



**United Nations Conference
on Trade and Development**

Distr.: General
26 April 2013

Original: English

Trade and Development Board

Trade and Development Commission

Intergovernmental Group of Experts on Competition Law and Policy

Thirteenth session

Geneva, 8–12 July 2013

Item 3(a) of the provisional agenda

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

**Prioritization and resource allocation as a tool for
agency effectiveness**

Note by the UNCTAD secretariat

Executive summary

Competition agency performance and effectiveness require priorities to be set and efficient allocation of the agency's scarce resources in order for the agency to meet its mandate and maximize the impact of its actions. The main objective of this report is to review how priority setting and resource allocation can be used as tools to enhance agency performance and effectiveness.

Contents

	<i>Page</i>
Introduction	3
I. Setting priorities and allocating resources are critical processes for agency performance	3
A. Concepts and definition of priority setting	4
B. Objectives of priority setting	4
C. The powers of competition agencies and the process of priority setting	5
D. Criteria for priority setting	6
II. The institutional design shapes the way the agency sets priorities	8
A. Criteria for agency performance, priority setting and resource allocation	9
1. Independence and priority setting	9
2. Enforcement powers and priority setting	10
3. Accountability and priority setting	10
4. Transparency and priority setting	10
5. Portfolio of the agency	11
B. External factors that influence the way priorities and resource allocation are set	11
III. Efficient use of resources to meet priorities	11
A. Recruitment and retention of staff	12
B. Simplifying procedures to make better use of resources	13
C. Learning from other case laws	13
D. Effect of resources on priority setting	14
IV. Priority setting and resource allocation are closely related to the life cycle of the agency	15
V. Recommended practices for priority setting and resource allocation	17
VI. Issues for discussion	18
References	19

Introduction

1. The topic of priority setting and resource allocation is part of UNCTAD's work on agency effectiveness. This present paper is prepared in conformity with paragraph 6(b) of the agreed conclusions of the twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (9–11 July 2012), which requested UNCTAD to prepare a paper on "prioritization and resource allocation as a tool for agency effectiveness". Hereafter, we will refer to priority setting.

2. 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.¹ The paper identifies challenges faced by young competition agencies in applying priority setting and resource allocation as relevant tools for their effectiveness.

3. 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

4. Priority setting and resource allocation are vital parts of the internal effectiveness of a competition agency.² 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.

5. 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

¹ Responses to the questionnaire were received from Brazil, Costa Rica, France, Germany, India, Indonesia, Mauritius, the Republic of Korea, the Russian Federation, Serbia, Turkey and Ukraine.

² 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.

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.

6. 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

7. 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.

8. 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.

9. 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.

10. 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

11. 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:

12. 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.

13. 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.³ 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

14. 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.

15. 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.⁴ 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).

16. 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.

17. 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.⁵ 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.

18. 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

³ 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.

⁴ Responses obtained in questionnaires sent by competition agencies responding to the UNCTAD survey carried out between December 2012 and February 2013.

⁵ Responses obtained to the UNCTAD survey from Brazil, Colombia and Costa Rica.

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.

19. 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:⁶

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

20. 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.

21. 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.

22. 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.⁷ Similarly, in Indonesia the anti-monopoly agency Komisi

⁶ 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).

⁷ 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.

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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. Priority setting in the United Kingdom's OFT⁸ 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.

31. 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).

32. 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.

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

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

(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;

(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

34. 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.

35. An important external factor is the institutional design of the agency. In this sense, there are at least three types of agency models:⁹

(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;

(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;

⁸ See the OFT's website, www.of.gov.uk.

⁹ See Fox EM and Trebilcock 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.

(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.

36. 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

37. 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.

38. 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 scarce resources (see below).

39. 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

<i>Criteria for effectiveness</i>	<i>Priority setting and resource allocation</i>
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

40. 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.¹⁰ 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

41. 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

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

43. 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.

¹⁰ The new draft competition law gives full powers to the competition agency.

44. 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

45. 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.

46. 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

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

(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;

(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);

(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

48. 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.

49. 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.

50. 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

51. 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.

52. 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:

- (a) What are the crucial areas of knowledge for the organization's future success?
- (b) Which are most valuable areas of knowledge?
- (c) Which are most at risk of loss through staff loss and turnover?
- (d) Which areas could be easily replaced if lost and which are irreplaceable?

53. 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.

54. 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.

55. For example, KFTC has a system of rewards to maintain the vitality of its knowledge management 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

56. 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

57. 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

58. 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.

59. 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.

60. 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.

61. 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.

62. 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:¹¹

¹¹ Interview with Mr. Sean Ennis, former Executive Director of the Mauritius Competition Commission.

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 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.

63. 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.

64. 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.

65. 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

66. 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.

67. 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.

68. 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.

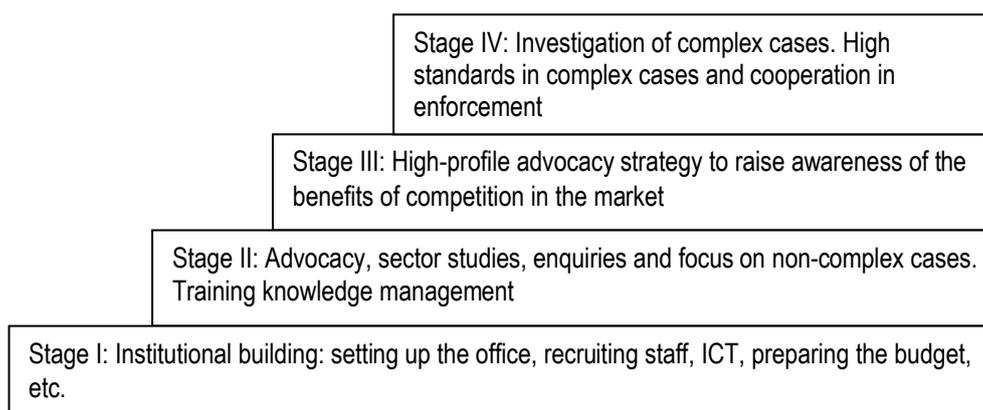
69. The second stage focuses on advocacy activities and non-complex cases. This phase may also include developing working relationships with regulatory bodies and other government institutions in charge of market organization. In this phase advocacy activities are usually strengthened so as to gain legitimacy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

70. 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.

71. 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.

72. 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

73. 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.

74. 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.

75. 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.

76. 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;¹²
- (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;

¹² See UNCTAD report Modalities and procedure of cooperation (forthcoming).

- (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

77. 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?
- (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?

References

- Consumer Unity and Trust Society (2005–2007). Strategic priorities of competition and regulatory agencies in developing countries. Paper submitted under the First Research Cycle of CUTS Competition, Regulation and Development Research Forum. Available at <http://www.circ.in/CDRF-DraftPapers.htm> (accessed 23 April 2013).
- Hollman HM and Kovacic WE (2011). The international competition network: its past, current and future role. *Minnesota Journal of International Law*. 20:2.
- ICN (2008). Agency effectiveness project. Kyoto. April. Available at http://www.cade.gov.br/Internacional/Agencies_Effectiveness_Report.pdf.
- ICN (2009). Seminar on competition agency effectiveness. Summary report. Brussels. June. Available at http://ec.europa.eu/competition/information/icn_seminar_2009/report_final_version.pdf.
- Inotai AG and Ryan S (2009). Improving the effectiveness of competition agencies around the world – a summary of recent developments in the context of the International Competition Network. *Competition Policy Newsletter 2009-2*. Available at http://ec.europa.eu/competition/speeches/text/cpn2009_2_6_en.pdf.
- Kovacic WE (2009). The Federal Trade Commission at 100: into our 2nd century – the continuing pursuit of better practices. Federal Trade Commission. January. Available at <http://www.ftc.gov/os/2009/01/ftc100rpt.pdf> (accessed 25 April 2013).
- OECD (2005). Evaluation of the actions and resources of the competition authorities. Policy Roundtables. DAF/COMP(2005)30. Paris. January.
- OECD (2012). Summary of the response to the questionnaire on the evaluation of the competition enforcement and advocacy activities. Working party No. 2 on competition and regulation. DAF/COMP/WP2(2012)7. Paris.
- Office of Fair Trading (2008). OFT Prioritization Principles. OFT953. London. October. Available at <http://www.offt.gov.uk/713560/publications/corporate/general/> (accessed 23 April 2013).
- Sebastiao M (2013). Five years term report in the service of competition. Autoridade da Concorrencia. Lisbon.
- Serebrisky T (2004). What do we know about competition agencies in emerging and transition countries? Evidence on workload, personnel, priority sectors, and training needs. World Bank policy research working paper 3221. February.
- UNCTAD (2007). Criteria for evaluating the effectiveness of competition authorities. TD/B/COM.2/CLP/59. Geneva. 27 April. Available at http://unctad.org/en/Docs/c2clpd59_en.pdf (accessed 25 April 2013).
- UNCTAD (2011). Foundations of an effective competition agency. TD/B/C.I/CLP/8. Geneva. 9 May. http://unctad.org/en/Docs/ciclpd8_en.pdf (accessed 25 April 2013).
- UNCTAD (2011). Effectiveness of capacity-building and technical assistance extended to young competition agencies. TD/B/C.I/CLP/11/Rev.1. Geneva. 29 June. Available at http://unctad.org/en/Docs/ciclpd11rev1_en.pdf (accessed 25 April 2013).
- van Wyk M (2012). Recent development in South African competition policy with special emphasis on prioritizing sector for investigation. Paper prepared for Cresse Summer School and Annual Conference in Competition and Regulation. Available at http://www.cresse.info/uploadfiles/2012_PAR2_3_PAP.pdf (accessed 25 April 2013).