in a wider context and in detail in the case of media activities, with particular attention given to the ways in which media advocacy promotes the competition environment. Media advocacy strategies across key sectors of the media are outlined, including press and print, television and radio, and new media. The importance and methods of evaluating media advocacy strategies are also discussed at length. Case studies and descriptive and comparative statistics are presented, based on authorities' responses to a survey distributed by the UNCTAD secretariat. Finally, questions are raised for further discussion on the topic.

4. 4. This note is based on studies undertaken by national and international organizations, academic papers and responses from national competition authorities to the UNCTAD survey.

II. Advocacy as part of a communication strategy

A. What is advocacy?

5. 5. There is no single, all-purpose definition of competition advocacy because competition authorities around the world need to use advocacy to deal with a variety of challenges. Competition advocacy as defined by the International Competition Network (ICN) refers to "those activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through [its] relationships with

other governmental entities and by increasing public awareness of the benefits of competition".[89]

6. 6. Competition advocacy comprises the following: "initiatives undertaken by the competition authority towards other public entities in order to influence the regulatory framework and its implementation in a competition-friendly way [and] all activities by competition authorities aimed at raising the awareness of economic agents, public authorities and the public at large about the benefits of competition to the society as a whole and about the role competition policy can play to promote and protect competition".[90]

B. Why carry out advocacy?

7. 7. Advocacy is carried out on the basis that competition policy is desirable for a number of key reasons. In markets with a sufficient number of competitors (or potential competitors), "free competition is supposed to lead to low prices for the consumers, an efficient use of resources by the producers and maximization of social welfare". [91] As well, in a dynamic setting, competition leads to technological innovations, higher product quality, a wider range of products and improved production efficiency. Finally, "without intervention, some markets may fail to provide minimal levels of services considered of public interest".[92]

8. 8. An argument may be made that the ultimate aim of competition advocacy should be to highlight rent-seeking behaviour by special interest groups, the costs of which may end up being borne by consumers and society as a whole, and that minimizing such behaviour, via public policy, is good for society overall. This view may be more justified in developing and transition countries where the business community, consumers and media have limited experience in identifying, challenging and seeking redress for anti-competitive practices, and where regulatory agencies and the political system have neither a tradition nor an internalized culture of free-market competition. Other justifications for competition advocacy include the existence of a statutory mandate in the constitutive act of a competition authority, such as the publication of educational and awareness programmes for competition and consumer protection and disseminating legislation passed, as well as the attractiveness for competition authorities of ex ante advocacy interventions rather than sanctions.

9. 9. With regard to the latter justification, a number of competition analysts are of the view that advocacy is less controversial than law enforcement. For this reason, they suggest that advocacy should be prioritized in developing countries, whereby the main issue becomes how to improve the effectiveness of

[89] ICN Advocacy Working Group, 2011, ICN Advocacy Toolkit Part I: Advocacy Process and Tools, presented at the Tenth ICN Annual Conference, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc745.pdf (accessed 15 April 2014).

[90] ICN Advocacy Working Group, 2002, Advocacy and Competition Policy, prepared for the First ICN Conference, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf (accessed 15 April 2014).

[91] Ibid.

[92] Ibid.

competition advocacy initiatives. [93] Simon Evenett outlines the following rationales identified by the ICN for undertaking competition advocacy:

(a) Competition advocacy is complementary to enforcement, by targeting government regulations as well as private sector threats to competition, through measures to eliminate, revise, deter or limit harm to the economy.

(b) Competition advocacy serves to prevent ex ante government intervention in favour of the weak economic agents who would suffer most from a faulty competitive process.

(c) By virtue of the autonomy of a competition authority, competition advocacy may serve to reduce waste that may arise from the influence of special interest groups over the decisions of government regulating agencies.

(d) In young competition regimes, advocacy to the general public is important as a tool for enhancing transparency, which helps to build support.[94]

C. How to carry out advocacy?

10. 10. In practice, the scope of advocacy-related activities may vary widely. For example, a presentation featuring a set of bullet points about basic issues, such as how monopoly harms the public but enriches the monopolist, is a form of advocacy. An extended legal and economic argument in a sectoral regulatory process is also an example of advocacy. Advocacy-related activities can further include testifying, making written submissions or issuing papers to ministries, legislative departments, courts, sectoral regulators or municipalities. In addition, advocacy-related activities can include giving speeches to professional and trade associations, academic institutions and conferences, as well as writing articles for publication in specialized or other journals and developing an articulated strategy for media. Holding press conferences and otherwise publicly explaining the importance and implications of competition and market principles could equally be considered advocacy. A competition authority may also launch initiatives connected to current cases or antitrust concerns, such as thematic campaigns or a dedicated year of competition advocacy.[95]

11. 11. In developing countries without well-established competition regimes, promoting competition principles to the general public is an ongoing task to be given priority not only so that the competition authority may publicize its mandates and assert its visibility, but also as a logical starting point for its overall activities. Ex ante prevention proves more cost-effective than enforcement, especially in the early years of the authority, when the link between lack of awareness and resource paucity may prove to be a vicious circle in which entrenched ways of doing business prevail. Therefore, in the early years of an authority, it would be more productive to begin with advocacy, before gradually introducing enforcement that concentrates on simple cases that are easy to

[93] S Evenett, 2006, Competition Advocacy: Time for a Rethink, *Northwestern Journal of International Law & Business*, 26(3):495–496.

[94] Ibid., 497–500.

[95] M Skrobisz, 2012, The ABCs of advocacy: the basic principles, presented at ICN Advocacy Workshop, available at http://www.autoritedelaconcurrence.fr/doc/bos5_uokik_icn_oct12.pdf (accessed 15 April 2014).

evaluate. Investigation of complicated cases may be deferred until the competition culture and accumulated experience are more conducive to their conduct.[96]

III. Media advocacy

12. 12. The desired result of any media-based communication campaign is the ability of a competition authority to be heard and to exercise influence over the policy environment. By gaining access to the media and framing problems from a public policy perspective, the competition authority can strategically apply pressure to key decision makers in order to change the environment.

13. 13. Media advocacy involves the use of a wide range of communication strategies to advance competition policy, but not every media advocacy initiative will use every strategy. For example, focus groups and public opinion polls provide intelligence on what people think and may be used to effectively frame issues for specific audiences. Available skill sets and resources may predispose one authority to a particular type of communication, such as paid advertising or creating news. However, competition authorities must remain opportunistic and ready to take advantage of unfolding situations, no matter which combination of communication strategies they employ. At the same time, competition authorities must be wary of attracting media attention for its own sake and should employ a strategy of linking every media action to specific goals and objectives.

14. 14. Every day, there are stories in the news to which competition authorities can link their issues. Indeed, sometimes breaking news can be anticipated. For example, competition authorities around the world know that particular events, such as world competition and consumer days, will generate substantial news coverage. Authorities can plan the release of relevant stories to coincide with such foreseen events, and stories that may be generally newsworthy on any day may become leading news when thus pegged to associated events.

15. 15. Given the prerequisite skills to do so, authorities may wish to take advantage of the many opportunities to create news and help set media and public agendas. For example, the European Commission Directorate General for Competition conducted a study in European Union member States and Switzerland that revealed that consumers in Switzerland pay double the average rate for mobile telephones and Internet access compared to the rest of Europe. The study received widespread national coverage in Switzerland and helped put the issue of national provider Swisscom's monopoly under public scrutiny.

16. 16. The practice of media advocacy also helps a competition authority create a trained group of media advocates and thus builds capacity within the authority for further change. An important goal of media advocacy activities may be to develop, within authority staff, a set of critical skills to complement and enhance existing competition agency and advocacy efforts, in order to pursue economic reform.

[96] ICN Advocacy Working Group, 2002, Advocacy and Competition Policy, prepared for the First ICN Conference, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf (accessed 15 April 2014).

A. Role of a media advocacy strategy in promoting a competitive environment

1. Media advocacy helps raise public awareness

17. 17. Media advocacy can help raise public awareness of both the role and actions of a competition authority, as well as the benefits of addressing anti-competitive behaviours. Stating and explaining the merits of a competitive environment in common language may help the general public to better relate to competition policy objectives. As well, the harm that anti-competitive behaviour may impose on people's livelihoods, for instance in terms of higher prices for basic goods and services, can be easily explained via a number of media, such as in newspaper articles and television and radio discussions, and on social media. In this way, media advocacy can provide the public with an idea of fairness, but also the ways and means for reporting violations and seeking justice. Further, if the benefits of a competition authority's actions are seen in the media, the public (as well as many other stakeholders) will gain a better understanding of the role competition policy plays.

18. 18. Each of these media can be used to target specific audiences and highlight relevant issues in selected national markets. If the stories relate to issues such as wages, goods and the provision of basic services, they are likely to arouse interest across many levels of society. In this way, competition advocacy serves to popularize competition culture in public opinion and may also act as a source of political support. For example, the popularization of competition issues directly linked to livelihoods may trigger action by consumer associations or trade unions, to pressure for a redress of unfair pricing policies.

19. 19. Many of the respondents to the survey distributed by the UNCTAD secretariat indicated that they carry out promotional media activities to enhance the visibility of the competition authority as an effective institution in terms of policy influence and law enforcement. For instance in Latin America, the Fiscalía Nacional Económica in Chile, the Superintendencia de Industria y Comercio in Colombia and the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual in Peru are notable examples of institutions endowed with adequate autonomy and resources to effectively engage in advocacy campaigns to support and publicize their activities, utilizing different media such as the press, television and social networks.

2. Media advocacy influences the behaviour of business communities

20. 20. As a public education tool, media advocacy has the merit of enhancing, inter alia, an a priori understanding of competition law. Media campaigns may be used to specifically target business communities, highlighting relevant issues such as abuses of dominance, cartelization and sanctions and associated leniency schemes for informers. Such campaigns may expose risks taken by offenders, contribute to improving compliance rates and incentivize participation in leniency schemes. Business-targeted media advocacy activities may be particularly important in developing or transitional economies, which may lack an established competition culture or business community with the requisite legal or technical knowledge to take preventive measures against anti-competitive practices. Furthermore, if media advocacy activities highlight the results of cases

of non-compliance with competition laws, the relevant business community will be more likely to conform to competition laws.

3. Media advocacy influences the behaviour of policy makers

21. 21. Mass media, particularly news media, plays an important role in advancing democratic discussion of policy issues. Media can often effectively set the public agenda for an issue and establish discussion boundaries. In mediated democracy, public policy battles are fought not only in the legislature but on the evening news and the front pages, over the Internet and across radio waves. Mediated information can reinforce the status quo or advance policy goals of economic reform and a competitive market. Mass media, especially news media, can amplify voices so that policymakers cannot ignore them.

4. Interaction between competition advocates, media and the polity

22. 22. The impact of media advocacy on competition awareness and decision-making is expected to be a positive one in theory. However, this impact may be tempered by the political environment in which markets operate, including the media market itself. That is, if freedom of the press and political competition are both relatively limited, there is a high probability that the press may be subject to political interference. In such an environment, the impact of the competition authority on the course of policy through media advocacy would be lessened.

23. 23. Another related factor is the types of obstacles that competition advocacy may encounter in certain sectors, particularly in jurisdictions where competition culture is less well entrenched. Following a survey conducted in 2002, the ICN reported that “responsible agencies in privatization processes or regulatory reform may seek among others, to maximize governmental income, protect particular social groups, foster investment by granting a certain degree of protection, attend [to] environmental or labour concerns, as well as the preservation of sector specific interests that gain support from politicians, and may thus be reluctant to give priority to competition related recommendations”.[97]

5. The use of media as a tool to detect anti-competitive practices

24. 24. The majority of the authorities that responded to the UNCTAD survey indicated that they monitor the media for signs of anti-competitive practices. To carry out this task, most authorities (e.g. in Bulgaria, Croatia and the Czech Republic) have dedicated personnel or offices, which produce reviews (e.g. in Switzerland) and reports (e.g. in Bosnia and Herzegovina) or update internal information systems with their findings (e.g. in Poland). For example, the Competition Authority in Norway actively monitors the media through an automated search engine, using selected keywords and phrases, and in doing so has detected possible competition problems in specific markets and failures to notify regarding mergers and acquisitions.

25. 25. Many of the respondents (e.g. Croatia, Germany, the Republic of Moldova, Serbia and Spain) noted that media information cannot be considered direct evidence in the legal system, but that it may be mentioned as a source of investigation. Often, media information is only used as an initial circumstantial

[97] Ibid.

indication to investigate a matter in order to find further evidence. The party presenting such information as evidence would have to prove its statements using other more reliable types of evidence.

26. 26. In other jurisdictions (e.g. Poland, Sweden and Switzerland) the principle of free assessment of evidence is applied, meaning that, in principle, there are no restrictions on sources of evidence and that, in some cases, there are no rules that specify the weights of different types of evidence. However, many respondents from jurisdictions where media information is considered before the courts emphasized the need to rigorously establish the validity of such evidence or to provide corroborating evidence or other more substantial types of evidence. For example, the European Union will normally seek confirmation of media-obtained information directly from the source, using its regular investigatory tools. In the London Interbank Offered Rate case, for instance, the European Commission took into account publicly available information in the press. In a number of cases, the quality of media-based evidence is primarily assessed either by the authority (e.g. in Germany), an independent committee (e.g. in Sweden) or the court itself (e.g. in the Czech Republic). Outlined below are some of the case studies highlighted by survey respondents:

(a) **Czech Republic**. In one instance, poultry producers were convicted of competition distortion for agreeing on a joint price-setting strategy. Evidence included a recording made by a television channel during a meeting of poultry producers.

(b) **Denmark**. After a sales manager of a company explained to a television interviewer how companies use resale price maintenance, the ensuing case resulted in a fine of DKr 1,000,000 against the company. In another case, against potato producers, part of the evidence presented by the public prosecutor consisted of television programmes during which the producers had discussed future potato prices and their trade organization's chair had encouraged members to raise prices and limit potato production.

(c) **Norway**. In a case where two asphalt companies were fined for bid rigging, a nine-minute news story on the national broadcast network was included as a case reference, but not used as stand-alone evidence.

(d) **Poland**. The Office of Competition and Consumer Protection has instituted proceedings in numerous cases based on media reports, including cases related to collusion on the waste market,[98] bid rigging in Wrocław[99] and broadcasting of football matches.[100]

(e) **Republic of Moldova**. The State has initiated several investigations based on media articles. In one case, the judge accepted media-based evidence

[98] Poland, Office of Competition and Consumer Protection, 2009, available at uokik.gov.pl/news.php?
news_id=1081 (accessed 15 April 2014).

[99] Poland, Office of Competition and Consumer Protection, 2013, available at uokik.gov.pl/news.php?
news_id=10746 (accessed 15 April 2014).

[100] Poland, Office of Competition and Consumer Protection, 2013, available at uokik.gov.pl/news.php?
news_id=10571 (accessed 15 April 2014).

in order to prosecute several companies acting to simultaneously fix prices for the retail distribution of oil.

(f) **Russian Federation**. The Federal Antimonopoly Service recently issued a notice of prohibition of activity, which may lead to declaration of a violation of a competition law, on the basis of a public proclamation made by the director general of a company (also published on the company's website), concerning the company's planning behaviour on the market.

(g) **Serbia**. The Commission for Protection of Competition has issued warnings or initiated the following cases using information obtained from various media sources: (i) using information obtained from a newspaper on the behaviour of milk producers, a procedure was initiated that ended with a decision against the largest milk producer for abusing its dominant position; (ii) after a journalist questioned a local city authority's decision regarding unique prices for taxi services for each taxi driver, a procedure was initiated; and (iii) action was taken after a newspaper reported a merger that had been completed without prior notification.

(h) **Spain**. In one case, the Comisión Nacional de la Competencia opened formal proceedings against the Spanish Association of Frozen Dough Makers (ASEMAC) after its President made statements to the press, including on pricing recommendations, that implied violations of competition law. In another case, the Comisión Nacional de la Competencia became aware through press reports of statements made by the Chair of the Tourism Board of the Confederation of Employers and Industries of Spain (CEOE) in relation to recommended price increases by hoteliers. The Comisión took into consideration the circumstances surrounding the statements, including the specific audience, position of the speaker in the sector and reaction of the sector. After investigation, the Confederation was fined €150,000.

(i) **Switzerland**. The editorial office of a television broadcast for consumers transmitted a letter containing an automaker's statement concerning the importation of commercial vehicles from Germany to Switzerland to the secretariat of the competition authority, and the authority used this letter as one of several forms of evidence in a subsequent case.

27. 27. In the next chapter, some media types through which advocacy strategies may be effective are outlined and further case studies from survey responses are provided.

B. Types of media

1. Press and print

28. 28. Press releases, interviews, conferences and print media are most often used to advocate to the public the merits of fewer regulatory choices in enhancing competition, raise awareness about an issue that is high on the agenda of a competition authority, publicize an important case of a competition authority's law enforcement activities as a way of educating the public or inform the business community about certain legal requirements, such as those concerning business acquisitions.

29. 29. All authorities that responded to the UNCTAD survey indicated that they make use of press releases to mark events, as outlined above, and this method may be highly effective in raising awareness. For instance, the competition authority in Morocco has carried out a dozen industry studies on competition since 2009 and, on launching a report, holds a press conference to which representatives from a variety of media sources are invited, in order to ensure a wide dissemination of results. In one case, public debates ensued on a dysfunctional compensation system governing the prices of regulated goods and services, which ultimately led to a process of government-backed reform.

30. 30. A news or press release may often be the best way to get a message across and, in order for such releases to be most effective, authorities should cultivate productive relationships with the press and relevant individual journalists. Authorities should regard themselves as sources for stories for which they have the necessary expertise, credibility and reliability, as well as timely information and broad knowledge of related issues. In Zambia, for example, authority staff have published articles in two national daily newspapers outlining the authority's mandate and the role of competition and consumer protection. Feedback has been positive, with consumers bringing complaints to the attention of the authority. In the United States of America, after advances in technology led to the use of digital dispatching applications on smartphones to bypass dispatchers when calling and paying for taxis, the Federal Trade Commission began an advocacy effort to encourage local regulatory agencies in the taxi business to avoid unwarranted regulatory restrictions on competition. Responding to rules set by local and State regulatory agencies, aimed at limiting the types of vehicles available and the ability for drivers to use smartphone applications, Commission staff made comments via press releases that emphasized the benefit to consumers of competition between traditional and new methods of delivering services. A major newspaper printed an op-ed piece by a commissioner that questioned the proposed regulations and the Director of the Commission's Office of Policy Planning was invited to give a keynote address at the annual meeting of an industry group of regulators, which was covered by representatives from industry-focused news media, in order to explain the Commission's position.

31. 31. In some cases, it may be appropriate to issue feedback to journalists that can constructively highlight key information that may have been excluded from published stories and to provide background materials or suggest alternative or follow-up stories. For example, in order to maintain the interest of journalists on issues related to competition, the Office of Competition and Consumer Protection in Poland organizes annual competitions and presents awards for the best newspaper articles, radio broadcasts and television programmes in the field of competition and consumer protection.

32. 32. It is important, however, to recall that journalists' goals may differ from those of a competition authority, and that this holds true across all media types. Indeed, it may be very difficult for authorities to have constructive relationships with the press, as standards of openness, fairness and transparency of the press vary greatly across countries. Outlined below are further case studies highlighted by survey respondents:

(a) **Brazil**. As competition culture in the State is relatively young, the Administrative Council for Economic Defence (CADE) used the occasion of its

fiftieth anniversary to hold a series of advocacy events for Brazilian stakeholders, including publication of a book concerning the evolution of competition in Brazil, educational campaigns to highlight the importance of public policies to protect the competitive environment and the relaunch of the *Brazilian Competition Journal*. Related advertising campaigns were launched, which included the production of graphic material, publication of advertisements in major newspapers and national magazines and the launch of business-linked websites.

(b) **Bulgaria**. The Commission on Protection of Competition, observing the principle of transparency, provides ongoing information about its activities to the general public and mass media. Press releases are issued for some of the decisions adopted by the Commission, published on the Commission's official website and sent by e-mail to all major national media, including daily and weekly newspapers, magazines, television and radio channels and news agencies.

(c) **Chile**. The State's main competition policy centre was commissioned to undertake a study to evaluate the risk of trade associations in the State and concluded that there was no doubt that trade and business associations were common instruments for collusive behaviour and they often facilitated practices that increased implicit coordination among competitors, leading to less competition. Following the study, the first draft of what would become Asociaciones Gremiales y Libre Competencia, Advocacy Material Number Two, of the Fiscalía Nacional Económica was published and subjected to a public consultation process. In the National Economic Prosecutor's advocacy materials, some guidelines and recommendations on compliance with competition rules were established for business association partners. In a hostile environment, the draft generated much discussion, which continued after final publication. The authority coordinated several activities for the presentation and discussion of this material, including press conferences and seminars. Subsequently, the Prosecutor filed complaints before the Competition Tribunal against different trade associations, the largest against three poultry producers colluding in chicken meat sales to major supermarkets. Anti-trust guidelines within industries have begun to develop as a result of these advocacy efforts, requiring trade associations, such as the Chamber of Construction and the Mining Council of Chile, to conform to competition principles. Similarly, three important actors in the Chilean economy, the non-governmental organization Generación Empresarial Foundation (an entity comprised of senior managers from various companies, whose role is to oversee business ethics), Confederation of Production and Commerce, and the newspaper that had been most critical of the Prosecutor in the past, together published competition guidelines.

(d) **Croatia**. The competition authority issues an e-mail newsletter every month highlighting its activities, including important decisions made by the authority's council, new legislative changes, news of anti-trust and State aid activities, plans for future work and notices of important anti-trust and State aid cases in the European Union and worldwide. Press releases, coordinated with a specialized public relations expert, are issued for some of the decisions adopted by the authority.

(e) **Mauritius**. The competition authority has previously organized a competition week, during which the authority distributed desk calendars with

cartoons depicting the ill effects of cartels and monopolies, while emphasizing the benefits of its leniency programme. These calendars reinforced, on a daily basis, the need to denounce restrictive business practices. The feedback received was very positive, especially from small and medium enterprises.

(f) **Papua New Guinea**. The competition authority has distributed pamphlets to companies considering business acquisitions, explaining the importance of applying for authorization and the associated procedures.

(g) **Poland**. The Office of Competition and Consumer Protection held a nationwide educational campaign targeted at professional market participants to raise awareness of anti-competitive agreements. The project began with a conference held in cooperation with the University of Wrocław, and a series of videos, radio broadcasts and newspaper articles were made available on the Office's website.

2. Television and radio

33. 33. The demands of media advocacy through television and radio are quite different from those of print media.

34. 34. One of the key differences is that the costs of television productions are much greater, so much so that this may be an insurmountable obstacle for smaller authorities. However, for authorities that can afford the costs there exist a number of advantages, including the fact that in many cases, there is no need to relay the message through a third party such as a print journalist. Also, in paying for exposure, the message of the authority is presented in the manner, at the time and to the target audience of the authority's choosing. Not all paid advertising or content may be prohibitively expensive; radio can be a relatively inexpensive way to communicate with a target audience or organization.

35. 35. Another key difference is the time available. Television and radio journalists have very little time to present a story. Typically, television stories run between ninety seconds and three minutes and radio news items last between thirty and sixty seconds. As noted in chapter III, it is therefore important for authorities to maximize the effectiveness of their advocacy measures in this medium, preferably by pegging stories to wider events or issues. In this way, a story can be expanded to help advance the desired issue locally and nationally. Three case studies highlighted by survey respondents are outlined below.

(a) **Papua New Guinea**. The national television network has signed memorandums of understanding with the competition authority and customs concerning the ban on importing and selling hazardous products. Events and actions related to this prohibition are televised in order to show the authority's interest in addressing consumer protection issues. The authority also uses television and radio to showcase its role and function to a wider audience, both literate and illiterate. Authority staff give an overview of their work areas and answer questions on air. Consumers may freely express their views and anonymously report suspected breaches of the Independent Consumer and Competition Commission Act to the authority.

(b) **Poland**. A leniency campaign held by the Office of Competition and Consumer Protection disseminated knowledge on competition protection to entrepreneurs. Television spots promoting the leniency programme were

broadcast nationwide, with a focus on business issues channels. The Office President sent information on the programme to the five hundred largest enterprises and the Office provided a special helpline through which participants in a prohibited agreement could anonymously obtain information on the programme and familiarize themselves with the procedures for applying for leniency. A subsequent campaign was launched as a consequence of an increased number of proceedings in concentration cases and insufficient knowledge of competition law in this area. Entrepreneurs were provided with a procedure for notifying their intent to concentrate and the negative impact concentrations may have on the market was clarified. The campaign consisted of a 10-episode series of television and radio programmes on concentration control, supported by resources on the Office website explaining the concentration procedure, including access to the series, the debate that launched the campaign, and a frequently asked questions page. Interested undertakings could reach the Office via the campaign information line or e-mail address. In addition to these initiatives, the Office sent relevant materials to businesses and organizations, including guidance on the concentration procedure and a document on the market analysis conducted by the Office in cooperation with business.

(c) **Zambia**. The competition authority has used television and radio to hold public awareness campaigns regarding unfair trading practices and consumer rights and obligations in dealing with traders. Authority staff have been interviewed on both public and community television question-and-answer programmes and the public engagement and feedback received by the authority has greatly increased as a result.

3. New media

36. 36. The world wide web is increasingly used as a way to store and update information regarding competition authorities, as social media sites such as Facebook and Twitter are used to obtain feedback from the public regarding ongoing news or hot issues. The UNCTAD survey makes clear that both developed and developing countries use social media to reach a wider audience and achieve two-way communication. Some survey respondents, such as Croatia, stated that they regard their presence on certain new media sites as their most efficient media tool to promote their competition authority's advocacy activities. Outlined below are related case studies highlighted by survey respondents:

(a) **Bulgaria**. The Commission on Protection of Competition website contains detailed information and explanations of Commission functions and activities, such as adopted decisions, annual reports and guidelines concerning different aspects of application of competition law. For instance, following a leniency programme presented as an interactive stage play at a seminar for businesses, a video recording was posted on the website.

(b) **Canada**. On the occasion of its second annual "2 Good 2 B True Day", the Competition Bureau hosted a Twitter chat focused on the two most prevalent scams. As part of Fraud Prevention Month, this social media event was presented in partnership with the Fraud Prevention Forum, for which the Competition Bureau is chair.

(c) **Egypt**. The competition authority uses social media extensively to reach the public, aiming to increase transparency and build trust. Its Facebook page hosts news and educational materials, including booklets, frequently asked questions and comics, and provides a forum for public discussions. High usage statistics demonstrate the importance of investing in social media to maintain visibility and raise public understanding of relevant issues.

(d) **Norway**. The Competition Authority participated in public debates concerning the creation of a designated law securing fixed prices on books, with the objective of preventing this law from coming into force. Through broadcast of the Authority's opinion via strategically placed media spots before the due date for submitting evidence to the hearing and placement of supporting material on its website, the Authority's view set the agenda for discussions and was the favoured participant in debates and interviews. Although the law was adopted, the Authority's opinion still remains in the public debate.

(e) **Russian Federation**. The Federal Antimonopoly Service website has been designed to present the most recent proceedings and decisions and the main competition advocacy initiatives, as well as comments made in the media on authority actions. The Service supports one website devoted to tenders for the development of State property and a separate anti-cartel website that provides information on the nature of cartels, the threats they pose and how citizens can contribute to disclosures. The Service also has a social media presence on Facebook and Twitter, where new releases are posted and comments and feedback solicited from the general public on the authority's work. In 2010, a dedicated Facebook page called FAS-book was launched, to serve as an effective group communication with representatives of the competition authority in an informal setting. In practice, these social networks are becoming a virtual alternative for the reception rooms used by the Service, where complaints are filed, proposals made and public discussions carried out.

(f) **United States**. The Federal Trade Commission publishes online a series of illustrated dialogues aimed at older children explaining and illustrating real life applications of competition and consumer protection principles in the form of an interactive trip through a shopping mall. The following topics are covered: advertisements, security, modelling frauds, deceptive jobs, miracle projects, lotteries and competitions, competition, supply and demand, mergers and history of American competition law. Another visual aid that is often used in training sessions on competition advocacy is a video devoted to the first successfully completed international cartel case of the American competition authority for price fixing of the animal feed additive lysine, which led to sanctions and three prison sentences.[101]

(g) **United Kingdom of Great Britain and Northern Ireland**. The Office of Fair Trading[102] had a Twitter account administered by an intra-institutional group representing all employees of the Office. The Office tweeted approximately once per day, including invitations for feedback on certain issues undergoing consultations by the Office and messages regarding new authority information

[101] Federal Trade Commission, 2009, Lysine Cartel, available at http://www.youtube.com/watch?v=wDH0Rv8R0SQ (accessed 15 April 2014).

[102] The Office of Fair Trading closed on 31 March 2014 after the UNCTAD survey was conducted, and its work has passed to a number of different bodies.

online, such as news, publications, YouTube videos, speeches and campaigns. The Office was unable to provide individual replies. However, all suggestions and new topics received from Twitter users were disseminated to the respective Office employees.

IV. Measuring the effects of a media-based communication strategy

37. 37. Measuring the effectiveness of any media-based communication campaign may not always be a simple process. Media advocacy can be a key part of an overall strategy but does not stand alone and is not a complete strategy in itself. As well, media should be used as an advocacy tool only in the context of other approaches, such as law enforcement, coalition building and policy advocacy. The complexities of each economic and political landscape make isolating media advocacy's contribution difficult; policy battles can take years and include contributions from various stakeholders. At a simple level, authorities may wish to track the basic outcomes associated with a chosen issue, including whether the issue was on the public agenda, awareness of the issue was raised and advocacy put pressure on and mobilized key decision makers, as well as whether the policy was enacted or the intended change occurred.

38. 38. There are a number of measures that may be used to assess the outcomes of media advocacy activities. For instance, the degree to which an issue appeared on the media agenda can be measured by the amount of coverage generated, while the placement of the coverage and whether the issue was framed from a public policy perspective can be assessed through a content analysis. Whether media coverage advanced policy can be assessed by, for example, monitoring the progress of legislation and interviews with key advocates and decision makers. Evaluators can examine key documents, such as minutes of parliamentary or local council meetings, and conduct interviews with decision makers or journalists to help determine whether media coverage successfully applied pressure that helped mobilize action. Stakeholder polling is often an effective way to ascertain whether the issue reached prominence among certain groups, although polling on a large-scale basis can be costly and may not be an option for smaller authorities.

39. 39. Despite the difficulties associated with media advocacy evaluation, it is important that authorities carry out this process. As authorities often have limited budgets and resources, it is important for media advocacy activities to be as effective as possible, both in terms of impact and cost. As outlined in the previous chapters in this note, this is especially important in jurisdictions within developing countries. For example, the competition authority in Mauritius embarked on a nationwide media advocacy campaign that included simultaneous advertising through radio, on billboards and in the press. At the end of the campaign, the authority noted a substantial increase in feedback and complaints by the public, but many did not fall under the competition act and often concerned consumer protection issues instead.

40. 40. It is also important for the evaluation process to highlight media advocacy as a key part of an overall strategy and to note that it does not stand

alone. The effectiveness of media advocacy may be limited by constraints within other operational areas of the authority. For example, Indonesian news coverage indicates that the Commission for the Supervision of Business Competition is effective in framing messages and speaking directly to targets. One major Jakarta newspaper provides front-page coverage, and local television news runs related stories used as teasers for main programmes. However, the Commission does not have the capacity to follow up on attention generated by widespread media coverage. Therefore, valuable opportunities for advancing public policy may be lost.

41. 41. In response to the UNCTAD survey, a number of institutions (e.g. in Serbia), stated that they did not currently carry out evaluations of the effectiveness of media-based advocacy activities, while others (e.g. the European Union) noted that they did not have specific techniques for evaluating the effectiveness of media-based advocacy activities and still others (e.g. Malta) only evaluated media coverage following specific events.

42. 42. A number of competition authorities (e.g. in Jordan, Malaysia, Mauritius and Morocco) keep records of the number of complaints they receive and assess the impact of advocacy. Some respondents (e.g. Botswana, Chile, Egypt and Indonesia) indicated that they have conducted wide-ranging surveys of perceptions of the effectiveness of the authority, including on the usefulness of previously published studies and guides. In order to evaluate their media advocacy activities, some authorities (e.g. in Guyana and Spain) rely on feedback received through close relationships with key stakeholders and constituents, such as in public administration, the private sector, academia, law firms and the press and among consumers, while others (e.g. in Suriname) take measures through levels of interaction and responses from activity participants or website usage. Some authorities (e.g. Serbia) expressed their intentions to put in place the relevant mechanisms for evaluation. Two further examples are as follows:

(a) **Denmark**. The Danish Competition and Consumer Authority evaluated the effect of a 2013 campaign on the introduction of imprisonment in cartel cases, asking a number of competition lawyers and members of trade organizations whether the campaign resulted in better awareness of the competition rules. All respondents answered positively.

(b) **United Kingdom**. The Office of Fair Trading evaluated competition advocacy interventions on the basis of a specifically designed methodology. Part of the impact was measured quantitatively through the effect of competition advocacy on prices. Due to the fact that regulation could lead to an increase in prices, the price in conditions of anti-competitive regulation and the price in conditions of competitive regulation were compared, as well as the price in conditions where there was a lack of any regulation. The benefits for consumers could be summarized in two main areas: lower prices and increased consumption as a result of lower prices. For a precise calculation of the effect, information was needed about the elasticity of demand in order to determine what the decrease in consumption would be if prices were increased. Outcomes of competition advocacy were also reflected in non-price effects, such as improved product qualities or delivery processes, but were more difficult to measure.

43. 43. Many other respondents indicated that they take a more formal approach to evaluation. The authorities in both Brazil and the Czech Republic, for instance, have specialized units for evaluating the effectiveness of media-based advocacy activities, and the Czech Republic employs a specialized company to conduct an annual analysis of media coverage of the authority and its activities. In Colombia, the authority works with an advertising agency that reports on the coverage of its media advocacy campaigns and also has a media company that provides monthly updates and saves resources through the use of free press. All measurement tools are reported to senior management and allow for improved decision-making. The Public Relations Department of the Federal Antimonopoly Service of the Russian Federation monitors mass media on a daily basis for mentions of the Service, citing the importance of knowing public reaction to any message, case decision or suggestion on the development of product markets made by the authority. The Swedish Competition Authority also compiles media and business intelligence on a daily basis, and the Director General is provided with weekly presentations that assess, both qualitatively and to some extent quantitatively, the media impact of activities. The Authority places special emphasis on editorial and opinion articles or statements by politicians and leading figures within trade unions and organizations. Two further case studies are as follows:

(a) **Poland**. The Office of Competition and Consumer Protection evaluates the effectiveness of its activities by monitoring statistics via the world wide web and data concerning website visits, following the numbers of press releases on a given issue and, in certain cases, by commissioning social research, such as to learn the extent of knowledge among undertakings in Poland of the leniency programme, of competition law and of the principles of granting State aid.

(b) **Ukraine**. The press office of the Antimonopoly Committee uses an e-mail sender to distribute news highlighted on the official website to newspapers, magazines, other print media, television and radio stations, news agencies, non-governmental organizations and associations whose activities are connected with the Committee, and regional, district and local media, in order to reach the widest possible audience.

44. 44. The types of monitoring in the case studies above allow for authorities to take into account the opinion of mass media and business and keep a close watch on negative publications in mass media and react accordingly.

V. UNCTAD survey on practices in competition advocacy and the media

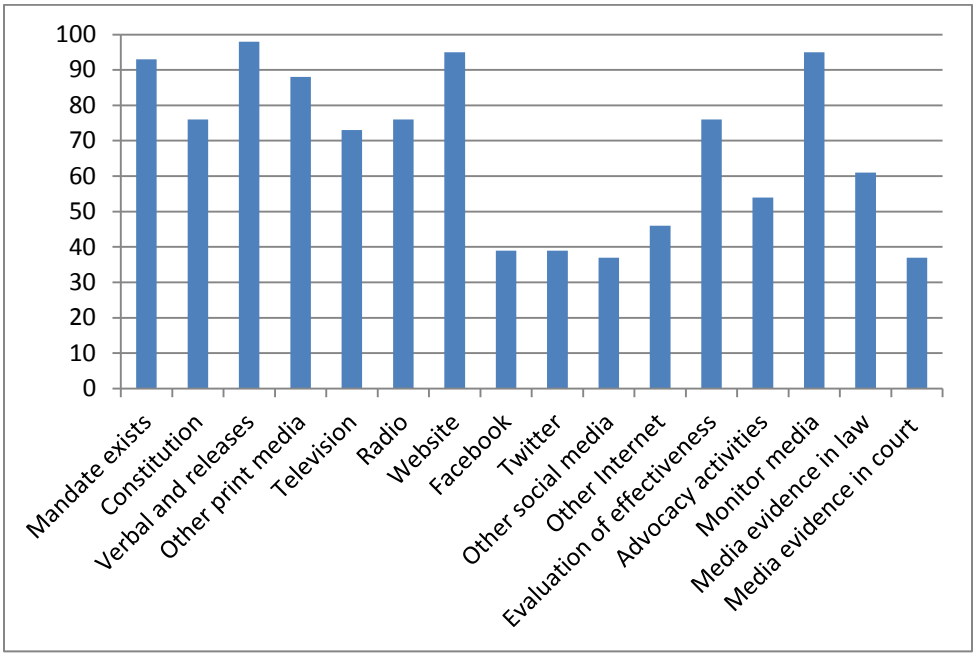
45. 45. This chapter presents a brief summary of the 43 responses received from competition authorities to the UNCTAD survey.

46. 46. Figure 1 demonstrates that on average over 90 per cent of respondents have an advocacy mandate, use press conferences and releases for communication via media, host a website for advocacy and monitor media to detect breaches of competition law.

47. Figure 1

Competition advocacy and the media

(Percentage of positive responses)



Note: Mandate exists refers to authorities that have a mandate on advocacy; Constitution refers to authorities that have a mandate enshrined in their constitution; Verbal and releases refers to authorities that use interviews, press releases and conferences; Other print media refers to authorities that use other print media; Television, Radio, Website, Facebook, Twitter and Other social media refer to whether authorities use such media as part of a communication strategy; Other Internet refers to authorities that use other web-based sources; Evaluation of effectiveness refers to authorities that evaluate the effectiveness of their advocacy activities; Monitor media refers to authorities that monitor media for breaches of competition law; Media evidence in law refers to authorities whose jurisdictions' laws permit the use of evidence found in the media; and Media evidence in court refers to authorities that have used evidence found in the media in court.

48. 47. A significant majority of respondents (70–80 per cent) have a constitutional mandate for advocacy, use television and radio for advocacy campaigns and have mechanisms for evaluating media advocacy activities. Social media are less widely employed; 30–40 per cent of competition authorities use social media including Facebook, Twitter and other sites. In approximately two-thirds of jurisdictions (60 per cent) the law allows for the use of evidence found in the media and around one-third of respondents (37 per cent) have used media evidence in court proceedings.

49. 48. Approximately half of the respondents (53 per cent) were aware of their budget allocations for advocacy activities and on average, this allocation is relatively low, with a median of 3.7 per cent for overall advocacy and a median of 1.2 per cent specifically for media advocacy activities. There is large regional variation in the median budget share dedicated to advocacy: 3 per cent in Africa,

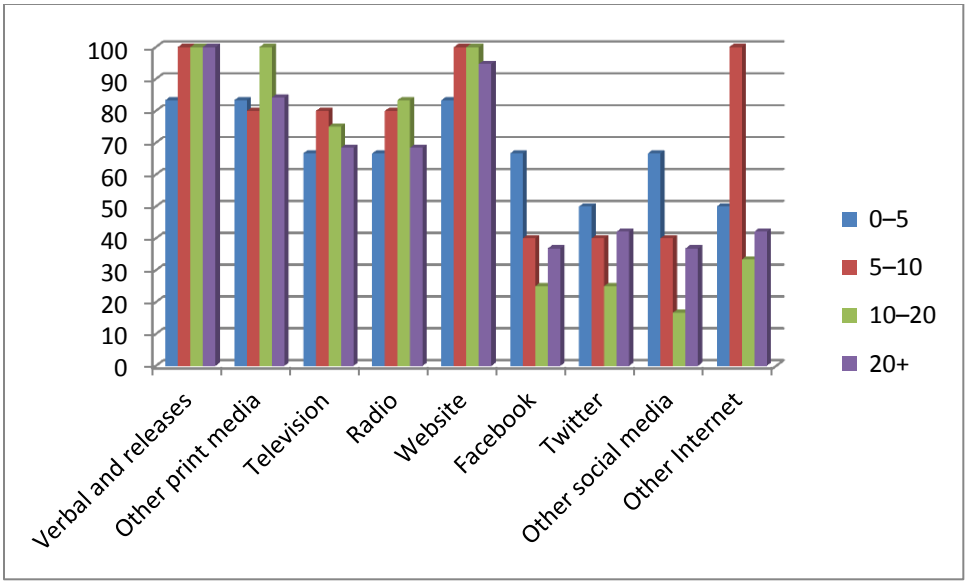
8 per cent in South and Central America, and 5.5 per cent in States of the Organization for Economic Cooperation and Development. Little variation was exhibited in budget allocations for media-based advocacy; the median of reported shares was below 1.5 per cent in the four reporting regions.

50. 49. Figure 2 shows that concerning “old” media and website use, all competition authorities follow a similar pattern, regardless of age: more than 80 per cent use press and print media and host a website, while 65–80 per cent utilize television and radio for campaigns. However, in terms of social media, 50–65 per cent of young agency respondents indicated use of Facebook, Twitter or other social media sites. This was far in excess of positive responses from older and mature authorities and may indicate that social media use is more appealing for younger authorities, which may be under pressure both to rapidly increase authority recognition and to secure resources as and efficiently and cost-effectively as possible. Interestingly, there appears to be a relative lack of use of social media (10–30 per cent) by maturing authorities (10–20 years) in comparison to both older and younger authorities.

51. Figure 2

Use of media advocacy by authority age

(Percentage by authority age)



52. 50. The table below shows the regional profile of respondents with respect to the use of media for advocacy. It may be seen that press activities and television are used by almost all authorities, regardless of region. Radio is highly used in Asia and the Pacific (100 per cent), Africa (88.9 per cent) and Western Europe and North America (75 per cent), but much less among transition economies of Europe and Central and South America (58.3 per cent and 62.5 per cent respectively). Regarding social media, authority usage rates are largely significantly lower than 40 per cent, with the exception of respondents from Africa who widely use Facebook (77.8 per cent) and Twitter (66.7 per cent). This may support the suggestion that new social media could become an alternative to more expensive traditional media in terms of coverage and access, particularly among young or less endowed authorities.**Relative use of media for advocacy by region**

	Africa	*Central and South America*	*Asia and the Pacific*	*Transition economies of Europe*	*Western Europe and North America*
Interviews, press releases, conferences	88.9	100	100	100	100
Other print media	66.7	100	100	83.3	87.5
Television	88.9	100	100	100	100
Radio	88.9	62.5	100	58.3	75
Website	88.9	100	100	100	87.5
Facebook	77.8	25	33.3	16.7	37.5
Twitter	66.7	25	16.7	33.3	37.5
Other social media	44.4	25	50	25	37.5
Other Internet	55.6	50	33.3	25	75

VI. Questions for discussion

53. 51. Suggested questions for discussion include the following:

(a) How should young competition authorities develop media advocacy strategies? Should criteria be established to prioritize sectors of interest when allocating resources?

(b) What lessons can late adopters of competition law learn from countries with established competition cultures? What should the adaptation process take into account?

(c) What capacity-building assistance should be given to stakeholders for effective media advocacy?

(d) Where media and political freedom is an issue, how should competition advocacy be handled?

(e) What would be the best modalities of international cooperation in advocacy in general and with respect to media in particular?

UNCTAD

Criteria for Evaluating the Effectiveness of Competition Authorities

UNCTAD

I. INTRODUCTION AND OVERVIEW

1. There is evidence that competition policy improves productivity, and it is a fundamental tool for increasing economic growth. The removal of entry barriers can promote efficiency and the development of new enterprises. Competition policy can encourage the efficient allocation of resources within an economy, lowering the prices of important products and inputs and improving quality and hence choice.

2. Competition policy might also be a component of a country's overall development strategy, in terms of, for example, attaining the Millennium Development Goals.[103]

3. The primary sources for information in this note include UNCTAD studies, submissions we have received from Members in response to a questionnaire, the OECD report on "Evaluation of the Actions and Resources of Competition Authorities" [104] and the country submissions to the OECD round-table held on the topic. The note also draws on competition authority websites as well as academic literature on the quantification of competition authorities and their actions.

II. MEASURING EFFECTIVENESS

4. This subject should be examined through two questions, namely "Did the agency's interventions produce good results?", and "Did the agency's managerial processes help ensure that the agency selected initiatives that would yield good outcomes?" [105]. This approach distinguishes between focusing on inputs into the management of the competition law enforcement regime and focusing on the effects of that regime. Thus, determining agency effectiveness and unravelling exactly where deficiencies lie (and how they might be remedied) require continuous examination of both process inputs and policy outcomes, by looking at not only the effective work carried out by the competition authorities but also the results achieved.

[103] This was discussed in conferences held in Bucharest, Baku and Brno as found in http://r0.unctad.org/en/subsites/cpolicy/docs/MDGs.pdf. There were also remarks made on this topic in discussions held in Cape Town and São Paulo, as summarized in the annex to UNCTAD(2006) at http://www.unctad.org/en/docs/ditcclp20064_en.pdf.

[104] OECD (2005).

[105] OECD (2005, p. 19).

III. ASSESSING THE COMPLIANCE IMPACT OF ENFORCEMENT ACTIVITIES

5. It is difficult to assess the impact of regulatory enforcement action on social phenomena as wide-ranging as compliance or non-compliance with competition laws. Empirical research clearly shows that a range of factors beyond enforcement are likely to affect levels of compliance. It is therefore difficult to disentangle the impact of enforcement action on compliance from other factors that affect compliance. Even more difficult is the fact that "compliance" itself is a complex concept. What amounts to compliance with the law is a matter of interpretation, negotiation and frequently argumentation, between business and regulators, their lawyers and, where matters are litigated, the courts.[106] "Compliance" has a contested meaning, in the absence of a commonly accepted understanding of the way regulatory requirements should be interpreted and applied.

6. One of the criteria by which one could judge the success of an enforcement action is the extent to which it helps build a shared understanding between regulator and "regulatee" of what compliance means and how it should be put into practice (Parker et al[107], 2004). In other words, the compliance impact of enforcement action cannot be judged merely by whether the regulator wins a judgment in court. It is argued that enforcement action must be judged by the extent to which it helps bring business norms and practices into alignment with regulatory expectations. Indeed, enforcement action is most successful in terms of its "compliance" impact, if it achieves not only alignment between business and regulatory understanding of what a particular regulatory *rule* requires in a particular situation but also a shared understanding of, if not commitment to the *goals and purposes* underlying the relevant regulatory rules.[108] A shared understanding of the goals and purposes of a regulatory regime is more likely to lead to the same interpretation of the rules in different circumstances, and a shared commitment to those same goals creates an opportunity for habitual compliance.[109] There are also various ways of accomplishing "compliance" through different "styles" and techniques of regulatory compliance and enforcement.[110]

IV. THE NEED FOR EVALUATION BY COMPETITION AUTHORITIES

7. Certain key questions arise with regard to the practices of the relevant agency when considering international approaches to evaluation. First, does the agency concerned undertake ex post evaluation of its decisions relating to merger control, anti-competitive agreements and abuse of dominance? Second, what criteria are used in assessing the impact of decisions in competition cases? To further understand this, it is important to consider country-specific cases in which such an evaluation was undertaken. Finally, it is important to determine whether the country involved has drawn lessons from the experiences gained so far in the country concerned in evaluating the impact of competition decisions.

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[106] Black (1997), McBarnet (1994), Reichman (1992).

[107] Parker, Ainsworth and Stepanenko (2004).

[108] Op.cit., p. 3.

[109] Black (1997, p 30-32), Meidinger (1987), Braithwaite and Braithwaite (1995), and Parker (2002, pp. 22-29).

[110] May and Wood (2003); see also Grabosky and Braithwaite (1986).

8. While merger control, actions against anticompetitive practices and abuse of dominance are regarded as the primary areas of agency activity, ex post evaluation need not be related solely to decisions but can also extend to evaluation of advocacy initiatives and reviews of case selection practices. For instance, if productivity is a stated goal of competition policy, it is important to determine to what extent each policy lever − merger control, investigation of anticompetitive actions, advocacy and market investigations − furthers attainment of that goal.

9. Types of evaluation carried out can be grouped into those that compare the enforcement record of one country against others at a single point in time or against itself across time; those that examine the quality of the individual decisions or the decisions in general; and finally those that examine the market outcomes arising from the interventions.[111]

10. The points above concern the "how?" and the "what?", but it is also important to consider the "why?" Responses to UNCTAD's request for submissions identified the role of ex post evaluation as providing insight into the *effects* of agency enforcement activity, which in turn feeds into the *processes* by which this enforcement is carried out, in terms of both case selection and actual enforcement procedure.

11. The communications submitted by the countries have shown that evaluation performed at the initiative of the competition authority itself is preferable to external formal evaluation.

12. Before we consider some of the key benefits of ex post evaluation of competition authority actions, it is worth pausing to acknowledge that there are costs associated with this activity, in terms of both manpower and financial resources. Staffers assigned to undertaking review forego the opportunity to work on cases or general sector reviews. In countries with developed competition cultures and wide and deep economic expertise, the authority might be able to subcontract evaluation out to academics or consultants. In developing countries, however, there may be severe shortages of suitably skilled personnel in public and private sectors alike.

13. Furthermore, various country submissions leading to the seventh session of IGE, as well as to the OECD evaluation round-table, make the important point that when conducting intervention, it is important to frame the correct counterfactual. In the context of cases against anti-competitive conduct, there are costs and benefits arising from intervention *and* from non-intervention. This is similar for cases where mergers are either cleared, cleared with remedies and conditions, or blocked. It is well recognized that measurement of incorrect intervention is analytically difficult. However, several countries have reported that the review of certain decisions would be more effective if conducted at their own initiative.

1. Improving the efficiency of intervention

14. The most obvious reason for evaluation is to find means of improving intervention. Due to the resource constraints most authorities face, it is important to reflect on processes and practices and to maximize the potential effectiveness of a given agency's resources. Furthermore, this is particularly valid in the context of competition policy, where it is not possible to simply transpose a set of "best practice" laws and processes. In competition policy, while

[111] OECD (2005, p 173) submission from Sweden.

much can be learned through comparison and benchmarking, one size does not fit all, and each jurisdiction needs to find the methods that are best suited to its needs.

2. Developing a competition culture

15. As documented in UNCTAD (2006), the lack of a competition culture can be a significant impediment to the effective implementation of a new competition law. It is therefore important to develop strong communication capability within a nascent authority, so that the *nature* and *effect* of the authority's interventions can be understood and appreciated. This can provide some justification for the conduct of ex post evaluations so that effects can be roughly quantified and disseminated.

3. Updating and amending laws, guidelines and procedures

16. The evaluation process can also provide a diagnosis for major procedural and administrative changes that are necessary for the optimum functioning of the authority and the law. One important example in recent years has been the effective implementation of a corporate leniency policy. External peer reviews in a variety of jurisdictions have also help generate the political impetus to effect the requisite changes.

17. In its submission, the EC notes that the Directorate-General for Competition regularly undertakes reviews of legislative acts such as the Block Exemption regulations in the period in which they come up for amendment. Such reviews typically employ case studies and surveys to determine their effect and effectiveness with a view to possible amendment.[112] General fact-finding exercises can be conducted through hearings, questionnaires and consultation. This can feed into the policy process and inform the drafting of Green and White papers that eventually lead to the amendment stage.

V. CATEGORIES OF INITIATIVES: WHO HAS CONDUCTED THE REVIEWS OF AGENCY PERFORMANCE?

18. We group the types of evaluation initiative into two sets. On the one hand, we have external reviews of procedure, advocacy, case selection and outputs, and on the other hand, there are agency-conducted reviews of process, advocacy, prioritization and outputs. These categories need not be strictly mutually exclusive. Reviews can be agency-led with varying degrees of collaboration by the private sector, academics or international organizations.

19. The other end of agency evaluation classification is to ask who the intended audience of the report is. The report can be geared exclusively to agency officials, Government more generally, or the public. The most suitable option will be determined by circumstances.

[112] Details can be found in OECD (2005, pp. 210-213). Here, it will noted that the format does not have to be an actual report compiled by means of review.

4. Review of intervention procedures by external academic experts, including UNCTAD/OECD peer reviews

20. UNCTAD and OECD peer reviews provide an important means for countries to benchmark their management processes and to receive feedback on the appropriateness of their criteria for intervention and on possible impediments to the effective implementation of their competition regimes.

21. The process of peer review can also contribute greatly to the development of a country's competition regime. Peer reviews have become a fixture of UNCTAD's work in competition law and policy as well as that of the OECD. At a recent conference, a speaker from Brazil noted that participation in various peer review processes as *donors* had also been found to be very thought provoking and helpful.[113] In its submission to the round-table,[114] Turkey notes that the value of the peer review lies in the fact that it is prepared by "experts having consulted third parties such as practitioners, academics, business associations' members, governmental officials working for various governmental agencies in addition to the officials of the Authority". In that country, it helped provide an impetus for the development of the leniency programme, modifications in merger control, increases in maximum fines for violations, procedural changes for consent agreements, and increases in legal and economic expertise in the Turkish Competition Authority (TCA).

22. Another forum providing some external discussion of processes and standards is the International Competition Network (ICN). The ICN assists in developing informal cooperation and knowledge-sharing between agencies, and can further soft cooperation and harmonization and help provide useful peer insights into the workings of a country's competition regime.

5. Review of the competition law system by bodies outside Government

23. In the United States, the General Accounting Office (GAO) completed a study in 2004 on "Energy Markets: Effects of Mergers and Market Concentration in the U.S. Petroleum Industry". The report examined mergers in the US petroleum industry, amongst other things to determine how changes in industry structure have affected US wholesale gasoline prices. The report was based on detailed data and econometric analysis. Via an analysis of the effects of mergers within the industry, the report indirectly examines the effectiveness of the country's antitrust regime.

24. In November 2005, the National Audit Office in the UK released a report examining the effectiveness of the Office of Fair Trading (OFT).[115] The report makes various recommendations regarding the OFT's use of resources, case management, and measurement and communication of achievements.

[113] UNCTAD (2006, p. 209).
[114] OECD (2005, p. 180).
[115] NAO (2005).

The OFT perspective on the productivity debate:

In a report presented in January 2007, the UK Office of Fair Trading (OFT) analysed the link between competition and productivity. The Treasury has identified competition as one of several productivity drivers for a country's economy. This means that the effectiveness of a competition authority can also be measured in terms of productivity in the market. Similarly, low productivity can indicate a lack of competition, which implies that effective competition is equal to effective productivity. This has been borne out by the large amount of literature giving evidence for this theory that has been analysed in the report. (OFT, 2007, p. 16) The productivity analysis has been thought to help the OFT identify sectors where more input has to be provided in the form of prioritizing areas of concern in which the OFT must make an effort. The OFT then becomes an important actor in boosting productivity performance.

The impact that competition has on productivity has been divided into three areas: "within- firm effects", "between-firm effects" and "innovation". The first area explains the x-efficiency theory that can be assured through competition enforcement that pressures managers to concentrate on the company's internal efficiency. The second area deals with the productivity level of companies that compared to each other have as an effect the exit from the market of companies that are less efficient compared to others. The third area for consideration, even though it has been identified as complex, is the connection between competition and innovation. Innovation and technological improvements are often improved through a high level of competition within the relevant market.

25. In the Republic of Korea, the Office for Government Policy Coordination evaluates the adequacy of the Fair Trade Commission's assessment of competition law enforcement conducted as part of government performance management.

26. The State Supervision Council reviewed the activities of the Turkish Competition Authority, releasing a report in 2002[116] that advised various management process changes, urged greater coordination with sector regulators and recommended various legal amendments, amongst other things.

6. Internal review

27. The Swiss submission to this meeting reports that the data that Comco (the Swiss Competition Commission) has been collecting "is exclusively an internal ex post control of certain decisions and not intended for external use". Furthermore, the criteria developed for evaluating decisions are case-specific but could involve "the price, the quantity or access to goods or services". Exactly how specific cases are chosen is however not reported.

28. The EC submission to the OECD round-table on evaluation describes how, in the review of several of the Block Exemptions, different mixes of Commission staff and outside consultants and academics were employed, depending on need and convenience.[117] Canada has reported that a "Merger Remedies Study" is under way. The purpose of this study is to evaluate the

[116] OECD (2005, p. 180).
[117] OECD (2005, p. 210).

effectiveness of past remedies by studying, for example, the difference in competitiveness within the market and whether this has effectively improved as a result of the remedies imposed. Another matter to consider is whether the Canadian Competition Bureau has been able to predict correctly the competitive effects, the outcome and whether any relevant factors were left aside when the remedies were established. Finally, the aim is to evaluate the techniques used and to determine whether these can be improved through this internal self-evaluation.

VI. CRITERIA FOR EVALUATING THE EFFECTIVENESS OF COMPETITION AUTHORITIES

29. The first set of criteria on which one might choose to focus is “input” criteria: These refer to the set of managerial processes and systems by which a country implements its competition regime. In this respect, one might choose to focus on case selection or staff turnover, etc. or other sui generis measures of agency effectiveness the authority determines to be significant.

30. Trying to weight the various input criteria by their relative importance requires an understanding of how the various criteria relate to effects on economic outcomes. There is a small body of literature that attempts to devise means of measuring the institutional capacities of competition authorities. As noted in UNCTAD (2006), “Voigt (2006, p. 6) develops indicators measuring the de jure and de facto independence of competition agencies in his model relating competition law and agency characteristics to total factor productivity. De jure independence is a composite index combining information about government supervision, agency objectives, agency appointments, term length of agency officials, agency case allocation, the nature of executive instructions to the agency, and transparency. De facto independence is a composite combining the executive's “average term length”, competition officer incomes and competition decisions reversed by executive decisions, as well as other variables.”[118]

31. If it is the case (and it should be noted that Voigt’s results are not entirely conclusive) that greater de facto independence boosts productivity (and hence growth), then the evaluation of these components of de facto independence provide a means of evaluating the competition authority’s effectiveness in attaining the end of greater economic growth.

32. Alternatively, an agency might attempt to gain some insight into its effectiveness by examining various “output” criteria. The first set of “output” criteria that might be examined involve those that do not entail any attempt to quantify the success of the interventions in terms of, for instance, broader efficiency objectives, but focus instead on measures of bureaucratic success. Measures such as cases prosecuted successfully, turnover times for merger filings, etc. are closely related to the “input” criteria we have identified above.

[118] UNCTAD (2006) http://www.unctad.org/en/docs/ditcclp20064_en.pdf

33. In this category, we might also include various measures of stakeholder satisfaction. Changing perceptions of agency effectiveness and an increased general awareness of the competition act itself can be an indication of improvements in the conduct of agency enforcement and advocacy activities.

34. These sorts of output criteria can be quite crude.[119] Case complexity varies by jurisdiction. For example, differing merger *thresholds* can mean that different agencies deal with cases of varying degrees of complexity. Also important are differences in the nature of the merger *notification* regime. In these instances, cases per staff member or turnover times for merger filings etc. may not be a reliable measure of productivity. Cases prosecuted successfully, as a measure used to assess productivity, also feature various difficulties, since jurisdictions differ in their emphases on administrative and judicial measures.

35. Accordingly, an agency might instead choose to focus on "output" criteria, which contain some kind of attempt to include quantification of the success of the interventions such as, for example, an effort to quantify the cost savings arising from successful investigations and competition law infringements deterred.

36. The types of study an authority might undertake in this regard can vary from back-of-the-envelope calculation to detailed econometric analysis. The appropriate extent of quantification varies with the importance of the case and the capacity of the authority, but this does not undermine the fact that *some* measure of quantification is to be welcomed, if only because it gives the authority an understanding of the orders of magnitude involved. Even a brief calculation can feed into the authority's future enforcement priorities and strategic planning.

37. For example, the EC has reported in its "Merger Remedies Study"[120] that overall effectiveness can be observed by looking at the remedies imposed, as this can reflect the degree of efficiency in reaching the expected results. Here, effectiveness can be quantified in terms of the percentage of remedies that have attained their intended objectives. The study showed that 57 per cent of the remedies analysed were fully active, i.e. they had fulfilled their intended objective, 24 per cent were only partially active and seven per cent were ineffective, as the intended objective was not satisfied.

38. With this type of approach, one would try to estimate the benefit of the competition regime by summing the positive outcomes of individual cases. However, this excludes the deterrent benefits from the possession of competition law, which can be quite sizeable.[121] On the other hand, it also excludes the number of pro-competitive actions that were not undertaken

[119] The following discussion draws on OECD (2005, p. 174).
[120] http://ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf
[121] Clarke and Evenett (2003) find that total overcharges from the practices of the vitamins cartel amounted to, at a minimum, some US$ 789.39 million and, importantly, "import bills rose more in those Latin American jurisdictions which did not have active cartel enforcement regimes".

out of fear of wrongful prosecution by means of the competition law. Hence, in jurisdictions where the application of the law is uneven and transparency of decision making with respect to competition is not clear, it can be very difficult to quantify the impact of competition by means of this "bottom-up" approach.

39. Similar difficulties arise when one tries to estimate the benefits of competition law enforcement at the country level. Again in this instance, it is difficult to isolate the impact of competition law and its enforcement. This is certainly extremely difficult to do at the level of the country competition authority, as many factors may affect the mark-up or level of manufacturing productivity, aside simply from the effectiveness of the competition regime. Nonetheless, there are interesting insights to be gained from the study of partial equilibria, and suggestive evidence can be adduced from such studies of specific interventions to support its positive impact on economic growth, if not quantify it exactly.

40. There is one sense in which a competition authority truly *has* to study its effectiveness and that is in terms of compliance. Undertakings must be monitored to determine if they indeed implement the required conditions and remedies. Most countries responding to our request for further information indicated that they also monitored undertakings found to have infringed the competition law in the past and the markets in which anti-competitive actions had been found in the past (e.g. Pakistan, Slovakia).

41. As the submission from Turkey illustrates, though, competition enforcement actions are self-monitoring in one sense: if the problem in the affected sector persists, we might expect this to be followed by another complaint (p. 1). However, the expected result should be focused on eliminating anti-competitive practices immediately and ending the negative impact on competition in the market.

42. The United States Federal Trade Commission (FTC) and Department of Justice (DOJ) report that agencies analyse completed litigation to assess the performance of participating agency staff, contracted consultants and expert witnesses; to evaluate the litigation tools and strategies employed; and to review "the legal and economic underpinnings of the case".[122]

43. It might be difficult to assess the effectiveness of certain competition authorities due to their recent establishment and the limited number of cases that have reached the execution stage. This is the case with Tunisia, for example, where the importance of objective evaluation of the work carried out by the authority was underscored. This objective evaluation should be linked to certain specific criteria such as, for example, the time frame in which the cases are handled and the number of undertakings that have been brought into conformity following an intervention by the competition authority.

[122] OECD (2005, p. 185).

44. If a competition authority has been able to make recommendations or submit proposals to the Government concerning competition policy issues that have had a positive impact on the economy, this is also an indication of effectiveness. The competition authority in Tunisia has, for example, played a proactive role and paved the way for various reforms connected to competition legislation.

45. One important criterion for evaluating the effectiveness of a competition policy authority is to compare the outputs it achieves with the stated goals of its competition policy regime. This is normally set out in the preamble of the legislation enacting the country's competition regime. Accordingly, one yardstick for evaluating the effectiveness of the competition agency would be to examine continuously whether the stated goals of the legislation are being met by the authority's enforcement activities. This idea was also taken into account in the case of Tunisia, which states that effectiveness can be measured by ascertaining to what extent the authority has been able to fulfil its mission. Consideration has to be given to the impact that the authority's existence actually has on the competitive situation in the country. If the mission is to improve competitiveness and the market is still dominated by a few companies, it would indeed be legitimate to question the authority's effectiveness.

46. Another potential criterion for determining whether the authority is effective, or is at least perceived to be so, is to consider the attitude of important stakeholders. It is important to note in this respect that determining the relevant "stakeholders" (or at least determining what weights one assigns to their relevant interests) is to some extent determined by the stated goals of the legislation – if the competition legislation gives precedence to consumer interests then this group may be the primary stakeholder. If promoting or protecting small businesses is the purpose of the legislation, then this group is given priority, and so forth.

7. Responding to stakeholder needs

47. A UK Competition Commission stakeholder survey final report (2006) was drafted to provide more details on performance than those found in international peer reviews. The methodology was to survey stakeholders – that is, those involved in the process of inquiries: respondent firms and their advisors, consumer groups and trade associations – as to the Commission's performance in relation to a set of indicators. Although the sample was small, this allowed the authors of the report to identify areas which respondents thought were important but where the performance of the Commission was not entirely satisfactory. Business and trade associations had a slight preference for "process" indicators, while advisors tended to favour results.[123] The report recommends "improved communication about the inquiry process" as a means of improving stakeholder perceptions of performance.[124]

[123] Competition Commission (2005, pp. 17-18).
[124] Competition Commission (2005)

48. Since 1994, an annual survey has been undertaken by the Swedish Competition Authority of parties randomly selected from "small and medium-sized companies, large companies, municipalities and county councils, commercial lawyers, journalists [and] trade associations".[125] The study is contracted out to a market research company, and is aimed at determining awareness of the Competition Act (and hence indirectly the competition culture) and providing some stakeholder feedback on the effectiveness of the authority.

8. Measuring changes in inputs

49. This can involve the evaluation of agency processes in terms of management practices, organizational structure and operational procedure.

50. Various indicators can be used in this respect such as, for instance, the cost of merger review. One example is the DOJ Merger Review Process Initiative,[126] which aimed to speed up the identification of the key legal and economic characteristics of a case and hence the relevant economic data, as well as the process of evaluating the evidence. There have also been other initiatives to attempt to streamline the notification and review processes.

51. One of the biggest changes in a variety of jurisdictions over recent years has been the creation of corporate leniency programmes. The revision of the amnesty process has been identified by US agencies as crucial to its increased use in that country.[127] Monitoring jail sentences imposed and fines levied enables the DOJ to assess the effectiveness of its criminal antitrust enforcement.[128]

52. The UK Competition Commission reports[129] that it appointed economic consultants to study the analytical procedures employed by the staff during the initial two weeks of a merger inquiry with a view to comparing them with best practices and recommending potential areas for improvement. The internal process changes arising from such review might then feed into "resource allocation budgets".

53. Other important process changes that will improve the effectiveness of competition law enforcement involve those that increase enforcement cooperation with other jurisdictions. This is a topic addressed at length in other UNCTAD publications.[130]

9. Measuring changes in outputs

[125] OECD (2005, p. 175).
[126] OECD (2005, p. 188).
[127] OECD (2005, p. 189).
[128] OECD (2005, p. 189).
[129] OECD (2005, p. 201)
[130] UNCTAD (2005, 2006).

54. Some countries have written that while they do not specifically consider the effects of competition law on a case-by-case basis, there is a more general focus on the proper functioning of markets, as is the case with Finland,[131] for example via sector studies. However, there are a number of instances in which countries have pursued ex post evaluation, trying to get a handle on the precise effects of their competition law interventions (and non-interventions). We shall consider these in the next section. The largest number of studies relate to reviews of competition law and policy related to mergers.

VII. EX POST EVALUATION

55. We group the ex post evaluation activities into those relating to the impacts of sectoral studies, or sector inquiries, i.e. those that review advocacy initiatives and case selection; merger enforcement review; and those entailing a review of particular case interventions.

10. Impact of sectoral studies and sector inquiries

56. Agency staff or outside consultants might be appointed to conduct a study of a particular sector that has been identified as potentially problematic in terms of competition aspects, that is particularly important from a consumer standpoint, or that is significant in some other way. These studies have sometimes been conducted during the development phase of the law in determining the need for the competition law. In other jurisdictions that have a competition law and a competition authority, a sectoral study might include a review of relevant cases conducted by the authority. This could provide helpful insights into the effects of particular interventions in terms of broader sectoral changes. Sector inquiries, such as within the EC setting, can be used as an important information-gathering device, apart from being a precursor to actions under articles 81 and 82 or cross-jurisdiction harmonization or industry initiatives. Furthermore, the inquiry will entail the review of past cases conducted within the sector as well as an analysis of their impact on the subsequent development of the market. In other jurisdictions, such as the UK, the sector inquiry can lead to the imposition of remedies that may have major market implications.

11. Reviewing advocacy initiatives and improving case selection

57. UNCTAD (2006) reports that the authorities of the Brazilian Secretariat of Economic Law (SDE) treat the enforcement of competition law as a “portfolio management” problem. The cases selected feature the highest returns (i.e. they have the greatest economic impact or affect a large number of shareholders) and are likely to be ratified by the Council for Economic Defence - CADE. The OFT in the United Kingdom recently published a paper on productivity and competition, explicitly designed to add to the understanding of “how a competition authority can build productivity analysis into its prioritization”.[132] One means of this is “horizon scanning”, which entails identifying key productivity bottlenecks in the economy.

[131] Submission by Finland.
[132] OFT (2007, p. 4).

58. The FTC/DOJ submission reports that in a speech delivered in early 2005 by FTC Chairman Deborah Platt Majoras, she attempted to quantify the impact of the agencies' advocacy activities, concluding that those activities had indeed had a positive impact.[133]

12. Reviewing merger enforcement

59. The UK Competition Commission (CC) continuously monitors the application of remedies with a view to developing policy and practice in this area. It conducted a 2007 study in this regard with a methodology that consisted of examining four cases that cover all of the main types of remedies typically applied – "divestiture, remedies to restrict vertical behaviour, and remedies to control outcomes" (p. 2) – by means of desk research and interviews with those responsible for implementing the remedies. The report notes two major previous studies of remedies, namely one undertaken by the US FTC in 1999 examining its divestiture process and another completed by the DG Competition of the European Commission in 2005. The methodology of these two studies was mainly to interview purchasers and divesting parties. The CC report compares the findings of the three studies and offers potential reasons relating to the different merger regimes and experience of the three bodies as potential explanations for differences in findings.

60. In its submission to UNCTAD in preparation for the Eighth Session of the IGE, the Canadian Competition Bureau indicated that it was in the process of completing a study analysing the effectiveness of the merger remedies applied in the past with a view to gaining insight into "the processes, principles, terms, and conditions" where improvement could be effected.

61. The OFT, the Department of Trade and Industry and the Competition Commission in the United Kingdom also completed a study of the ex post effects of mergers in 2005.[134] The study covers 10 of the 29 cases referred by the OFT to the CC that were subsequently cleared without remedies, to determine whether the reasons posited by the CC for clearance were borne out, that is, there was an attempt to corroborate the most important reasons for the mergers' clearance (the outcomes predicted by the CC) with subsequent experience. The method of investigation mainly involved interviewing buyers of products from the affected markets and led to a host of insights into the determinants of buyer power.

62. There is thus an attempt to determine whether the competitive constraints identified by the CC that recommend merger without remedy do in fact prevail. In this respect, the authors of the study examined the paths of "e.g. prices, profits, entry/exit, new products, new technology, and changes in customer tastes and buying strategies".

[133] OECD (2005, p. 187).
[134] This report (OFT, 2005) was written by PricewaterhouseCoopers LLP for the OFT, DTI and CC.

63. The evidence from the report is that the CC has a good record of anticipating future market developments.[135] The report identifies the predicted main short- and long-run competitive constraints, comparing them to the ex post findings. It also recommends that, in the context of failing firms, the clues about the (target) firm's ability to survive can be found in "recent market share data or evidence of switching behaviour in (say) the six months prior to the announcement of the merger".[136] Moreover, it questions the implicit assumption by the CC that it was better that the "failing" firm survive.[137] In general, therefore, the report emphasizes the importance of assessing the appropriate counterfactual (p. 79). The report further finds that "buyer power" is a richer and more complex notion than the one that is often reflected in competition assessments" (p. 84). The report provides some useful preliminary investigation of this topic, for instance on the importance of dual-sourcing.[138]

64. An earlier paper (OFT, 1999) set out the theory of oligopolistic markets applied to 11 case studies and found the clearance decision in most of them to have been made correctly. This study again emphasizes the importance of buyer power and the development of the market following the structural changes arising from the merger. The case studies and review of the theory are then used as a basis for recommendations regarding the way in which future horizontal mergers are reviewed.

65. One of the means by which the UK Competition Commission aims to identify its effectiveness is by quantifying the effects of its interventions. One example is Competition Commission (CC) 2006, in which there is an attempt to quantify those mergers against which the CC took action and not those it cleared without remedy (the subject of the previous study). The study represents a prediction of what would have happened to, amongst other things, prices, had the "substantial lessening of competition" in fact occurred. The estimated cost for consumers is £31.4 million.

66. In an earlier report (2003), the UK CC commissioned academics to study various merger reports it had completed with a view to improving the analysis contained therein.

67. Following the issuing of the horizontal merger guidelines in 1992, the agencies responsible for competition policy enforcement in the US have continually sought to monitor the enforcement of the legislation governing mergers. This has included the publication in 2003 of Merger Challenges Data 1999-2003, Horizontal Merger Investigation Data for fiscal years 1996-2003, the merger review process, and the issuing in 2006 of commentary on the Horizontal Merger Guidelines (p. v). The purpose of this commentary was to enhance the transparency of the implementation of merger guidelines.[139]

[135] OFT (2005, p. 71).
[136] Ibid., p. 77.
[137] Ibid.
[138] Ibid, p. 27.
[139] Commentary on the Horizontal Merger Guidelines March 2006 – FTC and DOJ.

68. In 2004, the US DOJ issued the *Antitrust Division Policy Guide to Merger remedies* with a view to studying the legal and economic principles guiding the imposition and construction of merger remedies.[140] In 2005, the FTC hosted a conference on *Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry*, at which prominent academics were urged to compare the methodologies used to study oil industry mergers in different reports by the Government Accounting Office (GAO) and the FTC Bureau of Economics.

69. There has also been research on hospital industry mergers and various mergers that were not challenged by the DOJ in, for example, audit services and the airline industry.[141] Furthermore, the DOJ has conducted various studies of the performance of various regulated industries.

70. The Zimbabwe Competition Commission (ZCC) concluded an ex post evaluation of merger control in November 2006. A stakeholder conference was held following this review to discuss some of the findings with a view to considering recommendations. The study of mergers approved by the ZCC divided the cases considered into those approved with and without conditions. As this process had not been completed at the time of writing, it is too early to draw final conclusions. This exercise is to be followed by an investigation of enforcement against anti-competitive activities.

71. The US DOJ and FTC have also hosted joint hearings and workshops considering for instance industry and legal developments in terms of intellectual property, health care and mergers. This has enabled the agencies to gain access to a wide spectrum of views on these subjects, industry participants, academic experts and other interested parties.[142] Such hearings can provide a basis for future advocacy and investigation work.

72. The EC states that the "Merger Remedies Study" published in October 2005 has been “by far the most important ex post evaluation of its interventions in recent years". This was followed by a subsequent methodological study, also in the merger field, which was carried out by a private consultant and published in January 2007. The purpose of this study was to identify firstly, the problems arising in the design and implementation of merger remedies; secondly, how effective the Commission remedies had been during the period 1996-2000; and finally, potential areas of improvement in the design of future remedies. The study involved the consideration of 96 remedies used in 40 cases and surveyed many of the key individuals involved in the mergers. In many instances, divestitures were used as a component of a remedy package.

73. The study found that some of the key remaining problems in the design of divestiture remedies were “the failure to adequately define the scope of the divested business, […] the

[140] OECD (2005, p. 184).
[141] OECD (2005, p. 185).
[142] OECD (2005, p. 186).

approval of an unsuitable purchaser, the incorrect carve-out of assets and the incomplete transfer of the divested business to the new owner."[143]

74. The report highlights some of the components of a viable divested enterprise, the potential dependence of the remedy package on third parties, issues surrounding the carving-out of assets, questions relating to intellectual property rights, and the importance of improving the role of trustees monitoring the implementation of the remedies. It also looks at other important components of remedying design and implementation, such as difficulties in selecting purchasers for the divested business.

75. The other kinds of remedies studied were those involving access commitments, which were found to be difficult to design (terms of access) and monitor.

76. The merger remedies study also investigated the effectiveness of the remedies in terms of their stated aim, namely "maintaining effective competition by preventing the creation or strengthening of a dominant market position". This was attempted through a mix of quantitative and qualitative evidence.

77. In a recent study on the impact of the Australian Competition and Consumer Commission (ACCC),[144] the authors conclude that the ACCC has had a significant impact on the business community in Australia and its compliance with competition law. They find that improved enforcement activities and higher penalties, for example, have led to increased compliance awareness.

78. They also report that this compliance awareness does not automatically translate into changed behaviour within the business community. Their case studies show that compliance commitment and programmes remain symbolic in certain cases, moreover, it is difficult to convince not just senior management but also middle management of the importance of effective compliance. According to the authors, the solution could be a "multi-strand regulatory mix" in which regulations are adopted to improve compliance and contextual factors are taken into account where "…enforcement action that changes the contexts for market behaviour in a variety of ways is more likely to be effective in improving compliance…".[145]

13. Reviewing particular case interventions

79. Competition authorities might commission legal or economic experts to study, evaluate and make recommendations on the court cases in which the agency has been involved. A 2004 study commissioned by the UK Department of Trade and Industry (DTI) examined the impacts

[143] EC submission, p. 3.

[144] Parker, Ainsworth and Stepanenko (2004).

[145] Ibid, p. 105

of the implementation of competition policy in six "illustrative cases: retailers opticians' services, international telephone calls, the Net Book Agreement, passenger flights in Europe, new cars and replica football kits". These case studies all fall under the broad topic of *competition policy* more generally, even if not all pertain to the enforcement of competition law. The promotion of competition is found to lower prices; increase quantities sold, and promote wider variety of product choice.

80. The Korean Fair Trade Commission (KFTC) reports that consumer welfare is the basis for its assessments. Ideally, the investigation would be comprehensive, assessing "changes in price of goods and services, the extent of quality improvement, the scope of expansion in consumer choices".[146] In practice, the focus tends to be on "price changes in goods and services before and after the imposition of remedies on cartels".

81. The KFTC presents four cases by way of illustration. In the first, which concerns price fixing in the markets for winter and summer school uniforms, a comparison of ex ante and ex post prices and volumes yields savings of some 15 billion won. In the second, which pertains to the abolition of service fee regulations in certified professions, the KFTC has regularly monitored prices on behalf of consumers. The KFTC believes that this will assist consumers in making a rational choice with respect to the purchase of professional services. With respect to bid-rigging on public construction, the KFTC reports that "an estimated four trillion won of government budget is saved every year as the average contract-awarding rate fell from 87% in 1997 to 75% by mid-2000". Finally, with respect to the graphite electrodes cartel, the KFTC reports the cartel's cost to the country (and by implication, the savings for the country from its disclosure). As the KFTC indicates, the usefulness of this exercise lies simply in terms of illustrating how the savings from enforcement exceed its cost.

82. The US DOJ and FTC annually prepare summaries of the magnitude of markets affected by their interventions, as well as estimations of the size of gains to consumers arising therefrom. They report that these values can be based on empirical merger simulation as well as other methods.[147]

83. It is noteworthy that many countries report that they have not conducted any exercise to evaluate the effectiveness of antitrust decisions.

VIII. DEVELOPING COUNTRY PRIORITIES FOR IMPACT EVALUATION

84. Developing countries are beset by a number of barriers to competition. There is an urgent need for an effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries. Oliveira (2006), Oliveira and Paulo (2006) and Oliveira and Fujiwara (2006) discuss some of

[146] KFTC submission
[147] OECD (2005, p. 186).

these factors, which include large informal sectors, problems relating to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints.[148] It is important for each country to tailor its implementation of evaluation initiatives to promote competition while operating within these constraints.

85. These features suggest that uncompetitive markets are an even greater problem in developing countries. The need for effective competition law enforcement is great, but there are serious constraints on effective policy implementation.

86. Evaluation can assist in addressing the more severe political economy problems, thereby helping provide legitimacy for the policy system. On the other hand, capacity constraints within developing countries hamper the proper performance of these evaluations. Nevertheless, when conducted appropriately in these contexts, evaluation can help to provide insights into the country-specific constraints to competition in these jurisdictions arising out of the characteristics listed above, as well as suggesting potential remedies.

87. Consideration of the various above-mentioned criteria may be an important factor in developing country objectives. The priorities of developing countries may be quite different from those of developed countries. However, there is a risk of asking too much, when other policy instruments may be the most appropriate tools for achieving certain ends. This strengthens the case for evaluation. It is necessary to understand the effects of a country's programme of competition law enforcement in order to determine the potential and limitations of competition policy.

IX. CONCLUSIONS

88. This background note has introduced the topic of evaluation of the effectiveness of competition authorities. It has presented the rationale behind evaluation, the types of evaluation that have been conducted thus far, and who has conducted them. Finally, there has been a discussion of the evaluation initiatives that have been undertaken in terms of sector studies, advocacy initiatives, merger and cartel enforcement review, and particular case interventions into anti-competitive conduct.

[148] An OECD (2004) background secretariat note identifies four categories of difficulties: a general category, "lack of competition culture", to be understood as "political support for, and the use of, competition policy as 'default' or 'normal' way of organizing economic activity". The other three kinds of difficulty relate to (a) the particular problems faced by small developing economies, (b) problems related to informal sectors, and (c) "institutional adaptation to the introduction of pro-competition laws and policies". A submission by China to the Global Competition Forum adds to this list the problems of anti-competitive activity by local and regional governments, although this ties in to point (c) on institutional adaptation.