

OECD Global Forum on Competition

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**Challenges faced
by young
competition
authorities**

**Session
Documentation**

TABLE OF CONTENTS

SESSION III

CHALLENGES FACED BY YOUNG COMPETITION AUTHORITIES

Note by the Secretariat	DAF/COMP/GF(2009)3/REV1
Note du Secrétariat	DAF/COMP/GF(2009)3/REV1
Call for Contributions	DAF/COMP/GF/WD(2008)17
Appel à contributions	DAF/COMP/GF/WD(2008)17

Written Contributions

Albania	DAF/COMP/GF/WD(2009)7
Algeria	DAF/COMP/GF/WD(2008)58
Brazil	DAF/COMP/GF/WD(2009)51
Bulgaria	DAF/COMP/GF/WD(2008)56
Chile	DAF/COMP/GF/WD(2008)60
Czech Republic	DAF/COMP/GF/WD(2009)6
El Salvador	DAF/COMP/GF/WD(2008)54
Hungary	DAF/COMP/GF/WD(2009)47
Indonesia	DAF/COMP/GF/WD(2009)5
Israel	DAF/COMP/GF/WD(2009)55
Jamaica	DAF/COMP/GF/WD(2008)59
Japan	DAF/COMP/GF/WD(2009)56
Latvia	DAF/COMP/GF/WD(2009)2
Lithuania	DAF/COMP/GF/WD(2008)57
Mexico	DAF/COMP/GF/WD(2009)58
Morocco	DAF/COMP/GF/WD(2008)52
Netherlands	DAF/COMP/GF/WD(2009)52
Papua New Guinea	DAF/COMP/GF/WD(2009)59
Poland	DAF/COMP/GF/WD(2009)76
Romania	DAF/COMP/GF/WD(2009)75
Russian Federation	DAF/COMP/GF/WD(2009)60
Serbia	DAF/COMP/GF/WD(2009)61
Singapore	DAF/COMP/GF/WD(2008)55
Slovak Republic	DAF/COMP/GF/WD(2009)62
Slovenia	DAF/COMP/GF/WD(2009)14
South Africa	DAF/COMP/GF/WD(2009)1
Tunisia	DAF/COMP/GF/WD(2008)77
Turkey	DAF/COMP/GF/WD(2009)16
Ukraine	DAF/COMP/GF/WD(2008)53
United States	DAF/COMP/GF/WD(2009)63
Zambia	DAF/COMP/GF/WD(2009)70

Presentations by

Thomas Abe	
Zoltán Nagy	DAF/COMP/GF/WD(2009)18



NOTE BY THE SECRETARIAT

CHALLENGES FACED BY YOUNG COMPETITION AUTHORITIES

NOTE BY THE SECRETARIAT¹

1. The early 1990s saw the beginning of a trend that continues unabated today: the adoption of a competition law by more and more countries. In 1989 there were 37 countries that had some form of competition law,² but some of these did not resemble the laws that exist today (focusing on price controls, for example), and others were not being enforced. Today, the number of countries with modern competition laws exceeds 100.³ This is a good time to reflect in the Global Forum on Competition (GFC) on the experiences of these countries in implementing their new laws. What went right, and what didn't? What were the challenges faced by these new competition agencies, and how did they meet them?

2. To this end a questionnaire (see Annex) was issued to GFC "Designated Participants".⁴ The questionnaire is attached to this note as an annex. The responses are summarised in part II of this note. First, part I describes other studies and projects conducted in this field.

1. THE BODY OF WORK ON IMPLEMENTING NEW COMPETITION LAWS

3. Information on how new competition agencies begin to enforce their laws continues to accumulate, as more countries enact such laws. Some of it comes from experts who have provided technical assistance to new agencies. William Kovacic, Chairman of the U.S. Federal Trade Commission, has written extensively on the topic.⁵ In a 1997 article he outlined the risks associated with transplanting a

¹ This paper was drafted for the OECD Secretariat by John Clark, Consultant. It does not necessarily represent the views of the OECD Secretariat or those of its Member countries.

² Consumer Unity & Trust Society (CUTS), *"Competition Regimes Around the World – A Civil Society Report"* (2006), Introduction, Annex 1.

³ The UNCTAD *Guidebook on Competition Systems* (2007) states that "... a total of 113 countries and regional groupings have adopted or are in the process of adopting competition legislation."

⁴ The GFC Designated Participants are:

- Observers to the Competition Committee: Brazil, Chile, Indonesia, Israel, Lithuania, Romania, Russian Federation, Slovenia, South Africa, Chinese Taipei
- Non-Observer Accession country: Estonia
- Non Observer Enhanced Engagement countries: China, India
- Countries and organisations having attended (as of 19 November 2008) at least one GFC meeting:
 - o Albania, Algeria, Argentina, Azerbaijan, Bahrain, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Costa Rica, Croatia, Ecuador, Egypt, El Salvador, FYROM, Gabon, Georgia, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Latvia, Lebanon, Malaysia, Malta, Mongolia, Morocco, Nigeria, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Senegal, Serbia, Singapore, Tanzania, Thailand, Tunisia, Ukraine, Uzbekistan, Venezuela, Vietnam, Zambia
 - o Andean Community, Asian Development Bank, Business and Industry Advisory Committee, CARICOM Commission, Common Market for Eastern and Southern Africa, Consumers International, Consumer Unity & Trust Society (CUTS) International, International Bar Association, International Development Research Centre, Inter-American Development Bank, Trade Union Advisory Committee, United Nations Conference on Trade and Development, Commission of the West African Economic and Monetary Union, World Trade Organization, World Bank.

⁵ See William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brooklyn Journal of International Law 403 (1997). See also, Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 University of Cincinnati Law Review 1075 (1998);

Western-style competition law into a developing economy. The recipient country faced many challenges that did not exist in those countries that had long experience with competition policy. Among the challenges were meagre resources for the new agency, limited indigenous expertise on the subject, tepid support for competition policy (what today is called “competition culture”), deficient judicial systems and limited access to business information.

4. Recently the U.S. Federal Trade Commission sponsored a workshop on technical assistance, in which experienced providers of technical assistance from several countries participated, as well representatives of recipient countries.⁶ They spoke of the challenges that confront new competition agencies. Among those articulated were: inadequate resources, both human and financial, insufficient foundation for business – property rights, contractual rights, business rights (to begin and operate a business) – weak support from government (which sometimes is more interested in industrial policy), corruption and inefficient judicial systems.

5. Other scholars have approached the topic from different perspectives: abuse of dominance cases in transition and developing countries;⁷ on competition advocacy;⁸ from the perspective of small economies;⁹ on measuring effects of competition law enforcement in developing countries.¹⁰

6. In recent years, various international organisations have studied the topic in one form or another. Those efforts are summarised below.

OECD¹¹

2004 Global Forum on Competition: Challenges/Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition

7. The focus of this discussion was on the relationship between economic development and the promotion of competition. The Secretariat’s background note included an extensive discussion of a condition facing all new competition agencies – the lack of a competition culture in the country. The note concluded that this deficiency was “the central impediment” causing challenges and obstacles. The note

Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chicago-Kent Law Review 265 (2002); Kovacic, *Lucky Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical assistance*, 3 European Competition Journal 319 (December 2007).

⁶ United States Federal Trade Commission, *A Conference on Charting the Future Course of International Technical Assistance*, February 6, 2008, transcript available on the FTC web site at <http://www.ftc.gov/oia/wkshp/docs/wkshptranscript080206.pdf>.

⁷ Maria Coppola Tineo and Russell Pittman, *Abuse of Dominance Enforcement under Latin American Competition Laws*, in Philip Marsden, ed., *Handbook of Research in Trans-Atlantic Antitrust* (Elgar, 2006); Russell Pittman, *Abuse of Dominance Provisions of Central and Eastern Europe Competition Laws: Have Fears of Over-Enforcement Been Borne Out?*, *World Competition* 27(1) (2004).

⁸ Simon Evenett, *Competition Advocacy: Time for Rethink?*, *Journal of International Law and Business*. Spring 2006, Volume 26, No. 3.

⁹ Michal S. Gal, *Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies*, *New York University Center for Law and Business Working Paper #CLB-01-004*, available on the SSRN Electronic Library.

¹⁰ Bruce M. Owen, *Competition Policy in Emerging Economies*, Stanford Institute for Economic Policy Research, SIEPR Discussion Paper No. 04-10, available on the SSRN Electronic Library.

¹¹ All of the documents referred to in this section are available on the OECD/competition web site.

discussed reasons for the slow acceptance of a new competition regime in a society. Chief among them is the fear of those who prosper in the *status quo* that they will lose if forced to compete. The note also touched on other, fundamental challenges facing a competition agency, including the impact of other government policies on competition, corruption, exclusions of various sectors from the competition law and the presence of a large informal sector.

8. There were several country submissions for this discussion. Some of them acknowledged these broader, structural challenges facing competition agencies, but some also focused on more immediate problems, such as insufficient resources, deficient competition laws, lack of important investigation tools, inefficient judicial systems and inefficient institutional structures.¹² The discussion in the 2004 Forum invited a closer look at these issues, which is the purpose of this inquiry in 2009.

Peer Reviews

9. There have been several peer reviews of “young” competition agencies conducted in the Competition Committee and in the Global and Latin American competition forums. Countries reviewed include Argentina (2006), Brazil (2005), Chile (2004), Chinese Taipei (2006), Czech Republic (2001 and 2008), Hungary (1999), Korea (2000), Mexico (1998 and 2004), Peru (2004), Poland (2002), Russian Federation (2004), El Salvador (2008), South Africa (2003), Turkey (2002) and Ukraine (2008).¹³ In addition, the Baltic countries – Estonia, Latvia and Lithuania – were not peer reviewed but were the subject of a comprehensive report published in 1999. These in-depth studies, taken together, provide good insight into problems facing competition agencies in their early years.

10. Some issues were nearly universal across all of the countries. In virtually every country the original competition law was found to be inadequate in some regard. It was either substantially amended or replaced entirely, sometimes only a few years after enactment. Almost every country lacked a sufficient competition culture, the “central impediment” identified in the 2004 Global Forum.¹⁴ Usually it was not for lack of effort on the part of the competition agency that this condition existed; many agencies were diligent in this aspect of competition advocacy. Rather, convincing other parts of the government and the public as a whole of the merits of competition proved simply to be a difficult challenge. Another common problem was a slow start in prosecuting cartels. There was more than one factor hindering anti-cartel efforts, including inexperienced staff, inadequate investigative tools, lack of understanding and co-operation from the public and insufficient sanctioning powers.

11. Other problems were common, but not universal. Several countries, but not all, suffered from inadequate financial resources, causing high staff turnover.¹⁵ Some whose laws included merger review lacked efficient procedures for dealing with them, whether because of low notification thresholds, the lack of pre-merger notification or an inefficient institutional structure.¹⁶ Some countries experienced delays and inefficiency in judicial review.¹⁷ It seemed that those whose cases were heard by a specialised tribunal fared better.¹⁸ Some agencies that had responsibilities in addition to competition enforcement, including

¹² In a supplementary note the Secretariat summarised these submissions. All papers are available on the GFC website at: <http://www.oecd.org/competition/globalforum>.

¹³ All country reports are available at: <http://www.oecd.org/competition> in the section “Country Reviews”.

¹⁴ South Africa had a better foundation than most in this regard.

¹⁵ They included Argentina, Brazil, Chile, Estonia, Latvia, Mexico, Peru, Russia and Ukraine.

¹⁶ Argentina, Brazil, Chinese Taipei, Hungary, Latvia, Lithuania, Russia, Ukraine.

¹⁷ Argentina, El Salvador, Hungary, Mexico, Russian Federation, Turkey, Ukraine.

¹⁸ Chile, Poland, South Africa.

unfair competition, anti-dumping, state aids, public procurement and consumer protection, found themselves devoting too much time and resources to these activities and not enough to competition, at least in the early years.¹⁹ Several countries were slow in developing working relationships with sector regulators²⁰, while a few excelled in this area²¹. A lack of independence was a problem for some of these agencies at the outset, but the situation improved over time, either through new legislation creating structural independence or by acquiring it de facto.²²

12. Each reviewed country is different, of course, and each faced one or more problems unique to it. Still, there were several common themes in these reviews, many of which surfaced again in the questionnaire responses discussed below.

2005 Roundtable on Using Evaluation to Improve the Performance of Competition Authorities

13. In 2005 a Competition Committee roundtable focused on the use of evaluation to improve the performance of competition authorities. Although most of the roundtable focussed on issues related to *ex post* examination of the impact of enforcement and advocacy actions, the contribution by the Portuguese Competition Authority (Autoridade da Concorrência, AdC), then two years old, described a pilot project run with the OECD to improve the AdC as an institution.²³

14. The objective was to help the AdC improve itself using a prototype methodology developed by OECD for the project. Under the methodology, the OECD collects information on an authority's performance on a number of key dimensions, provides feedback to the authority's leadership on that performance, and helps the leadership develop a self-improvement plan. The dimensions were identified following interviews with several current and former officials well versed in competition law and policy.²⁴ Nine key organisational and management dimensions were identified:

- Strategic Direction
- Leadership
- Organisation
- Operating and Management Processes
- Performance Standards
- Human Resource Utilisation;
- Relations with Government Institutions;
- Relations with relevant Publics

¹⁹ Chinese Taipei, Czech Republic, Estonia, Hungary. Latvia, Lithuania, Korea, Poland.

²⁰ Argentina, Hungary, Mexico, Peru, South Africa, Turkey, Ukraine.

²¹ Chile, Czech Republic, El Salvador.

²² Argentina, Brazil, Chinese Taipei, Czech Republic, Estonia, Latvia, Lithuania, Peru, Poland, Ukraine.

²³ <http://www.oecd.org/dataoecd/7/15/35910995.pdf>

²⁴ The key informants who have helped prepare the dimensions of a successful authority were Allan Fels (former Chairman of the Australian Competition and Consumer Commission), Lennart Goranson (former Deputy Director General of the Swedish Competition Authority), Bill Kovacic (then General Counsel of the US Federal Trade Commission), Matti Purasjoki (former Director General of the Finnish Competition Authority), Fernando Sanchez Ugarte (former President of the Mexican Federal Competition Commission) and Michael Wise (author of over 20 reviews of Competition Authorities).

- Performance Review

15. The AdC provided the following evaluation of the process in its 2005 roundtable paper:

Several lessons have been learned through the implementation of the Pilot Project. First, it has allowed for the development of an institutional assessment methodology targeted at Competition Authorities. Moreover, the pioneer application of this model ... has clearly shown that the methodology is robust and that it can be applied in a credible fashion. Testimony to this fact is the candidness of feedback received from interviewees. ... [S]haring feedback from interviewees in a facilitated management workshop was instrumental in shaping the necessary internal discussion. ... Furthermore, the methodology could be applied in a relatively short period of time and at a reasonable cost.

As to the methodology, it is both a development tool and an educational instrument. It communicates the significant dimensions of a 'successful' Authority. But on the other hand, the notional scoring has quite a few limitations. As a matter of fact, it is not yet fully applicable for benchmarking purposes, since there is no evaluation data basis for Competition Authorities as such. That stated, notional scoring allows for some degree of assessment of the stronger and weaker dimensions of an Authority, leading to the opportunity that performance objectives for future years become based upon some evidence assessment rather than less grounded information.

Overall, the consequences or opportunities created by developing and using an evidence based assessment can be summarised as follows:

- the assessment tool communicates the important dimensions that an Authority should focus upon and build development plans around
- the scores that result from an assessment become the baseline for improvement and development of the Authority over time
- *momentum* is created among management to gradually implement needed improvements.

16. Following the pilot program in Portugal, a second project was launched with the Hungarian Competition Authority, the GVH, in 2008. The GVH is currently implementing its Action Plan for self improvement.

International Competition Network

Capacity Building and Technical Assistance: Building credible competition authorities in developing and transition economies (2003)²⁵

17. This report was presented by the ICN Working Group on Capacity Building and Competition Policy Implementation to the ICN's second annual conference, held in Merida, Mexico in June 2003. It was based on the results of two questionnaires, one issued mostly to developing and transition countries on circumstances in which competition policy was introduced in their countries, and a second to both providers and recipients of technical assistance. Most responders were from Europe and the Americas.

²⁵ Available on the ICN web site at

http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/FinalReport_16June2003.pdf.

18. One chapter of the report dealt with the challenges facing new competition agencies. It concluded:

In the end, we have been persuaded that the overarching challenge confronting competition authorities in developing and transition countries relates to their stature and standing within the ranks of key stakeholders or interest groups as well as the public at large. In other words, all struggle to make their voices heard and it is this that constitutes the gravest challenge confronting competition authorities in these countries.”²⁶

19. The report considered the standing of new competition agencies with respect to various constituencies: government, the judiciary, civil society, competition professionals and the business community. Regarding the relationship of a competition agency to government, it noted that either of two models – a separately independent agency or one situated within the government structure – could be successful and each has its advantages and disadvantages. As for the judiciary: “If there is one common concern expressed across the diverse jurisdictions that responded to the questionnaire, it is directed at the perceived difficulty of the judiciary to come to grips with competition law.”²⁷

20. A competition agency’s relationship to civil society is complex; there are strong, well organised elements within society that can feel challenged by competition, including business and labour. Consumers and advocates for competitive markets are usually not so well positioned, on the other hand, complicating the mission of the competition agency. Also, the competition agency must demonstrate its competence to competition professionals, especially private sector lawyers, or risk losing its credibility. Finally, it must gain the confidence of the business community by promoting impartiality, transparency, consistency, efficiency and respect for confidentiality.

Assessing Technical Assistance for Competition Policy: Preliminary Results (2005)²⁸

21. This was a follow-up to the 2003 study, in which 37 countries were surveyed by means of questionnaires and oral interviews. The survey included data (from the period 2001-03) on the environment in the several countries that were the recipients of technical assistance. The data were summarised in the report:

- Agency powers as provided by the competition law, e.g., the ability to prohibit or require particular conduct, to conduct monitoring, to prohibit mergers and to impose fines: in most cases these powers were sufficient and consistent across countries,²⁹ though there was insufficient data on more specific powers, such as the ability to conduct dawn raids. The remedy most imposed was a remedial order prohibiting or requiring certain conduct.
- Fines: In the relevant period fines were increasingly being assessed, and they were larger; the reported median fine increased by 31% between 2002 and 2003. Several agencies reported problems collecting their fines, however.

²⁶ Id. at 24.

²⁷ Id. at 35.

²⁸ Available on the ICN web site at http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/assessing_technical_assistance.pdf.

²⁹ There was variance in the ability to impose criminal sanctions, however. A majority of respondents did not have those powers, but a minority did.

- Decisions and appeals: Agencies reported numbers of decisions, and some were quite large. There was little information on the nature of these decisions, however, which limited the ability to evaluate the data. On average, 12.8% of these decisions were appealed, and of those, 10.4% were reversed.
- Agency budgets: The survey permitted the construction of aggregate and average budget numbers, but qualitative analysis, that is, whether a budget was adequate under the circumstances, was not possible. It was determined that agencies devoted few of their resources to training.
- Staffing and staff turnover: The average number of professionals in an agency was 89; the numbers of lawyers, economists and “other professionals” were roughly equal. Staff turnover varied; it was very high in some agencies, relatively low in others.
- Workload: On average, merger reviews were by far the largest caseload category, outnumbering conduct cases by about 2:1.³⁰ There were few cartel cases – several countries had none – though the number was slowly increasing.

***Agency Effectiveness Project: A Report by the Competition Policy Implementation Working Group: Sub group 1 (2008)*³¹**

22. This report, presented at the seventh annual conference of the ICN in Kyoto, Japan, was prepared “. . . pursuant to a work plan that sets out to identify and examine operational and organisational characteristics of competition agencies that may be important for a successful competition policy implementation.” It was considered to have “. . . special importance for younger agencies, in which organisational issues may still be in flux.”³² The report was based on the results of a survey of 20 ICN member countries, 13 of which were young agencies as defined here. The report focused on processes employed for strategic planning and the setting of priorities, and the impact of these processes on resource allocation and agency effectiveness. The study’s most important conclusions were:

The success of a competition agency depends heavily upon its skill in selecting priorities and designing a strategy for applying its authority. The results of this study in the past year display a broad awareness that competition agencies, new and old alike, should create effective, forward-looking mechanisms for choosing goals and devising ways to achieve them.

The need for strategic planning stems from several considerations. To a large degree, the imperative to set priorities is a function of resources. No competition agency enjoys unlimited funds, and the scarcity of resources demands choices among a range of possible applications of the agency’s powers. Society has a vital stake in having the agency make these choices in a manner that most improves economic performance.

Without a conscious process of setting priorities and ranking possible activities according to their legal and economic significance, the competition authority is less likely to focus on what truly matters. Without a strategy, the agenda of the competition authority is prone to be governed entirely by external impulses in the form of complaints from consumers, requests for action by

³⁰ These data could be misleading, however, without further information on the nature of the cases involved. Each notification, for example, might constitute a case, which would make mergers disproportionately large.

³¹ Available on the ICN web site at http://www.internationalcompetitionnetwork.org/http://www.internationalcompetitionnetwork.org/media/library/CPI/CPI_WG_1.pdfg/media/library/CPI/CPI_WG_1.pdf.

³² Id. at 3.

business operators, or queries from legislatures and other government ministries. These impulses sometimes might channel a competition agency's efforts toward matters of the greatest significance, but this is not invariably or even routinely the case. Lest it merely respond to the random ordering of external events, even the most humble, least funded competition agency must strive to establish criteria for deciding which of the matters brought to its attention is worthy of further scrutiny.³³

World Bank

*What Do We Know about Competition Agencies in Emerging and Transition Countries? Evidence on Workload, Personnel, Priority Sectors and Training Needs (2004)*³⁴

23. This report was based upon the results of a needs assessment questionnaire issued to 48 competition agencies in transition and developing countries. Thirty-five countries responded. The results were aggregated according to three geographical areas: East Asia and Pacific, Latin America and Caribbean and Eastern Europe and Central Asia. A preliminary finding in the report was:

The view of competition authorities as a homogenous group across countries and regions can be strongly discarded. The analysis of the needs assessment questionnaire shows there are significant heterogeneities among competition agencies' mandates, exempted sectors, professional personnel endowment and capacity needs.³⁵

24. The study focused on competition agencies' workload, personnel endowment and priority sectors.³⁶ Some of its findings were:

- Merger workload: There was a significant dichotomy between countries that considered a large number of mergers and those that considered only a few, but only a weak relationship between size of the economy and numbers of mergers evaluated. This suggests that merger workloads are substantially influenced by the terms of the competition law that govern which mergers must be examined.
- Conduct cases: Countries that reported the highest numbers of conduct cases indicated that most of them involved excessive prices. These cases are difficult to analyse, with uncertain results. Thus, competition laws that include excessive pricing as a violation impose an undue burden on the competition agency in conduct cases.
- Human resources: Competition agencies in East Asia and the Pacific had twice the number of employees than those in Eastern Europe and Central Asia and four times those in Latin America. The number of competition cases considered in these regions did not vary in the same proportion, however. This could be partly explained by the fact that agencies in East Asia and Pacific tended to have broader responsibilities outside competition than did those in the other regions.

³³ Id. at 26.

³⁴ World Bank Policy Research Working Paper 3221, written by Thomas Serebrisky, World Bank Institute. Available on the World Bank web site at http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&theSitePK=523679&entityID=000009486_20040603154400&searchMenuPK=64187283&theSitePK=523679

³⁵ Id. at 3.

³⁶ Competition advocacy was not part of the questionnaire, mostly because the ICN had recently done substantial work in that field.

But additionally, agencies in East Asia and Pacific had higher numbers of administrative personnel relative to professionals than did those in the other regions.

- The study considered evaluating productivity in professional personnel by employing a cases per worker ratio as a proxy. This approach produced variances that could not be explained, however, probably due to the significant heterogeneity of mergers and conduct cases across countries, noted above, and so this measure was rejected.
- Respondents were asked to rank various sectors in importance to them for enforcement activity. Among infrastructure industries, telecommunications was overall ranked highest. Electricity, especially issues related to access to the natural monopoly component (transportation), was also important. In Latin America and the Caribbean transport sectors were important, especially air transport.
- Respondents were also asked to rank various enforcement topics, e.g., mergers, conduct cases and conceptual framework (topics such as natural monopoly theory, market definition, demand elasticity, etc.) in importance. Again, rankings varied by country and region.

World Trade Organisation: Working Group on the Interaction between Trade and Competition Policy

***Support for Progressive Reinforcement of Competition Institutions in Developing Countries through Capacity Building (2002)*³⁷**

25. This background note prepared by the Secretariat dealt primarily with capacity building, but a section of it discussed strategies for building effective competition policies and agencies in developing countries – the process of establishing an effective competition policy.³⁸ The note was a synthesis of annual and other reports prepared in the Working Group on the topic.

26. The note echoed themes developed in other studies, listing four major points:

- crafting a competition law appropriate to the country's economic circumstances and legal environment;
- establishing the competition agency's priorities;
- building the competition agency, including recruitment and training of staff, development of case handling procedures, etc.; and
- developing a competition culture, including through relevant public education activities.

27. Several key steps in the process were highlighted: focusing on prosecuting hard core cartels; developing a competition advocacy programme in regulated industries; possibly delaying merger control; acquiring adequate financial and personal resources; achieving independence; and acquiring technical competence.

UNCTAD

28. A principal focus of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy is on promoting competition policy in developing countries. In this sense a great deal of the work

³⁷ Available on the WTO web site at

³⁸ Id. at 5-8.

of the IGE is, at least indirectly, relevant to the topic at hand. Its ongoing work on the United Nations Set of Principles and Rules on Competition and its Handbook on Competition Legislation, for example, are reference works for new competition agencies. The IGE regularly conducts reviews of capacity building and technical assistance for developing countries, and it also has begun conducting peer reviews.

29. The IGE's substantive work also impacts young competition agencies. In 2008, for example, the Group conducted a discussion on achieving independence by competition agencies. The background note specifically addressed challenges for new agencies in developing countries in acquiring independence.³⁹ Consistent with other studies, the document noted that a "key short- to medium-term challenge in setting up independent competition authorities in developing countries is attracting staff that has adequate skills or the potential to rapidly acquire requisite skills." Obtaining adequate financial resources was another important challenge. These challenges were discussed in the context of whether it is best for a new agency to be part of a ministry or structurally independent. No definitive conclusion could be reached. Both structures have advantages and disadvantages. An agency that is within government, for example, could have more success in acquiring qualified personnel from other government agencies.. An independent agency, on the other hand, might be able to offer higher salaries than those given to ordinary civil servants.

II. ANALYSIS OF QUESTIONNAIRE RESPONSES

30. The questionnaire (Annex I) was drafted to avoid creating too much of a burden on responding countries, and so it did not ask for detail or require the production of specific data. Rather it sought opinions and conclusions on the following topics: (1) the organisational phase – recruiting executives and staff, setting priorities and goals, and issuing guidelines and regulations; (2) competition culture and competition advocacy; (3) conduct cases and investigations – abuse of dominance and restrictive agreements; (4) mergers; (5) judicial appeals; (6) resources; (7) independence. Finally, the questionnaire asked respondents (a) to list the five most important actions that they would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

31. One issue facing the drafters of the questionnaire was defining a "young" competition agency. Is it one that is less than five years old? Less than ten? Any guideline would be somewhat arbitrary, but it was decided to consider as young any agency that began enforcing a competition law since 1990. That date could be considered as the beginning of the "modern" era in competition policy, at least in the international context, and of the rapid expansion in the number of countries implementing new competition policies. Central economic planning in Central and Eastern Europe and Central Asia had ended. Many of those countries enacted new competition laws at that time. Countries in other parts of the world were also liberalising their economies then, and this effort included enacting new laws or revising old ones. The questionnaire invited countries that fell within that timeline to respond as "young" agencies. Older agencies were invited to respond to the same questions, basing their answers on their own experiences enforcing their laws and, importantly, on their experiences in providing technical assistance to younger agencies.

32. To date 30 countries have responded, most as young agencies.⁴⁰ The submissions are quite thoughtful and contain a wealth of useful information. The summary below is only that; readers are encouraged to consult the individual responses as well.

³⁹ *Independence and Accountability of Competition Authorities*, note by the Secretariat (2008), at 12-15, available on the UNCTAD web site at http://www.unctad.org/en/docs/c2clpd67_en.pdf.

⁴⁰ As of 10 February 2009: Albania, Algeria, Brazil, Bulgaria, Chile, Czech Republic, El Salvador, Hungary, Indonesia, Israel, Jamaica, Japan, Latvia, Lithuania, Mexico, Morocco, Netherlands, Papua New Guinea, Poland,

First steps

Describe how you conducted . . . [the] organisational phase [relating to creating a new organisation and preparing it to enforce a new law -- recruiting staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.]. What went well, and what didn't?

33. Several of the responding countries were slow off the mark in beginning to enforce their laws. For some it was because the law that was enacted was inadequate. This was true in **Algeria**, for example. Its first competition law was enacted in 1995. It was followed by new laws in 2003 and 2008.

The review and enhancement of the Council's organisational and legal framework [in 2008] were prompted by the fact that it had been in existence for a number of years and by the mismatch between its *modus operandi* and the role that this type of institution should play in regulating the economy and implementing the rules on competition.

Algeria's Competition Council considered few cases in its first several years, but that is beginning to change.

34. The OECD Peer Review showed that **Brazil** was another country whose law was deficient in several respects. That law still exists, despite attempts to amend it in the intervening years, but Brazil's competition agencies nevertheless have made substantial gains in efficiency and productivity through administrative actions.

35. **Mexico's** competition law became effective in 1993. While the Federal Competition Commission made progress in the ensuing years, it was slow. Comprehensive amendments to the law were enacted in 2006, and in its response Mexico called these amendments "most important." They clarified substantive standards, provided the CFC with important new powers and corrected a legal deficiency that, pursuant to a Supreme Court decision, had effectively halted the CFC's prosecution of conduct cases.

36. **Romania** was another country whose initial progress was hindered by defects in its first competition law, which was enacted in 1996. A series of amendments beginning in 2003 remedied many of these problems, so that

. . . we can consider that RCC is now, after almost 13 years of existence, a strong authority, one of the main pillars of Romania's functional market economy.

37. Some new competition agencies were inadequately funded at the beginning, resulting in their inability to mount serious enforcement efforts in their early years. **Albania, Jamaica, Latvia** and **Slovenia** were among them. **Singapore**, on the other hand, was deliberately measured in implementing its law. Its agency was established at the beginning of 2005. One year later the conduct provisions of its law became effective, and 18 months after that the merger control provisions took effect. The agency's first substantive decision, a cartel case, was issued in January 2008.

38. **Zambia** reported having an especially difficult time. Its competition law was enacted in 1994, but it was not until 1997 that the Competition Commission was established. It faced further problems:

Romania, Russian Federation, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Tunisia, Ukraine, United States and Zambia.

The budget allocation in the first five years was inadequate to increase the work force or train the officers of the authority. Thus the Commission suffered from underfunding, understaffing, the lack of adequate equipment and lacking capacity to effect training programmes. Procedures for the new Act were established but regulations of the Act were not.

To date the **Zambian Competition Commission** has decided but one case, and that case is still in court. In 1999 the Commission detected a cartel in the poultry sector, but “no prosecution was carried out because of lack of funds and key prosecutorial staff.”

39. Countries in transition from centrally managed economies shared several common experiences.⁴¹ There had been little or no experience with free markets in these countries. A competition culture, lacking in all countries with new competition laws to some extent, was virtually nonexistent in transition countries. **Bulgaria** described its situation:

In those early years, the notion of competition was just beginning to emerge as a value in the political and economic reality. For this reason, the newly established CPC encountered numerous challenges and obstacles in its effort to promote competition and enforce competition law.

40. Also, the new competition agencies in these countries had responsibilities that extended well beyond traditional competition law enforcement. They participated – some more, some less – in demonopolisation and privatisation programmes and they supplemented, or even substituted for, regulatory regimes in some infrastructure sectors.⁴² The **Slovak Republic** described its activities in this area:

. . . [M]ainly in first years of its existence the Office fulfilled . . . wider tasks and it also initiated various legislation changes, for example: i) it actively entered the privatisation process with the aim to demonopolise markets; ii) it initiated the abolishment of tobacco and salt state monopolies (1994); iii) it initiated the Governmental Resolution on establishment of public procurement (1991); iv) it has been repeatedly submitting the draft of the Act on Regulation of Network Industries or on Competitive Method of Granting Licences. . . .

41. Further, some agencies were assigned other duties that diverted important resources from the competition mission. **Lithuania** was one:

. . . [H]aving accumulated additional functions, such as antidumping and consumer protection, the former competition authority had not enough qualified resources for dealing with quite different [cases] and even contrary to competition matters.

42. The **Russian Federation** was another:

Historically the Russian Competition Authority . . . [had] multi-functional powers that definitely distracted many resources from concentrating on purely competition matters.

43. In most cases these problems were overcome eventually. New or substantially amended laws were enacted; resources were increased. The completion of the privatisation process and the creation of sector regulators in transition countries permitted those competition agencies to turn to more traditional law enforcement. **Hungary** provided a useful perspective on the experience in a transition country:

⁴¹ Transition countries that submitted responses were Albania, Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia and Ukraine.

⁴² See Coppola Tineo and Pittman, *supra* at n. 7.

The development of the GVH between 1991 and 2009 has been a long and gradual process: sudden leaps might happen, and they might be true in terms of output, but usually did not represent the nature of input needed to achieve them, since as a general rule they were based on lengthy preparations. . . . Stage one – from 1991 (and actually from an earlier date) until around 1999 – was a start up phase under the turbulent conditions of economic transition and a deep recession. Stage two – between about 2000 and 2008 – is a more mature phase where international integration in general, and accession to the EU in particular, has a somewhat different and more important effect.

44. **Serbia**, on the other hand, began its political and economic reforms later than its neighbours. Its competition law was adopted in 2005 and the competition agency began operations in 2006. The agency currently faces the same problems that beset other transition countries a decade or more earlier, among them continuing political instability, economic underdevelopment, undue influence by a few powerful business interests, lack of a competition culture and a lack of resources and enforcement tools in the competition agency.

45. Some countries, especially those that began their work after the first “wave” in the early 90s, became productive more quickly. **El Salvador** was one. Its Competition Superintendency began operations in 2006 with a good law (though not perfect – it too was amended substantially soon after enactment) and adequate resources. With the help of an outside consultant it created a comprehensive five year plan, created and published regulations governing its internal procedures, initiated co-operative relationships with regulators and other government agencies and instituted an aggressive competition advocacy programme.

46. **Papua New Guinea** is another “new entrant.” Its experience might be especially useful for small economies. In 2002 it enacted comprehensive new legislation designed to create a “business regulation framework.” It created a single agency having responsibility for regulation of infrastructure industries and for competition law enforcement. The competition law was drawn substantially from New Zealand’s. The application of the substantive provisions of the competition law were delayed for one year, during which time staff was hired and internal regulations created.

47. **El Salvador, Papua New Guinea and South Africa** made extensive use of outside private consultants during their formative periods. All found the process to be quite helpful, though at least in South Africa’s case, also expensive. It seems that a key in employing consultants is to bring in someone who has had substantial experience in competition law enforcement, as opposed to someone who may have practiced only in the private sector. This was a finding in a paper on capacity building submitted by the OECD to the WTO Working Group on the Interaction between Competition and Trade Policy in 2002.⁴³

48. **Morocco**, the youngest of the agencies responding to the questionnaire (the official installation of the Competition Council occurred in January 2009), has, consistent with the conclusions of studies described in part I above, established formal priorities for the new agency in its first two years. Among the “older” young agencies, the **Czech and Slovak Republics** (then Czechoslovakia) also engaged in advance planning:

. . . [T]here was an expert group established in 1989, i.e. even before establishment of the [competition] Office, within the Ministry of Finance, which was, along with several competition lawyers, preparing the competition act and some general concepts (relevant market definition,

⁴³ Communication from the OECD circulated to the WTO Working Group on the Interaction between Competition and Trade Policy on 22 April 2002. See in WT/WGTCP/M/17 para. 40.

cartel agreements classification etc.), which were used during the beginnings of the Office's enforcement activities.

Hungary and the **Netherlands** were other countries that did so.

49. Almost all responders emphasised somewhere in their responses that transparency is important for a new agency. One tool for promoting transparency is the publication of internal procedural regulations and substantive guidelines. It seems that not many new agencies made this a priority, however. **Israel** articulated a rationale for going more slowly in this area:

Establishing internal procedures and creating regulations and guidelines which implement the new law should take place in a gradual manner. The implementation of competition law diverges from one jurisdiction to another. Country specific characteristics and features of individual legal systems need to be integrated into the development. A step by step approach, which relies on actual experience rather than just theory, is likely to be more effective.

50. But some countries did create regulations and guidelines early on. **Indonesia** was one:

The first step was to specify various internal orders, including human resource management and implementation of the competition law. Various orders like [a] code of ethics, strategic plan, case handling procedure and others were formed as an initial foundation.

Papua New Guinea was another. One of its five most important recommended steps was:

As early as possible, put in place procedures and manuals to ensure the agency operates to the highest standards of corporate governance even where (especially where) this sets it apart from other government agencies.

51. Finally, one point that was made in several responses was the importance to the fledgling agency of technical assistance. Long term assistance (consistent with the findings of other studies on this topic) was most valued. **Tunisia**, for example, valued highly the assistance provided by France. The **Czech Republic**:

It should be mentioned that the specialised training was accelerated; already in 1991 the [competition] Office provided its employees with highly specialised and long-term training in cooperation with FTC and DOJ (USA) and many expert seminars, prepared by the *Bundeskartellamt*. Continuity of the professional growth of the staff was also secured through the participation in the OECD meetings.

52. **Hungary** spoke of the value of its peer review in the development of the GVH:

The OECD regulatory reform review of Hungary in 1999 also had significant impact on the "development agenda" of the GVH. Competition policy in Hungary, including the whole activity of the GVH was peer reviewed and recommendations were made. The review (both the mission in Hungary and the report prepared on that basis) was not only of high quality and thorough, but also was carried out at the right time ... to make a difference. In addition, it gave ammunition to be used in lobbying at non-GVH decision makers for their support.

Hungary also made use of the OECD methodology for assessment and self-improvement, described above in Part I.

53. Transition countries that were candidates for EU membership benefited from their association with the Member states and the Commission in the *acquis communautaire* process. The Commission's twinning programme matches Member States and Candidate Countries for the purpose of facilitating the development of various public policies in the Candidate Country. The ICN Consultation Program for Newer Competition Agencies operated in a similar fashion.

54. The **Netherlands**, a mature market economy, responded to the questionnaire as a young agency, as its competition law was adopted within the questionnaire's 20 year timeline. It was unique among responders for this reason. It had fewer problems in its early years than its counterparts in developing countries. Still, the NMA faced challenges. Its description of the process it used to staff the new agency could be of use to other countries.

The first step in staff recruitment for the NMA was to register Ministry staff interested to go work at the new organisation. The taskforce conducted job interviews with those interested, after which qualified persons were appointed. Subsequently, a labour market campaign was conducted to attract qualified personnel. Also those persons who came from the Ministry were encouraged (also financially) to attract qualified persons in their personal network. This turned out to be a success as the new staff fit in well in the organisation, and were motivated, and competent.

Tunisia was another country that recruited heavily from within government, followed by extensive training for the new employees.

Competition culture and competition advocacy

Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

55. Every country reported that competition culture was lacking when the new agency opened for business. Many undertook programmes to improve this situation. They employed the usual measures in this regard: publish decisions, annual reports and regulations and guidelines; establish a website; cultivate relations with the press; make speeches; conduct seminars. Improvement was slow and sporadic, however. Anecdotal evidence suggests that no matter how aggressive such a programme is it will require time to produce effects. **El Salvador** and **Papua New Guinea**, both new agencies, quickly implemented impressive advocacy programmes, but their impact was muted in the agencies' first years. On the other hand **Lithuania**, whose agency is much older, reported real progress.

The developed competition culture, increased public awareness and educated business society and consumers through making the requirements of the Law on Competition a public domain could be regarded as one of the main achievements of the Competition Council.

56. **South Africa** adopted a creative approach in this area. It created within the Competition Commission a separate Compliance Division, which had a specific mandate to "encourage, facilitate and monitor voluntary compliance by the business community with the provisions of the Act." **Hungary** was another agency that created such a unit. In South Africa the Compliance Division was responsible for all of the Commission's educational and advocacy functions. Its efforts met with success, but it also encountered some hurdles. It had difficulties in establishing working relationships with more established sector regulators, who resisted what they considered encroachment by the Commission into their domain. Further, unlike most countries where consumers expected little from the new competition agency, South African consumers expected too much. They looked to the Commission to control prices, for example, and they expected the Commission to impose tougher penalties than the law permitted it to.

57. Each agency faced unique circumstances when it came to promoting a competition culture in its country. **Indonesia's** response was interesting, describing an obstacle that it overcame:

We encountered difficulties at first due to the public's perception of KPPU as an . . . institution [with excessive powers] that acted as an investigator/police, prosecutor, and judge simultaneously. This is because KPPU worked independently of other state institutions. However, along with extensive socialisation and enforcement results, public perceptions begin to change and welcome KPPU as an important institution for economic development.

58. Progress in **Tunisia** was slow after it enacted its competition law in 1995. A contributing factor was misunderstandings in the business community about the purpose of the competition law and the benefits that it can provide:

...difficulties remain due to some lack of confidence of the business community that prefers to call on the government for settling their disputes instead of sending their cases to the Competition Council. According to the business community, this distrust is justified by the need to protect their trade brand in case they would be subject to sanctions or even due to the cost and length of the litigation.

59. The new agencies understood that an essential task in developing a competition culture was to convince consumers of the benefits to them of competition. Two, the **Czech Republic** and **El Salvador**, reported difficulties in working with more established consumer organisations in their country, however. **Jamaica** described a different problem. The new Fair Trading Commission correctly decided that it needed to establish itself as a consumer-friendly agency, but later it concluded that it had devoted too many resources to consumer protection matters and not enough to competition.

This had debilitating effects on the Commission before its tenth year of existence as locally based firms had developed a very limited understanding of what Competition Law & Policy is about. . .

60. A few submissions highlighted a critical fact about developing a competition culture: speeches, seminars and web sites are not by themselves sufficient. The agency must also demonstrate success in enforcing the law. The **Czech Republic** emphasised this point, noting the favourable impact on public opinion that resulted from successful cases against cartels in coffee, taxi services and television broadcasting of football matches.

Issuing the [football] decision, which enabled the TV companies to make records of the football matches, provided millions of football fans with proof of real advantages which can be expected from the effective competition enforcement and convinced the general public that the Office's interventions are meaningful.

61. The same can be said of successful intervention with sector regulators through competition advocacy. **Indonesia** pointed to an advocacy effort by the KPPU in the airline sector that resulted in lower prices for consumers.

Conduct cases and investigations – abuse of dominance and restrictive agreements

What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

62. New competition agencies faced three nearly universal obstacles to effective enforcement of their laws' conduct provisions: (1) inadequate investigatory tools and sanctioning powers, (2) insufficient expertise in the professional staff, and (3) lack of public awareness of the law and its merits for consumers, resulting in little co-operation with investigators in these cases. The first has been ameliorated in most countries through new laws and amendments. There has been progress in overcoming the second and third in many countries, but often it is slow.

Abuse of dominance

63. Again, the experience in transition countries in dominance cases was unique. The new competition agencies inherited an economy that had featured state-owned monopolies in many sectors. Some still existed, either as state-owned entities or newly privatised ones. Regulatory schemes were not in place in all sectors. Thus, abuse of dominance cases, many against state enterprises, were predominant in the early years. **Latvia:**

The infringements of the Competition Law were mainly established in activities of state and municipalities enterprises that were mostly natural monopolies. It is important that one of the main tasks of [the] Competition Law was to provide that monopolies belonging to the state do not harm competition and that the Competition Council implemented it without taking into account ownership of enterprises which had made infringements.

Complicating this situation in transition countries was the fact that many of these cases involved alleged exploitative practices, notably excessive prices, which are now understood to be both difficult to prosecute and ultimately unproductive in terms of restoring competition. Over time, however, with the completion of privatisation and the development of the private sector the incidence of dominance cases declined in these countries.

64. One problem that existed in **Poland** and in other transition countries in the early years was that the competition agency had little discretion to dismiss complaints by private parties that were clearly without merit.

According to the OCCP's experience, in 80 per cent of cases initiated on a business's request no breach of antitrust law was found. The new solution [provided in a 2007 amendment to the competition law], to a great extent, shortened the time of conducting proceedings. It also allowed for the Office to set its priorities for actions in sectors of economy which require most intervention.

65. The **Czech Republic** described another situation that existed in some transition countries. Its first law created a presumption of dominance based on market share (in the Czech Republic's case, 30%) and required firms having such share to notify or register with the Competition Office. The Office found itself having to devote significant time and resources to enforcing this notification obligation. Over time it became apparent that these rules were arbitrary and unworkable, and they were eliminated in the first amendment to the law.

66. Elsewhere, it seemed that dominance cases were relatively few, probably reflecting the fact that abuse of dominance is the most difficult type of case to investigate and prosecute successfully. **Singapore** articulated the problem:

As of end November 2008, CCS has yet to act against any abuse of dominance or non-cartel restrictive agreements cases. For the investigation of abuse of dominance cases, CCS faces challenges in defining the relevant product market or qualifying the manner of abuse for some cases. Sometimes, the alleged behaviour does not fall within commonly seen forms of abuse or case law, and there are case-specific factors complicating the assessment of the case. In this regard, CCS is articulating possible theories of harm prior to the requesting of information from parties, as well as consulting experienced case-handlers from other more established jurisdictions.

67. Countries were not asked to discuss cases, but those that did described dominance cases employing different, sometimes controversial, theories. **Algeria's** first three cases were dominance cases involving discriminatory practices. **South Africa** described an excessive pricing case and a discrimination case. South Africa's pricing case involved anti-retroviral drugs, and while a strict competition analysis might not have demonstrated unlawful conduct, it was declared so in light of the country's HIV/AIDS epidemic. In the discrimination case a violation ultimately was not found by the courts, but a relevant issue was the stated purpose in the competition law to protect small and medium-sized businesses.

68. **Chile** described difficulties that it has encountered in dominance cases. It seems that in that country some practices that might be prosecuted as abuse of dominance are protected by constitutional or property rights that guarantee freedom of enterprise. The FNE has also encountered resistance from regulators on jurisdictional grounds when it has pursued possible dominance in their sectors.

Cartels

69. Most countries found it difficult to develop an active anti-cartel programme quickly. In some, naïve cartels produced early successes (the **Czech Republic** prosecuted 15 in its first year), but these rather quickly dried up. Most early competition laws did not provide the necessary tools for the task; dawn raids were not authorised; available sanctions were not sufficiently harsh. Several countries adopted a leniency programme, but most of these were not immediately productive, either because the threat of severe sanctions was not credible or because there were flaws in the programme itself (e.g., insufficient transparency or uncertainty about eligibility for leniency).

70. In many countries this has begun to change. New laws provide better tools. Leniency programmes have been adjusted, and are beginning to produce results. Countries reporting increasing success in their anti-cartel efforts included **Algeria, Brazil, Bulgaria, Czech Republic, El Salvador, Lithuania, Hungary, Israel, Poland, Singapore, Slovenia, and South Africa**. In South Africa, for example:

A few years into the CCSA's existence it was sometimes criticised for focusing more on merger regulation than on investigating or preventing restrictive practices. At that time, the competition authority was known more for its decisions in mergers and acquisitions than for detecting and prosecuting harmful cartel behaviour. To address this concern, in 2004, the Competition Commission developed a Corporate Leniency Policy ("CLP") which was designed to uncover hard core cartels. The Commission also embarked on an information campaign regarding its CLP and, thereafter, received its first application in January 2007. Since that time the Commission has received approximately 10 leniency applications and has also reviewed its policy to make it more

user-friendly. The Commission considers the CLP to be a highly successful tool in the detection and prosecution of cartels.

71. The **Netherlands** developed its anticartel programme more quickly. The NMa benefited from uncovering a large and sophisticated cartel in the construction industry early in its existence. Prosecuting this cartel provided an exceptional opportunity for the agency to sharpen its skills.

72. In other countries the effort continues to lag, though there is increasing awareness of the reasons for it and increasing will to address them.

Mergers

If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?

If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

73. Of the responding countries only **Jamaica** and **Indonesia** do not have merger control. In Indonesia a merger regulation has been drafted but it has not yet been approved. In its response Jamaica lamented the fact that it lacks merger control.

It is the view of the Staff that not having such authority is threatening to undermine advancements which we have been making in other aspects of competition law enforcement. One immediate concern for us at this moment is that our inability to review mergers will undermine the public's confidence in the Commission as an agent for safeguarding its welfare. We make specific reference to recent developments in the subscriber television (cable) market in Jamaica whereby a single recent entrant has been expanding its customer base through a series of acquisitions of incumbent service providers. In some instances, the acquisitions resulted in monopolised markets; with higher subscription fees for consumers within these markets. In March 2008, public outcry against the effects of the acquisitions reached a crescendo. Since the entrant was not prevented from acquiring rivals in some of the regions in which it operated, the Commission's non-intervention was misconstrued by the public as evidence of our unwillingness, rather than our inability, to intervene in the interest of competition and consumer welfare. This concern extends to other industries where mergers have been consummated without the benefit of review by the Commission. These industries include health insurance and commercial banking.

74. Elsewhere the story of merger control is one of evolution. Notification rules change, as do review procedures and substantive standards. In **Brazil**, for example, merger review had been slow and inefficient. That changed in 2003.

Recently, in 2003, the "Fast-Track System" for simple cases has been introduced, which freed up resources. Currently, 75% of the caseload is being reviewed under this simplified procedure, allowing for additional resources for more complex cases. Moreover, the Commission has made consistent efforts to narrow the mandatory merger review, so as to avoid the notification of cases with negligible probability of competition harm.

75. Again, there are aspects of merger control common to transition countries. Several transition countries were immediately active in reviewing mergers as a result of privatisation programmes in their country. Their review procedures were not efficient, however. The notification rules of some were based on market share, a notoriously imprecise measure for this purpose. Many had notification thresholds that were too low, resulting in too many notifications. These imperfections were modified over time, however. For those countries involved in accession to the European Union the process resulted in an overhaul of their merger control programmes, bringing them into conformity with those of the European Commission and applying consistent substantive standards. The **Slovak Republic's** story is typical.

At the very beginning, after the creation of the Office, approximately 60% of the Office's capacities were given to mergers. This situation arose from relatively low thresholds of merger notification, but it was also connected with massive privatisation in early nineties in SR.

Regarding notification criteria of merger notification, which were valid at the beginning of the Office's activities, it is necessary to state that market share was one of the alternative notification thresholds – undertakings were obliged to notify a merger, if a market share of 20% was identified, then this threshold was increased at 25%.

Considering . . . the non-transparency of market share as a notification criterion, from the year 2004 notification criteria of merger notification pursuant to the Act on Protection of Competition have not been based on market share.

The substantial decrease of number of notified mergers from 200-250 per year to approximately 70 assessed cases per year relates also to accession of the Slovak Republic to the European Union in the year 2004.

76. Still, some countries, both transition and non-transition, continue to struggle with setting the right notification thresholds. **South Africa** is one. It has experienced a 143% increase in notifications since 2002/03, and it fears that the number could double again by 2010. Thus, it proposes to raise the threshold levels. Not all countries have had this problem, however, especially those that began their programmes recently. **El Salvador's** notification thresholds are sufficiently high so that it has not had many to review. **Singapore** benefited from delaying its implementation of merger control for 18 months after it began enforcing its law. This was done

. . . with the intention of providing the business and legal communities some time to familiarise themselves with competition law in Singapore. This allowed CCS to manage its resources more efficiently during its initial years of operation as efforts were channelled towards investigations against anti-competitive agreements and abuse of dominance, as well as competition advocacy and outreach. Staff were sent on attachment programmes with the Australian Competition and Consumer Commission, UK Competition Commission and the New Zealand Commerce Commission to learn about merger assessment and to be sufficiently prepared before the merger regime took effect.

77. Of those responding countries with merger control, three, **Chile, Papua New Guinea** and **Singapore**, do not have mandatory notification. This too reduces the burden associated with reviewing notifications, though of course it may create other problems, notably an inability to deal with anticompetitive mergers before they are consummated. Chile described one difficulty with its procedures, which is that all resolutions of problematic mergers must be conducted at the level of its Competition Tribunal, which apparently is somewhat inefficient. In this regard, some countries specifically noted the usefulness of having procedures for preliminary consultation with merging parties, both about notification requirements and about substantive issues raised by the transaction.

78. All countries having merger control consider that it is useful and important. **Zambia** had, and continues to have, great difficulty in establishing an enforcement programme, but it was relatively more successful in mergers.

The Commission has done a lot of work in mergers and it is the area where it has achieved a lot of successes. Most mergers have been notified from many sectors of the economy. Most of these mergers have been approved with very few been disapproved.

79. **Latvia** was another country whose agency struggled in its first years but which conducted useful work in mergers:

. . . [In the early years] merger control was an important part of the authority's activities as the mergers that then occurred were very significant for further development of relevant markets. Another advantage of merger control is the information that the authority collects regarding different relevant markets.

Latvia was not the only country to note an indirect benefit from a merger control programme: the acquisition of information about various markets and sectors that is useful in subsequent matters, both conduct and merger.

Judicial Appeals

Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

80. Responses to the first question were idiosyncratic, reflecting the fact that no two judicial systems are alike. In some countries appeals were to courts of general jurisdiction. In others the court of first instance was a specialist court, sometimes dealing solely with competition cases (**Chile, Israel, the Netherlands, Poland, South Africa**), sometimes specialising in commercial cases (**Czech Republic** (in the early years), **Jamaica, Singapore**). It seemed that initially those systems employing specialised courts had fewer problems, perhaps not surprising. The time to final decision was shorter, the results better reasoned. South Africa:

In cases flowing from the Competition Commission to the Competition Tribunal, the competition authority has not encountered any problems with the length of time the CTSA takes to reach their decision. This can be attributed to the fact that both the CCSA and the CTSA deal exclusively in competition matters. The CTSA members who adjudicate competition matters are required to have the necessary skills in economics or law to carry out their functions and they continue to develop their competition expertise as they perform their functions.

81. The **Czech Republic** provides an interesting laboratory, in that before 2003 competition cases could be appealed exclusively to a division (or "senate") of the High Court in which there was a single judge who heard competition cases. Beginning in 2003, competition cases were first appealed to a generalist regional court.

To sum up, the Czech Republic has an experience with both one level, strictly specialised, and centralised jurisdiction of courts in competition matters (until 2002), on one hand, and a system

of two level, non specialised and partly decentralised jurisdiction, on the second hand. Both systems have their pros and cons. Due to the complexity and low frequency of competition cases, some specialisation might be necessary. However, at the same time, if the specialisation is too intensive (so that there is only one senate deciding all competition cases), there might be a risk of dominance of a single approach without any real possibility to seek remedy.

82. Not all countries in which appeals were to generalist courts reported difficulties, however. **Albania, Bulgaria, Hungary, Lithuania and Romania** had success in these courts. Others were less positive, however. **Slovak Republic:**

In important cases [in the court of first instance, a regional court, the] court annuls the decisions of the Council of the Office, while most of the decisions lack the concrete identification of the failures of the Office during the proceedings and a particular legal opinion of the court. The other negative fact is unfounded and disproportionate decreases of the imposed sanctions. The lack of experience of judges in competition law and hence [their] . . . outputs disables the effective enforcement of competition rules.

83. **El Salvador** reported that judicial appeals were its “main problem.” Delays are the norm. No case that has been appealed in that young agency’s existence has been finally decided. **Latvia** also reported severe problems with the courts. In that agency’s much longer existence 59 decisions have been appealed, and only 10 have been finally decided. In **Brazil** it took 7-10 years for cases to make their way through the courts. **Jamaica’s** experience has been mixed. A judicial reform in 2003 speeded the decision making process, which had been notoriously slow. Still, decisions in competition cases sometimes were not well reasoned. Competition cases were thought to be unimportant and were given low priority by the judges. The courts sometimes forced settlements that the FTC felt to be unreasonable. The FTC was required to pay filing fees that it could not afford.

84. **Mexico** experienced severe difficulties with judicial appeals from 2000 to 2004. The CFC has done much better in court recently, however. This was achieved partially through amendments to its competition law, noted above, but the CFC also looked inward to resolve the problem.

Our experience shows that the criteria for selecting cases are of vital importance for a competition authority. As we have gained experience, the quality of the cases accepted has improved, as well as that of the analysis conducted by the CFC. Our rate of success before the courts has improved dramatically, in large part because we have tried to understand the reasons why we lost some of the early cases. In addition to learning from our mistakes, we have become very proactive with the judicial tribunals, and are working actively to present our viewpoints throughout the process, and generate a clearer understanding of competition issues among the members of the judicial branch.

85. On balance, one could say that problems with the courts tended to improve over time. In some countries this was the result of comprehensive reform of the judicial system (**Jamaica, Latvia, Slovenia**). The judicial systems in those countries that progressed toward EU membership benefited from that process and from the new relevance of the decisions of EU courts (**Bulgaria, Czech Republic, Hungary, Romania, Slovenia**). Or improvement might simply have come about as judges and courts became more familiar with competition cases (**Indonesia, Russia, Ukraine**).

86. In this regard, most countries understand the importance of ongoing programmes for familiarising judges with competition principles, and most have such programmes in one form or another. The **Russian Federation** reported that generalist judges in that country had difficulty with concepts such

as market definition and dominance, and were confused about the relationship between the competition law and the Russian civil code.

With this regard the competition authority made its best to conduct joint meetings with the judges to explain peculiarities of competition law in order to elaborate the unified position of the judicial community to interpretation of the Russian competition law. The result of this work was adoption at the plenary session of the Supreme Arbitration Court of the Russian Federation of two crucial documents – Informative Letter “Review of practice of antimonopoly dispute solution” (1998) and Resolution “On certain issues of administering the antimonopoly legislation for the arbitration courts” (June 2008) which coincide with the competition authority’s understanding on the majority of fundamental issues of competition law interpretation.

Resources

Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

87. No country save the **Netherlands** felt that it had adequate resources at the beginning. The shortages were manifested primarily in personnel. An inadequate budget meant that salaries were low, which in turn caused a high rate of employee turnover. **Lithuania** was typical:

The Competition Council also had a problem with employee turnover – retaining good professionals in the agency. Part of the problem was a disparity in pay between positions in the Administration of the Competition Council and positions elsewhere in the public and private sectors. The positions in the Competition Council were paid at a lower rate than comparable positions in the ministries. Therefore, many highly qualified specialists, attracted by higher salaries elsewhere, left for other institutions or private sector.

88. But further, whether or not there were adequate funds, there often was a shortage of people with the necessary qualifications. This was true in **South Africa**. It addressed the problem in several ways:

One of the initial constraints was the shortage of legal and economic expertise in the field of competition law. The Competition Board, which was the predecessor to the Competition Council, was a relatively small agency and it did not have the kind of powers provided for in the Competition Act of 1998. Although the Competition Council employed several experienced staff members from the Competition Board, it required extensive training for all the employees on competition matters. Accordingly the Council engaged in a 6 month training programme prior to the commencement of the Council. After starting its operations, the Council embarked on a consultancy programme which ensured that consultants from established competition authorities were available to assist Council staff in their complaint investigations and merger assessments. The Competition Council has also undertaken a number of capacity building initiatives to ensure that current staff remain up to date with competition developments.

89. Most agencies that began with insufficient funding saw improvement over time. There was no shortcut in this process, however. Progress was commensurate with the development of competition culture in the country. **Bulgaria**:

Upon its establishment, the CPC had scarce resources, both financial and human, for the difficult task that lay ahead – the protection of competition and the interest of the economic operators in all sector of the Bulgarian economy. However, thanks to its firm competition policy and the promotion of competition culture, the CPC was able to convince the political elite and the society

at large of the importance of its task and in the subsequent years its budget grew to an adequate amount.

90. **Israel** emphasised the relationship between the perceived success of a competition agency and its budget:

There seems to be a degree of correlation between the effectiveness of the competition agency and the willingness of the Government to allocate additional resources. Since the IAA's establishment in 1994, there has been a significant increase in number of staff and budget. This change is mainly due to the recognition that the IAA is an effective and professional agency which delivers results in terms of criminal and administrative cases, merger control and advocacy. Consequently, it is imperative that young competition agencies strive to attain significant results as soon as possible.

91. Almost all responding countries continue to face resource constraints in some form. It is probably inevitable that they will continue to do so for the foreseeable future, as indeed will their older sister agencies in other countries. While every agency will work to augment its budget, it must also ensure that it is using the funds that it has most efficiently. **Mexico** has done so:

Given the permanent situation of limited resources faced by the CFC, it became necessary to apply measures to encourage a more efficient use of resources, and to seek support from bilateral and multilateral international organisations in the form of Cooperation Programs. These measures also included an internal restructuring and encouraging multidisciplinary collaboration and improving teamwork.

Independence

As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

92. Independence is not perceived by the responding countries as a problem. The responders were almost equally divided between those whose agencies are separately constituted bodies, not part of any government ministry, and those that are part of government. Still, in no case did a country state that it suffered from a lack of operational independence – the ability to decide cases free from government interference. A few expressed some concern over their lack of control of their budget (**Slovak Republic, Ukraine**). A few countries noted that they lacked sufficient independence in the first years of their operation, but that they achieved it later, usually through new legislation (**Latvia, Lithuania, Slovak Republic, South Africa**).

Five most important actions; five pitfalls

State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

93. Among those countries that listed their five most important recommended actions, three priorities stood out as having been recommended by many countries: (1) work on developing a competition culture (one form of competition advocacy); (2) concentrate on developing and retaining human resources; and (3) promote good relations and consistency in policy with other agencies in government and sector regulators (a second form of competition advocacy). Other recommendations by more than a few countries were: develop co-operation with other competition agencies and providers of technical assistance; set priorities; obtain an adequate budget; ensure that the law is sound and provides the necessary powers; develop working relationships with judges; achieve independence.

94. Fewer countries answered the second part of the question, the five pitfalls. Undoubtedly this was because this part of the question mirrored the first; the biggest mistakes are ones of omission – failure to do those things considered most important. The responses bore this out.

95. The **United States** responded as a mature agency. It focused on the last question – most important recommendations and most important pitfalls. Its positive recommendations included references to familiar themes: human resources, setting priorities, developing a competition culture and acquiring adequate investigation and sanctioning tools. It also provided some interesting observations about case selection:

Resources should be reserved for those cases where there is some likelihood that, absent intervention by the competition agency, consumer welfare and/or economic efficiency will be harmed by the conduct in question. Economists are trained to assess questions regarding the impact of conduct on consumer welfare or efficiency; without their input, there is a risk that enforcement will not be effective. Lawyers, on the other hand, are trained to consider whether sufficient evidence exists to prove the existence of a violation, how a case may be built that will withstand review by an independent tribunal or court, and whether due process and procedural rules have been observed. Without their input, there is again a risk that enforcement will prove ineffective. An organisational structure that brings both legal and economic disciplines into the decision-making process at an early stage is thus critical.

96. Regarding pitfalls, the U.S. recommended against permitting “external stimuli” – too many merger notifications and non-meritorious private complaints – to sidetrack the agency from focusing on its primary objectives; against trying to use the competition law to remedy all of society’s ills; against using fines to the exclusion of other remedies that would improve competition; and against ignoring other institutions, including the courts and the legislature.

97. **Japan**, another mature agency, also emphasised the importance of vigorous enforcement of the law:

The most important task for a competition authority is the strict enforcement of competition law. It is not enough to simply ban anticompetitive activities but is important to detect and eliminate them based on competition law. In Japan, around between 1955 and 1970, enforcement of the AMA was inactive and some point out that lack of rigorous enforcement during this period caused such a negative impact that entrepreneurs have regarded violations of the AMA as light infractions ever since, which has resulted in unending cartels and bid-rigging today. It is necessary to actively enforce the law by tackling typical cases that influence the national or the local economy while having effective investigative powers to detect illegal activities and effective sanctions to eliminate such activities.

III. CONCLUSIONS

98. A new competition agency faces many and diverse challenges. Most if not all have their origin in a fundamental condition that exists in a country new to competition policy: the lack of a competition culture. Beyond that, of those challenges that were identified by responding countries one appeared most often: developing human resources. They found it difficult to find, attract and retain qualified people. This is a function of several factors, among them an agency’s budget, the size of the talent pool in the country, experience, training and the perception of the agency as an interesting and desirable place to work. Technical assistance from more experienced countries and from international agencies can play an important role in this regard.

99. The questionnaire responses provided some useful new insights on other topics. Merger control was once considered problematic for new competition agencies. Some experts thought it was not necessary at all in small economies, and in any event there was a danger that it would divert scarce resources from more important work. Virtually all responders spoke positively about their merger control experience, however. Among the benefits of merger control is its visibility, which can help to enhance competition culture. Successful merger cases can demonstrate to the public how it can benefit from an effective competition policy. It is of paramount importance, however, that countries get their notification rules and thresholds right.

100. Save for the experience in transition countries in their early years, young agencies have struggled with dominance cases, a reflection both of the fact that these cases are difficult to prove and that the theories applying to single firm conduct continue to be unsettled. Though the questionnaires did not provide empirical evidence, it seems that the incidence of dominance cases in young agencies is declining.

101. The opposite is true in cartel cases, however. Many countries are beginning to overcome the barriers that they initially faced in their anti-cartel programmes – inadequate investigation and sanctioning tools, insufficient experience and weak public support for prosecuting cartels. Leniency programmes are beginning to show results, and the number of cartel cases seems to be on the rise, though again the responses did not produce empirical evidence of this trend.

102. It is difficult to generalise about competition policy and the courts. Each country's situation is different. There does not seem to be a single, preferred model for judicial review of competition cases. Nevertheless, where there are significant problems with judicial review, and of these the most important is inordinate delay, the effect on competition law enforcement is debilitating. Resolving these problems may be outside the competence of the competition agency – requiring fundamental changes in the judicial system, for example – but the agency must itself strive to improve its record in court through better case selection and better advocacy.

103. Obtaining adequate funding for the competition agency continues to be vitally important for all competition agencies, young and old. It, like most other challenges to effective enforcement, benefits from enhanced competition culture. Agencies must not overlook opportunities to enhance efficiency internally, however. Finally, independence of the enforcement agency is also important, but the questionnaire responses indicate that it was not a significant problem for new agencies.

104. Thus, the blueprint for success in beginning to enforce a competition law is now fairly well defined: Start with a good law, set priorities, develop efficient and transparent internal procedures, obtain an adequate budget, focus early on competition advocacy, both to develop a competition culture and to influence decisions of government and sector regulators that impact competition, acquire expertise in finding and prosecuting cartels, develop an efficient merger control programme, engage in careful case selection and develop a programme for interacting with judges on competition policy.

105. But even if the blueprint is followed perfectly, success will not come easily or quickly. It will require time and a sustained effort. William Kovacic has commented on this point:

It is . . . unreasonable to expect grand results after 5 or 10 years. For donors and technical assistance providers, it should be apparent that the requisite institution building is more like a marathon than a sprint.⁴⁴

⁴⁴ Kovacic, *Lucky Trip*, supra, n. 5 at 324.

ANNEX

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

I. Countries that have been actively enforcing a competition law for a relatively short time**A. Organising your agency and preparing for work**

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. *Describe how you conducted this organisational phase. What went well, and what didn't?*

B. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. *Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?*

C. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. *What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?*
4. *What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?*

D. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. *If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?*
6. *If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?*
7. *If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?*

E. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. *Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?*
9. *Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.*

F. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. *Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?*

G. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. *As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?*

Conclusion

12. *State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*

II. Countries that have been actively enforcing a competition law for a longer period

1. *For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.*
2. *State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*



NOTE DU SECRÉTARIAT

LES DÉFIS QUE DOIVENT RELEVER LES JEUNES AUTORITÉS DE LA CONCURRENCE

NOTE DU SECRÉTARIAT¹

1. Au début des années 90 s'est amorcée une tendance qui se poursuit aujourd'hui encore : l'adoption d'un droit de la concurrence par un nombre croissant de pays. En 1989, 37 pays étaient dotés d'une législation sur la concurrence, sous une forme ou une autre² ; néanmoins, dans certains cas, cette législation ne ressemblait pas à celles qui existent aujourd'hui (par exemple, elle mettait l'accent sur le contrôle des prix) ; dans d'autres cas, elle n'était pas appliquée. Aujourd'hui, plus d'une centaine de pays possèdent un droit de la concurrence moderne³. Le moment est donc bien choisi pour réfléchir, lors du Forum mondial sur la concurrence (FMC), à l'expérience de ces pays dans la mise en œuvre de leur nouvelle législation. Quels sont les réussites et les échecs ? Quels sont les défis rencontrés par les nouvelles autorités de la concurrence, et comment les ont-elles relevés ?

2. À cette fin, un questionnaire (voir l'annexe) a été adressé aux « Participants désignés » du FMC⁴. Ce questionnaire est joint en annexe à la présente note. La partie II de cette note résume les réponses reçues. La partie I décrit d'autres études et projets menés dans ce domaine.

1. ENSEMBLE DES TRAVAUX PORTANT SUR LA MISE EN ŒUVRE DES NOUVELLES LOIS SUR LA CONCURRENCE

3. Les informations sur la mise en œuvre du droit de la concurrence par les jeunes autorités s'accumulent à mesure que de nouveaux pays adoptent une législation correspondante. Certains renseignements proviennent d'experts qui ont fourni une assistance technique aux nouvelles autorités.

¹ Ce document a été rédigé pour le Secrétariat de l'OCDE par John Clark, consultant. Il ne représente pas nécessairement l'avis du Secrétariat de l'OCDE ou des pays membres de l'Organisation.

² Consumer Unity & Trust Society (CUTS), « *Competition Regimes Around the World – A Civil Society Report* » (2006), Introduction, annexe 1.

³ Selon le Guide de la CNUCED sur les régimes de concurrence (2007), « . . . au total, 113 pays et groupements régionaux ont adopté ou sont en passe d'adopter une législation sur la concurrence ».

⁴ Les Participants désignés au FMC sont les suivants :

- Observateurs auprès du Comité de la concurrence : Afrique du Sud, Brésil, Chili, Fédération de Russie, Indonésie, Israël, Lituanie, Roumanie, Slovaquie, Taïpei chinois
- Pays en voie d'adhésion n'ayant pas le statut d'observateur : Estonie
- Pays bénéficiant de l'engagement renforcé n'ayant pas le statut d'observateur : Chine, Inde
- Pays et organisations ayant participé (jusqu'au 19 novembre 2008) au moins à une réunion du Forum :
 - o Albanie, Algérie, Argentine, Azerbaïdjan, Bahreïn, Bosnie-Herzégovine, Bulgarie, Cameroun, Colombie, Costa Rica, Côte d'Ivoire, Croatie, Égypte, El Salvador, Équateur, Ex-République yougoslave de Macédoine, Gabon, Géorgie, Jamaïque, Jordanie, Kazakhstan, Kenya, Lettonie, Liban, Malaisie, Malte, Maroc, Mongolie, Nigéria, Ouzbékistan, Pakistan, Panama, Papouasie-Nouvelle-Guinée, Pérou, Philippines, Sénégal, Serbie, Singapour, Tanzanie, Thaïlande, Tunisie, Ukraine, Venezuela, Viet Nam, Zambie
 - o Banque asiatique de développement, Banque interaméricaine de développement, Banque mondiale, Centre de recherches pour le développement international, Comité consultatif économique et industriel auprès de l'OCDE, Commission du CARICOM, Communauté andine, Commission syndicale consultative auprès de l'OCDE, Commission de l'Union économique et monétaire ouest-africaine, Conférence des Nations Unies sur le commerce et le développement, Consumers International, Consumer Unity & Trust Society (CUTS), International Bar Association, Marché commun de l'Afrique de l'Est et de l'Afrique australe.

William Kovacic, Président de la *Federal Trade Commission* des États-Unis, a écrit de nombreux articles sur le sujet⁵. Dans un article de 1997, il soulignait les risques que posait l'adoption, dans un pays en développement, d'un droit de la concurrence d'inspiration occidentale. Le pays bénéficiaire s'est trouvé confronté à de nombreux défis qui n'existaient pas dans les pays possédant une longue expérience de la politique de la concurrence. Parmi ces défis figuraient l'insuffisance des ressources dont disposait la nouvelle autorité, l'absence d'expertise locale sur le sujet, le faible soutien en faveur de la politique de la concurrence (ce qu'on appelle aujourd'hui la « culture de la concurrence »), les défaillances du système judiciaire et l'accès restreint aux informations commerciales.

4. Récemment, la *Federal Trade Commission* a organisé un séminaire sur l'assistance technique, auquel ont participé des professionnels expérimentés de plusieurs pays, ainsi que des représentants de pays bénéficiaires⁶. Ils ont évoqué les défis que rencontrent les nouvelles autorités de la concurrence, notamment : manque de ressources, tant humaines que financières, socle insuffisant pour les entreprises – droits de propriété, droits contractuels, droits de faire des affaires (créer et exploiter une entreprise) –, faible soutien des pouvoirs publics (qui privilégient parfois la politique industrielle), corruption et systèmes judiciaires inefficients.

5. D'autres universitaires abordent le problème sous un angle différent : affaires d'abus de position dominante dans des pays en transition et en développement⁷ ; défense de la concurrence⁸ ; point de vue des petites économies⁹ ; mesure des effets de l'application du droit de la concurrence dans les pays en développement¹⁰.

6. Ces dernières années, différentes organisations internationales se sont, d'une manière ou d'une autre, intéressées au sujet. Voici le résumé de leurs efforts :

⁵ Voir William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brooklyn Journal of International Law 403 (1997). Voir également Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 University of Cincinnati Law Review 1075 (1998) ; Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chicago-Kent Law Review 265 (2002) ; Kovacic, *Lucky Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical assistance*, 3 European Competition Journal 319 (décembre 2007).

⁶ Federal Trade Commission des États-Unis, *A Conference on Charting the Future Course of International Technical Assistance*, 6 février 2008, compte rendu disponible sur le site Internet de la FTC à l'adresse suivante : <http://www.ftc.gov/oia/wkshp/docs/wkshptranscript080206.pdf>.

⁷ Maria Coppola Tineo et Russell Pittman, *Abuse of Dominance Enforcement under Latin American Competition Laws*, dans Philip Marsden, dir. pub., *Handbook of Research in Trans-Atlantic Antitrust* (Elgar, 2006) ; Russell Pittman, *Abuse of Dominance Provisions of Central and Eastern Europe Competition Laws: Have Fears of Over-Enforcement Been Borne Out?*, *World Competition* 27(1) (2004).

⁸ Simon Evenett, *Competition Advocacy: Time for Rethink?*, *Journal of International Law and Business*. Printemps 2006, volume 26, n° 3.

⁹ Michal S. Gal, *Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies*, *New York University Center for Law and Business Working Paper #CLB-01-004*, disponible auprès de la bibliothèque électronique du SSRN.

¹⁰ Bruce M. Owen, *Competition Policy in Emerging Economies*, Stanford Institute for Economic Policy Research, SIEPR Discussion Paper No. 04-10, disponible auprès de la bibliothèque électronique du SSRN.

OCDE¹¹***Forum mondial sur la concurrence 2004 : Les défis et obstacles rencontrés par les autorités de la concurrence pour accroître le développement économique en promouvant la concurrence***

7. Les débats se sont concentrés sur les liens entre développement économique et promotion de la concurrence. La note de référence du Secrétariat comporte une analyse détaillée d'un problème rencontré par toutes les nouvelles agences de la concurrence : le manque de culture de la concurrence dans le pays. Cette note conclut que cette lacune est « le principal obstacle » à l'origine des autres problèmes et difficultés. Elle examine les raisons qui expliquent la lenteur avec laquelle une société s'adapte aux principes de la concurrence. La principale d'entre elles est la crainte de ceux qui prospèrent dans la situation actuelle de sortir perdants face à la concurrence. La note évoque également d'autres défis fondamentaux que rencontrent les autorités de la concurrence, notamment l'incidence des autres politiques publiques sur la concurrence, la corruption, l'exclusion de divers secteurs du droit de la concurrence et la présence d'un secteur informel substantiel.

8. Les contributions de plusieurs pays ont alimenté ces discussions. Certaines d'entre elles reconnaissent ces défis structurels de plus grande ampleur auxquels se heurtent les autorités de la concurrence, mais d'autres ciblent également des problèmes plus immédiats, comme le manque de ressources, les lacunes des législations sur la concurrence, l'absence d'instruments d'enquête importants, l'inefficience des systèmes judiciaires et des structures institutionnelles¹². Les débats tenus au cours du Forum de 2004 invitaient à examiner de plus près ces questions, ce à quoi s'emploie l'enquête de 2009.

Examens par les pairs

9. Plusieurs examens par les pairs de « jeunes » autorités de la concurrence ont été effectués au sein du Comité de la concurrence, du Forum latino-américain sur la concurrence et du Forum mondial sur la concurrence. Les pays examinés sont les suivants : Afrique du Sud (2003), Argentine (2006), Brésil (2005), Chili (2004), Corée (2000), El Salvador (2008), Fédération de Russie (2004), Hongrie (1999), Mexique (1998 et 2004), Pérou (2004), Pologne (2002), République tchèque (2001 et 2008), Taipei chinois (2006), Turquie (2002) et Ukraine (2008)¹³. En outre, les pays Baltes – Estonie, Lettonie et Lituanie – n'ont pas fait l'objet d'examens par les pairs, mais d'un rapport détaillé publié en 1999. Prises globalement, ces études en profondeur donnent une bonne vision des problèmes rencontrés par les autorités au cours des premières années de leur existence.

10. Certains problèmes sont communs à pratiquement tous les pays. Presque partout, le droit de la concurrence initial s'avère inadapté à certains égards. Il a été soit sensiblement révisé, soit entièrement remplacé, parfois quelques années seulement après son adoption. Dans la quasi-totalité des pays, la culture de la concurrence est insuffisante, ce qui constituait « le principal obstacle » identifié lors du Forum mondial de 2004¹⁴. Cette situation n'est généralement pas due au manque d'efforts de la part des autorités de la concurrence ; au contraire, beaucoup d'entre elles consacrent une attention toute particulière à cet aspect de la défense de la concurrence. La difficulté consiste plutôt à convaincre d'autres administrations et

¹¹ Tous les documents cités dans cette section sont disponibles sur le site Internet de l'OCDE consacré à la concurrence.

¹² Le Secrétariat a résumé ces contributions dans une note complémentaire. Tous les documents sont disponibles sur le site Internet du FMC (<http://www.oecd.org/competition/globalforum>).

¹³ Tous les rapports sur les pays sont disponibles dans la section « Examen par pays » du site <http://www.oecd.org/competition>.

¹⁴ L'Afrique du Sud partait sur de meilleures bases que bien des pays à cet égard.

le grand public des mérites de la concurrence. La lenteur avec laquelle les pouvoirs publics engagent des poursuites contre les ententes constitue un autre problème fréquent. Plusieurs facteurs entravent les efforts de lutte contre les ententes, notamment un personnel inexpérimenté, des instruments d'enquête inadaptés, le manque de compréhension et de coopération de la part du public et l'insuffisance des pouvoirs de sanction.

11. D'autres problèmes ne sont pas systématiques, mais fréquents. Plusieurs pays, mais pas tous, ont des ressources financières insuffisantes qui entraînent une rotation élevée du personnel¹⁵. Certains, dont la législation prévoit l'examen des fusions, n'ont pas mis en place de procédures efficaces pour mener à bien cet examen, pour des raisons tenant à des seuils de notification trop bas, à l'absence de notification préalable des fusions ou à des institutions inefficaces¹⁶. Certains pays souffrent de la lenteur et de l'inefficacité du système d'examen judiciaire¹⁷. Il semble que la situation soit meilleure dans les pays où les affaires sont jugées par un tribunal spécialisé¹⁸. Certaines autorités qui assument des responsabilités autres que l'application du droit de la concurrence, comme la lutte contre la concurrence déloyale ou le dumping, les aides publiques, les marchés publics et la protection des consommateurs, ont consacré trop de temps et de ressources à ces activités et pas assez aux problèmes de concurrence, du moins les premières années¹⁹. Plusieurs pays ont tardé à établir des relations de travail avec les autorités de réglementation sectorielle²⁰, même si certains excellaient dans ce domaine²¹. Le manque d'indépendance était au départ un problème pour quelques-unes de ces autorités, mais la situation s'est progressivement améliorée, soit par l'adoption d'une nouvelle législation établissant l'indépendance structurelle, soit par son acquisition *de facto*²².

12. Naturellement, chaque pays examiné est différent et rencontre un ou plusieurs problèmes spécifiques. Néanmoins, ces examens mettent en évidence plusieurs problématiques communes, qui transparaissent souvent dans les réponses au questionnaire examinées ci-dessous.

Table ronde de 2005 sur l'utilisation de l'évaluation pour améliorer les performances des autorités chargées de la politique de la concurrence

13. En 2005, une table ronde du Comité de la concurrence s'est intéressée à l'utilisation de l'évaluation pour améliorer les performances des autorités chargées de la politique de la concurrence. Bien que cette table ronde se soit concentrée pour l'essentiel sur les questions liées à l'examen *ex post* de l'impact des mesures d'application du droit et de sensibilisation, la contribution de l'Autorité portugaise de la concurrence (Autoridade da Concorrência, AdC), alors âgée de deux ans, décrivait un projet pilote mené en partenariat avec l'OCDE en vue d'améliorer les performances de l'AdC en tant qu'institution²³.

¹⁵ Ces pays sont l'Argentine, le Brésil, le Chili, l'Estonie, la Fédération de Russie, la Lettonie, le Mexique, le Pérou et l'Ukraine.

¹⁶ Argentine, Brésil, Fédération de Russie, Hongrie, Lettonie, Lituanie, Taipei chinois, Ukraine.

¹⁷ Argentine, El Salvador, Fédération de Russie, Hongrie, Mexique, Turquie, Ukraine.

¹⁸ Afrique du Sud, Chili, Pologne.

¹⁹ Corée, Estonie, Hongrie, Lettonie, Lituanie, Pologne, République tchèque, Taipei chinois.

²⁰ Afrique du Sud, Argentine, Hongrie, Mexique, Pérou, Turquie, Ukraine.

²¹ Chili, El Salvador, République tchèque.

²² Argentine, Brésil, Estonie, Lettonie, Lituanie, Pérou, Pologne, République tchèque, Taipei chinois, Ukraine.

²³ <http://www.oecd.org/dataoecd/7/15/35910995.pdf>

14. L'objectif était d'aider l'AdC à s'améliorer en appliquant une méthodologie innovante élaborée par l'OCDE pour ce projet. Selon cette méthodologie, l'OCDE recueille des renseignements sur les performances d'une autorité de la concurrence dans plusieurs domaines essentiels, fournit un retour d'informations aux dirigeants de l'autorité sur ces résultats, et aide les dirigeants à élaborer un plan d'auto-amélioration. Des entretiens menés avec plusieurs responsables en exercice ou anciens responsables connaissant bien le droit et la politique de la concurrence ont permis d'identifier ces domaines²⁴. Neuf dimensions clés liées à l'organisation et à la gestion ont été répertoriées :

- Orientation stratégique
- Direction
- Organisation
- Processus opérationnels et de gestion
- Normes de performance
- Utilisation des ressources humaines
- Relations avec les organismes publics
- Relations avec les publics concernés
- Examen des performances

15. L'AdC a évalué le projet en ces termes à l'occasion de sa contribution à la table ronde de 2005 :

La mise en œuvre du projet pilote a fourni plusieurs enseignements. Premièrement, elle a permis d'élaborer une méthodologie d'évaluation institutionnelle ciblant les autorités de la concurrence. En outre, l'application innovante de ce modèle ... a clairement montré que la méthodologie est fiable et qu'elle peut être utilisée de manière crédible. En témoigne la franchise des informations fournies par les personnes interrogées. ... La mise en commun de ces informations lors d'un atelier de gestion encadré a contribué à stimuler les discussions internes nécessaires. ... En outre, la méthodologie a pu être appliquée dans des délais relativement brefs et pour un coût raisonnable.

Concernant la méthodologie, il s'agit à la fois d'un outil de développement et d'un support pédagogique. Elle met en lumière les dimensions importantes pour le succès d'une autorité de la concurrence. Mais, d'un autre côté, la notation théorique présente des limites. Elle n'est pas encore totalement utilisable pour effectuer des comparaisons, car il n'existe pas de base de données d'évaluation des autorités de la concurrence en tant que telles. Hormis cette réserve, la notation théorique permet d'apprécier dans une certaine mesure les points forts et les faiblesses

²⁴ Les principales personnes qui ont participé à la définition des principaux domaines permettant d'apprécier le succès d'une autorité de la concurrence sont : Allan Fels (ancien Président de la Commission australienne de la concurrence et de la protection des consommateurs), Lennart Goranson (ancien Directeur général adjoint de l'Autorité suédoise de la concurrence), Bill Kovacic (alors Président de la *Federal Trade Commission* des États-Unis), Matti Purasjoki (ancien Directeur général de l'Autorité finlandaise de la concurrence), Fernando Sanchez Ugarte (ancien Président de la Commission fédérale mexicaine de la concurrence) et Michael Wise (auteur de plus de 20 examens d'autorités de la concurrence).

d'une autorité, ce qui permet de fonder les objectifs de performance pour les années suivantes sur l'analyse de faits plutôt que sur des informations plus vagues.

Dans l'ensemble, les conséquences ou possibilités générées par l'élaboration et l'utilisation d'une évaluation fondée sur des faits peuvent se résumer en ces termes :

- l'outil d'évaluation met en évidence les dimensions importantes sur lesquelles l'autorité doit porter ses efforts et qui doivent orienter ses plans de développement,
- les scores obtenus à l'issue de l'évaluation deviennent le point de départ des initiatives futures d'amélioration et de développement de l'autorité,
- un élan est créé parmi les dirigeants afin de mettre progressivement en œuvre les améliorations requises.

16. À la suite du programme pilote déployé au Portugal, un deuxième projet a été lancé en partenariat avec l'Autorité hongroise de la concurrence, la GVH, en 2008. La GVH déploie actuellement son plan d'action dans un but d'auto-amélioration.

International Competition Network

Renforcement des capacités et assistance technique : des autorités de la concurrence crédibles dans les pays en développement et en transition (2003)²⁵

17. Ce rapport a été présenté par le Groupe de travail sur le renforcement des capacités et la mise en œuvre de la politique de la concurrence de l'ICN lors de la deuxième conférence annuelle de l'ICN qui s'est tenue à Merida, au Mexique, en juin 2003. Il s'appuie sur les résultats de deux questionnaires, l'un adressé essentiellement aux pays en développement et en transition et concernant les circonstances dans lesquelles la politique de la concurrence a été mise en œuvre dans leurs pays, et l'autre visant les fournisseurs et bénéficiaires de l'assistance technique. La plupart des répondants provenaient d'Europe et des Amériques.

18. Un chapitre du rapport s'intéresse aux défis que rencontrent les jeunes autorités de la concurrence. Voici sa conclusion :

En définitive, nous sommes convaincus que le principal défi auquel sont confrontées les autorités de la concurrence dans les pays en développement et en transition concerne leur position et leur statut parmi les principaux groupes d'intérêts et parties prenantes et au sein du public en général. En d'autres termes, tous s'efforcent de faire entendre leur voix et cela représente la plus grande difficulté pour les autorités de ces pays. »²⁶

19. Ce rapport examine la position des nouveaux organismes de la concurrence par rapport à différents groupes : pouvoirs publics, pouvoir judiciaire, société civile, professionnels de la concurrence et entreprises. Concernant la relation entre une autorité de la concurrence et les pouvoirs publics, deux modèles – un organisme indépendant et distinct ou une entité faisant partie de la structure de gouvernement – peuvent être efficaces, chacun comportant des avantages et des inconvénients. Concernant

²⁵ Disponible sur le site Internet de l'ICN à l'adresse : http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/FinalReport_16June2003.pdf.

²⁶ Idem page 24.

le pouvoir judiciaire : « s'il existe une préoccupation commune exprimée par les différents pays ayant répondu au questionnaire, c'est la difficulté perçue, pour le pouvoir judiciaire, à appréhender le droit de la concurrence.²⁷ »

20. La relation des autorités de la concurrence avec la société civile est complexe ; certains acteurs puissants et bien organisés au sein de la société peuvent se sentir menacés par la concurrence, notamment les entreprises et les travailleurs. En revanche, les consommateurs et les partisans des marchés concurrentiels sont généralement moins bien positionnés, ce qui complique la mission de l'autorité. De même, cette dernière doit prouver aux professionnels de la concurrence qu'elle est compétente, notamment aux juristes du secteur privé, sous peine de perdre sa crédibilité. Enfin, elle doit gagner la confiance des entreprises en favorisant l'impartialité, la transparence, la cohérence, l'efficacité et le respect de la confidentialité.

Évaluation de l'assistance technique aux fins de la politique de la concurrence : résultats préliminaires (2005)²⁸

21. Cette enquête fait suite à l'étude réalisée en 2003 auprès de 37 pays au moyen de questionnaires et d'entretiens. L'enquête comportait des données (sur la période 2001-03) sur l'environnement dans les différents pays bénéficiaires d'une assistance technique. Le rapport résume ces données :

- Pouvoirs d'agence conférés par le droit de la concurrence, c'est-à-dire la capacité d'interdire ou d'imposer un comportement particulier, de mener des contrôles, de s'opposer à des fusions et d'infliger des amendes : dans la plupart des cas, ces pouvoirs sont suffisants et cohérents d'un pays à l'autre²⁹, en dépit du manque d'informations relatives à des pouvoirs plus spécifiques, comme la capacité de mener des perquisitions-surprises. Le moyen de recours le plus souvent utilisé est une mise en demeure interdisant ou imposant un certain comportement.
- Amendes : pendant la période examinée, les amendes se sont multipliées et leur montant s'est accru ; la valeur médiane des amendes a augmenté de 31 % entre 2002 et 2003. Toutefois, plusieurs organismes de la concurrence ont rencontré des problèmes pour recouvrer leurs amendes.
- Décisions et recours : les autorités de la concurrence ont indiqué le nombre de décisions prises, très élevé dans certains cas. Néanmoins, on dispose de peu d'informations sur la nature de ces décisions, ce qui limite la capacité d'évaluer ces données. En moyenne, 12.8 % de ces décisions ont fait l'objet d'un recours, qui a donné lieu à une annulation de la décision d'origine dans 10.4 % des cas.
- Budget des autorités : l'enquête a permis de déterminer le budget global et moyen, mais il n'a pas été possible de réaliser une analyse qualitative afin de savoir si, eu égard aux circonstances, un budget était adapté ou non. Il est apparu que les autorités de la concurrence consacraient peu de ressources à la formation.

²⁷ Idem page 35.

²⁸ Disponible sur le site Internet de l'ICN à l'adresse : http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/assessing_tech_nical_assistance.pdf.

²⁹ On constate néanmoins des différences dans la capacité à imposer des sanctions pénales. Seule une minorité des répondants détient ces pouvoirs.

- Dotation et mouvements de personnel : en moyenne, 89 professionnels travaillent au sein d'une autorité de la concurrence ; le nombre de juristes, d'économistes et « d'autres professionnels » est globalement équivalent. Les mouvements de personnel sont variables : très élevés dans certains pays, relativement faibles dans d'autres.
- Charge de travail : en moyenne, les contrôles de fusion représentent de loin la majorité des dossiers traités ; ils sont près de deux fois plus nombreux que les affaires liées au comportement³⁰. Les affaires d'entente sont rares – et même inexistantes dans plusieurs pays – bien que leur nombre progresse lentement.

***Projet sur l'efficacité des autorités : rapport du Groupe de travail sur la mise en œuvre de la politique de concurrence : sous-groupe 1 (2008)*³¹**

22. Ce rapport, soumis lors de la septième conférence annuelle de l'ICN à Kyoto, au Japon, a été préparé « . . . conformément à un programme de travail qui cherche à cerner et examiner les caractéristiques des autorités de la concurrence qui, sur le plan du fonctionnement et de l'organisation, peuvent être importantes pour réussir la mise en œuvre de la politique de concurrence ». Il revêt « . . . une importance particulière pour les autorités plus jeunes dont l'organisation n'est pas nécessairement définitive. »³² Ce rapport est basé sur les résultats d'une enquête menée auprès de 20 pays membres de l'ICN, dont 13 sont de jeunes autorités de la concurrence selon la définition qui en est donnée ici. Il s'intéresse en particulier aux processus utilisés pour la planification stratégique et la définition des priorités, et à l'incidence de ces processus sur l'attribution des ressources et l'efficacité de l'organisme. Les principales conclusions de l'étude sont les suivantes :

- La réussite d'une autorité de la concurrence dépend beaucoup de sa capacité à sélectionner les priorités et à élaborer une stratégie pour exercer ses pouvoirs. Selon les résultats de cette étude menée l'année dernière, tous les acteurs sont largement sensibilisés à la nécessité, pour les autorités nouvelles ou plus anciennes, de mettre en place des mécanismes efficaces et tournés vers l'avenir pour définir des objectifs et concevoir des moyens pour les atteindre.
- La nécessité d'une planification stratégique tient à plusieurs facteurs. Dans une large mesure, l'impératif de définir des priorités est fonction des ressources. Aucun organisme de la concurrence ne bénéficie d'un budget illimité, et le manque de ressources exige d'arbitrer entre plusieurs actions possibles. Il est vital, pour la société, que ces choix soient faits de manière à optimiser la performance économique.
- Sans processus raisonné de définition des priorités et de hiérarchisation des activités possibles en fonction de leur importance juridique et économique, l'autorité de la concurrence risque de ne pas se focaliser sur ce qui compte vraiment. Sans stratégie, le programme de l'autorité sera vraisemblablement dicté intégralement par des influences externes, comme les plaintes de consommateurs, les demandes d'action de la part d'entreprises ou les requêtes d'organes législatifs et d'autres ministères. Ces influences peuvent parfois orienter les efforts de l'autorité vers les questions les plus importantes, mais ce n'est pas toujours ni même souvent le cas. Sous

³⁰ Toutefois, ces données peuvent être trompeuses en l'absence de précisions sur la nature des affaires traitées. Par exemple, chaque notification peut constituer une affaire, ce qui tend à gonfler artificiellement le nombre de fusions.

³¹ Disponible sur le site Internet de l'ICN :

http://www.internationalcompetitionnetwork.org/media/library/CPI/CPI_WG_1.pdf

³² Idem page 3.

peine d'en être réduite à réagir à l'enchaînement aléatoire d'événements extérieurs, une autorité de la concurrence, aussi petite et démunie soit-elle, doit s'efforcer d'établir des critères permettant de déterminer, parmi toutes les affaires portées à son attention, celles qui méritent un examen plus approfondi³³.

Banque mondiale

*Que savons-nous des autorités de la concurrence dans les pays émergents et en transition ? Informations sur les tâches, le personnel, les secteurs prioritaires et les besoins de formation (2004)*³⁴

23. Ce rapport s'appuie sur les résultats d'un questionnaire d'évaluation des besoins adressé à 48 autorités de la concurrence dans des pays en transition et en développement ; 35 pays ont répondu. Les résultats ont été agrégés en fonction de trois zones géographiques : Asie de l'Est et Pacifique, Amérique latine et Caraïbes, et Europe de l'Est et Asie centrale. Voici l'une des conclusions préliminaires :

L'idée selon laquelle les autorités de la concurrence constitueraient un groupe homogène dans l'ensemble des pays et des régions est radicalement fausse. D'après l'analyse du questionnaire d'évaluation des besoins, il existe dans plusieurs domaines des différences marquées d'une autorité à l'autre : mandats, secteurs exemptés, dotation en spécialistes et besoins en capacités³⁵.

24. Cette étude examine en particulier les tâches, la dotation en personnel et les secteurs prioritaires des autorités de la concurrence³⁶. Voici quelques-unes de ses conclusions :

- Activités se rapportant aux fusions : on constate une dichotomie marquée entre les pays qui ont examiné de nombreuses opérations de fusion et ceux qui en ont analysé quelques-unes seulement, alors que le lien entre taille de l'économie et nombre de fusions évaluées n'est pas flagrant. Cela donne à penser que les dispositions du droit de la concurrence qui déterminent le type de fusion à examiner influent considérablement sur les activités se rapportant aux fusions.
- Affaires liées au comportement : les pays qui signalent le plus grand nombre d'affaires liées au comportement indiquent qu'elles concernaient en majorité des prix excessifs. Dans ces affaires difficiles à analyser, les résultats sont incertains. Aussi, les législations sur la concurrence qui considèrent que des prix trop élevés constituent une infraction imposent un fardeau abusif à l'organisme de la concurrence dans les dossiers sur les comportements.
- Ressources humaines : les autorités de la concurrence en Asie de l'Est et dans le Pacifique emploient deux fois plus de personnel que celles d'Europe de l'Est et d'Asie centrale et quatre fois plus qu'en Amérique latine. Toutefois, le nombre d'affaires de concurrence examinées dans ces régions ne varie pas selon le même ordre de grandeur. Cela peut s'expliquer en partie par le fait que les autorités d'Asie de l'Est et du Pacifique assument généralement des responsabilités

³³ Idem page 26.

³⁴ Document de travail relatif aux recherches sur les politiques de la Banque mondiale n°3221, écrit par Thomas Serebrisky, World Bank Institute. Disponible sur le site Internet de la Banque mondiale : http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&theSitePK=523679&entityID=000009486_20040603154400&searchMenuPK=64187283&theSitePK=523679

³⁵ Idem page 3.

³⁶ La défense de la concurrence ne fait pas partie du questionnaire, principalement parce que l'ICN a récemment réalisé des travaux substantiels dans ce domaine.

plus étendues, hormis les affaires de concurrence, que celles situées dans les autres régions. En outre, les organismes de la concurrence en Asie de l'Est et dans le Pacifique enregistrent un ratio personnel administratif/experts plus élevé que les autres régions.

- L'étude s'attache à évaluer la productivité des experts en utilisant comme variable indicatrice le ratio du nombre de dossiers traités par employé. Toutefois, cette approche génère des écarts qui ne sont pas explicables, probablement à cause de la grande hétérogénéité des affaires relatives aux fusions et au comportement d'un pays à l'autre déjà mentionnée plus haut ; par conséquent, cet indicateur n'a pas été retenu.
- Les répondants devaient classer différents secteurs en fonction de leur importance dans les activités de contrôle du respect de la législation. Dans les infrastructures, les télécommunications arrivent en tête. L'électricité, et notamment l'accès au monopole naturel que sont les transports, revêt également une grande importance. En Amérique latine et dans les Caraïbes, le secteur des transports, et surtout des transports aériens, occupe une place prépondérante.
- Les répondants devaient également classer, par ordre d'importance, différents aspects relatifs à l'application du droit de la concurrence, par exemple les affaires de fusion, les affaires liées au comportement et le cadre conceptuel (ces aspects incluaient par exemple la théorie du monopole naturel, la définition du marché, l'élasticité de la demande, etc.). Là encore, les classements présentent des variations d'une région et d'un pays à l'autre.

Organisation mondiale du commerce : Groupe de travail de l'interaction du commerce et de la politique de la concurrence

***Soutien en faveur du renforcement progressif des institutions chargées de la concurrence dans les pays en développement au moyen du renforcement des capacités (2002)*³⁷**

25. Cette note de référence préparée par le Secrétariat porte essentiellement sur le renforcement des capacités, mais une section analyse les stratégies permettant de mettre en place des institutions et des politiques de la concurrence efficaces dans les pays en développement³⁸ Cette note fait la synthèse de rapports annuels et autres préparés par le Groupe de travail sur ce sujet.

26. La note se fait l'écho de thèmes abordés dans d'autres études et souligne quatre principaux objectifs :

- élaborer un droit de la concurrence adapté aux circonstances économiques et à l'environnement juridique du pays concerné ;
- définir les priorités de l'organisme de la concurrence ;
- mettre en place l'organisme de la concurrence, ce qui inclut le recrutement et la formation du personnel, la mise au point des procédures de traitement des dossiers, etc. ;
- et forger une culture de la concurrence, y compris en organisant des activités ciblées de sensibilisation du public.

³⁷ Disponible sur le site Internet de l'OMC.

³⁸ Idem pages 5-8.

27. Ce processus passe par plusieurs étapes fondamentales qui sont décrites dans le document : cibler les efforts sur les poursuites contre les participants à des ententes injustifiables ; élaborer un programme de défense de la concurrence dans les secteurs réglementés ; reporter le contrôle des fusions le cas échéant ; se procurer des ressources financières et humaines adéquates ; garantir son indépendance ; et acquérir des compétences techniques.

CNUCED

28. Le Groupe intergouvernemental d'experts du droit et de la politique de la concurrence de la CNUCED a pour principale mission de promouvoir la politique de la concurrence dans les pays en développement. À cet égard, une grande partie des travaux menés par le Groupe intergouvernemental se rapporte, du moins indirectement, à l'objet de cette note. Par exemple, les activités qu'il consacre à l'Ensemble de principes et de règles des Nations Unies sur la concurrence et son Manuel sur le droit de la concurrence constituent des références utiles pour les nouvelles autorités. Le Groupe intergouvernemental examine régulièrement les programmes de renforcement des capacités et d'assistance technique en faveur des pays en développement, et il vient de lancer des examens par des pairs.

29. Les travaux de fond menés par le Groupe intergouvernemental ont également des répercussions sur les jeunes autorités de la concurrence. En 2008, par exemple, le Groupe s'est penché sur la question de l'indépendance des autorités. La note d'information s'intéresse plus particulièrement aux défis que doivent relever les nouvelles autorités de la concurrence dans les pays en développement pour acquérir leur indépendance³⁹. À l'instar d'autres études, le document souligne que « l'un des principaux défis, à court ou à moyen terme, pour établir des autorités de la concurrence indépendantes dans les pays en développement est d'attirer des personnes dotées des compétences voulues ou susceptibles de les acquérir rapidement ». Obtenir des ressources financières suffisantes constitue un autre obstacle de taille. Cet examen s'inscrit dans le contexte plus large de savoir s'il vaut mieux, pour une nouvelle autorité, être intégrée dans un ministère ou jouir d'une indépendance administrative. Le document ne tire aucune conclusion définitive sur ce point. Les deux formules ont leurs avantages et leurs inconvénients. Une autorité qui fait partie d'un ministère pourrait ainsi recruter plus facilement du personnel qualifié auprès d'autres organismes de la fonction publique. En revanche, une autorité indépendante peut être en mesure d'offrir une grille de rémunération plus élevée que celle proposée aux fonctionnaires de base.

II. ANALYSE DES RÉPONSES AU QUESTIONNAIRE

30. Le questionnaire (annexe I) a été rédigé dans le souci de ne pas soumettre les pays interrogés à une charge trop lourde ; par conséquent, il ne demande pas de détails ou de données spécifiques. Il cherche plutôt à connaître l'avis et la conclusion des personnes interrogées sur les points suivants : (1) phase de conception – recruter des dirigeants et du personnel, définir des priorités et des objectifs, édicter des directives et des réglementations ; (2) culture et défense de la concurrence ; (3) affaires et enquêtes liées au comportement – abus de position dominante et accords restrictifs ; (4) fusions ; (5) recours judiciaires ; (6) ressources ; (7) indépendance. Enfin, le questionnaire demande aux répondants (a) d'énumérer les cinq actions essentielles qu'ils recommanderaient à une jeune autorité de la concurrence pour bien démarrer ses activités, et (b) les cinq pièges qu'elle doit éviter.

31. Les rédacteurs du questionnaire se sont heurtés à la difficulté de définir ce qu'est une « jeune » autorité de la concurrence. Est-ce une autorité qui a moins de cinq ans ? Moins de dix ans ? Toute directive comporterait une part d'arbitraire, mais il a été décidé de considérer qu'une autorité est jeune si elle applique le droit de la concurrence depuis 1990. Cette date peut être considérée comme le début de l'ère

³⁹ *L'indépendance et la responsabilité des autorités chargées des questions de concurrence*, note du Secrétariat (2008), pages 12-15, disponible sur le site Internet de la CNUCED (http://www.unctad.org/en/docs/c2clpd67_en.pdf).

« moderne » pour la politique de la concurrence, du moins dans le contexte international, et de l'expansion rapide du nombre de pays qui mettent en œuvre de nouvelles politiques de la concurrence. L'Europe centrale et de l'Est et l'Asie centrale ont alors cessé de pratiquer la planification économique centralisée. De nombreux pays y ont adopté de nouvelles lois sur la concurrence à cette époque. Des pays d'autres régions du monde ont alors libéralisé leur économie, adopté des lois nouvelles ou révisé les anciennes. Le questionnaire invitait les pays concernés par cette date à répondre en qualité de « jeune » autorité de la concurrence. Les autorités établies de plus longue date étaient invitées à répondre aux mêmes questions en s'appuyant sur leur propre expérience de la mise en œuvre des lois et, surtout, sur leur expérience dans la fourniture d'une assistance technique aux autorités plus jeunes.

32. À ce jour, 30 pays ont répondu, la plupart en tant que jeunes autorités⁴⁰. Les contributions sont très pertinentes et contiennent pléthore d'informations très utiles. La synthèse ci-dessous est nécessairement condensée ; les lecteurs sont également invités à se reporter aux réponses individuelles.

Premières étapes

Veuillez décrire comment vous avez mené à bien . . . [la] phase de conception [mettre en place un nouvel organisme et le préparer à appliquer un nouveau droit de la concurrence – recruter du personnel, trouver des locaux et du matériel, définir des objectifs et des priorités pour les premiers mois et les premières années, établir des procédures internes et édicter des réglementations et des directives de mise en œuvre de la nouvelle législation]. Quels ont été vos réussites et vos échecs ?

33. Plusieurs pays répondants ont tardé à appliquer leurs nouvelles lois. Dans certains cas, ce retard s'explique par le fait que la législation adoptée était inadaptée. C'est par exemple le cas de l'**Algérie** qui a adopté sa première législation sur la concurrence en 1995. De nouvelles lois ont été promulguées en 2003 et 2008.

La révision et l'amélioration du cadre organisationnel et juridique du Conseil [en 2008] sont motivées par son ancienneté et par l'inadéquation de son organisation et de son fonctionnement par rapport à l'importance du rôle que doit jouer une telle autorité en matière de régulation économique et de mise en œuvre des règles de la concurrence.

Le Conseil de la concurrence d'Algérie a examiné peu d'affaires au cours de ses premières années d'existence, mais les choses sont en train de changer.

34. L'examen par les pairs mené par l'OCDE montre que le **Brésil** est un autre pays dont la législation présentait des lacunes sur plusieurs plans. Cette législation est toujours en vigueur, en dépit des tentatives pour la modifier au cours des années écoulées. Néanmoins, les autorités brésiliennes de la concurrence ont réalisé des gains substantiels d'efficacité et de productivité grâce à des mesures administratives.

35. Le droit de la concurrence du **Mexique** est entré en vigueur en 1993. La Commission fédérale de la concurrence a certes fait des progrès les années suivantes, mais à un rythme lent. La législation a été profondément modifiée en 2006, et dans sa réponse le Mexique qualifie ces révisions de « fondamentales ». Elles ont clarifié des normes de fond, conféré à la CFC de nouveaux pouvoirs

⁴⁰ Au 10 février 2009 : Afrique du Sud, Albanie, Algérie, Brésil, Bulgarie, Chili, El Salvador, États-Unis, Fédération de Russie, Hongrie, Indonésie, Israël, Jamaïque, Japon, Lettonie, Lituanie, Maroc, Mexique, Pays-Bas, Papouasie-Nouvelle-Guinée, Pologne, République slovaque, République tchèque, Roumanie, Serbie, Singapour, Slovaquie, Tunisie, Ukraine et Zambie.

importants et comblé une lacune juridique qui, selon une décision de la Cour suprême, avait empêché la CFC d'engager des poursuites dans des affaires liées au comportement.

36. La **Roumanie** est un autre pays dont les progrès ont été au départ freinés par les lacunes de sa première législation sur la concurrence adoptée en 1996. À partir de 2003, plusieurs modifications ont remédié à nombre de ces problèmes, de sorte que :

. . . nous pouvons considérer que la RCC est désormais, après quasiment 13 ans d'existence, une autorité solide et l'un des principaux piliers de l'économie de marché roumaine.

37. Dans certains pays, faute de moyens financiers suffisants à leur création, les nouvelles autorités de la concurrence étaient dans l'incapacité de mener une action efficace d'application du droit au cours des premières années de leur existence. L'**Albanie**, la **Jamaïque**, la **Lettonie** et la **Slovénie** en faisaient partie. En revanche, **Singapour** a délibérément choisi de faire preuve de mesure dans l'application de sa législation. Son autorité de la concurrence a vu le jour début 2005. Un an après, les dispositions juridiques relatives au comportement ont pris effet, et 18 mois plus tard les dispositions relatives au contrôle des fusions sont entrées en vigueur. La première décision marquante de l'autorité, dans une affaire d'entente, date de janvier 2008.

38. La **Zambie** déclare avoir rencontré de nombreuses difficultés. Son droit de la concurrence a été adopté en 1994, mais il a fallu attendre 1997 pour que la Commission de la concurrence soit établie. Elle a connu d'autres problèmes :

Les cinq premières années, la dotation budgétaire était insuffisante pour recruter du personnel ou former les agents. La Commission a donc été pénalisée par un manque de ressources, d'effectifs, d'équipements adéquats et de moyens pour organiser des programmes de formation. Les procédures relatives à la nouvelle législation ont bien été mises en place, mais pas les règlements afférents.

À ce jour, la Commission zambienne de la concurrence a rendu une décision dans toutes les affaires sauf une, qui est toujours devant les tribunaux. En 1999, la Commission a décelé une entente dans le secteur de la volaille, mais « aucune poursuite n'a été engagée faute de moyens financiers et de procureurs ».

39. Les pays en transition d'une économie à gestion étatique ont des caractéristiques communes⁴¹. Ils n'avaient guère l'expérience du marché libre, voire aucune, et la culture de la concurrence, déjà peu développée dans tous les pays dotés de nouvelles lois sur la concurrence, y était quasiment absente. La **Bulgarie** décrit sa situation en ces termes :

Les premières années, la notion de concurrence commençait à peine à apparaître dans la réalité politique et économique. C'est pourquoi les efforts déployés par la toute nouvelle CPC pour promouvoir la concurrence et faire appliquer le droit correspondant se sont heurtés à de multiples défis et obstacles.

40. De même, les nouvelles autorités dans ces pays assumaient des responsabilités qui allaient bien au-delà de l'application traditionnelle du droit de la concurrence. Elles ont participé, dans une plus ou moins grande mesure, aux programmes de démonopolisation et de privatisation et ont complété, voire

⁴¹ Les pays en transition qui ont répondu sont les suivants : Albanie, Bulgarie, Fédération de Russie, Hongrie, Lettonie, Lituanie, Pologne, République slovaque, République tchèque, Roumanie, Serbie, Slovénie et Ukraine.

remplacé, des régimes réglementaires dans certains secteurs d'infrastructures⁴². La **République slovaque** décrit ainsi ses activités dans ce domaine :

. . . Principalement au cours de ses premières années d'existence, le Bureau de la concurrence a exercé . . . de multiples fonctions et engagé plusieurs changements législatifs, par exemple : i) il a activement participé au processus de privatisation afin de démonopoliser les marchés ; ii) il a été à l'origine de la suppression des monopoles publics sur le tabac et le sel (1994) ; iii) il a été l'instigateur de la Décision gouvernementale sur la création de marchés publics (1991) ; iv) il a soumis à plusieurs reprises un projet de loi sur la régulation des industries en réseau ou sur l'octroi de licences par appel à la concurrence. . . .

41. En outre, certaines autorités devaient accomplir d'autres tâches qui détournaient de nombreuses ressources de leur mission d'application du droit de la concurrence. La **Lituanie** en faisait partie :

. . . En raison des fonctions supplémentaires exercées, comme les actions antidumping et la protection des consommateurs, l'ancienne autorité ne disposait pas de ressources qualifiées suffisantes pour traiter des affaires très différentes et même en opposition avec celles de concurrence.

42. La **Fédération de Russie** est également dans ce cas :

Historiquement, l'Autorité russe de la concurrence . . . [exerçait] de multiples fonctions qui exigeaient de nombreux moyens qu'elle ne pouvait plus consacrer à des questions relevant du seul domaine de la concurrence.

43. Le plus souvent, ces problèmes ont finalement été résolus. Des lois nouvelles et profondément remaniées ont été adoptées et les ressources ont été accrues. L'achèvement du processus de privatisation et la création d'instances de réglementation sectorielle dans les pays en transition ont permis à ces autorités de la concurrence de jouer un rôle plus traditionnel d'application du droit. La **Hongrie** fournit un éclairage intéressant sur l'expérience d'un pays en transition :

La construction de la GVH entre 1991 et 2009 a été un processus long et progressif : des progrès soudains peuvent correspondre à une réalité en termes de production, mais ils ne reflètent généralement pas la nature des ressources injectées pour les obtenir, car ils sont le plus souvent la résultante d'un long travail préparatoire. . . . La première étape – de 1991 (et même avant) à 1999 environ – était une phase de démarrage, marquée par un climat de turbulences liées au passage à l'économie de marché et de récession profonde. La deuxième étape – de 2000 à 2008 environ – était davantage une phase de maturité durant laquelle l'intégration internationale en général et l'adhésion à l'UE en particulier ont produit des effets légèrement différents et plus marqués.

44. La **Serbie**, en revanche, a entamé ses réformes politiques et économiques plus tard que ses voisins. Elle a adopté sa législation sur la concurrence en 2005 et son autorité est entrée en fonction un an plus tard. L'autorité est aujourd'hui confrontée aux mêmes problèmes que d'autres pays en transition une décennie plus tôt, comme l'instabilité politique permanente, le sous-développement économique, l'influence abusive de quelques catégories puissantes, l'absence de culture de la concurrence et le manque de ressources et d'instruments d'application du droit au sein de l'autorité.

⁴² Voir Coppola Tineo et Pittman, supra au n° 7.

45. Certains pays, surtout ceux qui ont entamé le processus après la première « vague » du début des années 90, sont devenus productifs plus rapidement. C'est le cas du **Salvador**. Son autorité de la concurrence est entrée en fonction en 2006, dotée d'une législation de qualité (bien qu'imparfaite – elle a aussi été profondément remaniée peu après son adoption) et de ressources suffisantes. Avec l'aide d'un consultant extérieur, elle a mis en place un plan détaillé sur cinq ans, préparé et publié des règles portant sur ses procédures internes, noué une coopération avec les autorités de tutelle et d'autres organismes publics et lancé un programme dynamique de sensibilisation à la concurrence.

46. La **Papouasie-Nouvelle-Guinée** est un autre « nouvel entrant ». Son expérience peut être particulièrement utile pour les petites économies. En 2002, elle a adopté une nouvelle législation complète destinée à bâtir un « cadre de réglementation des entreprises ». Elle a ainsi mis en place une agence chargée de réglementer les industries d'infrastructure et de faire appliquer le droit de la concurrence. Ce droit est largement inspiré de celui de la Nouvelle-Zélande. L'application des dispositions de fond du droit de la concurrence a été reportée d'un an pour laisser le temps à l'agence de recruter du personnel et de rédiger le règlement interne.

47. L'**Afrique du Sud**, **El Salvador** et la **Papouasie-Nouvelle-Guinée** ont eu largement recours à des consultants privés au moment de la création de leurs autorités. Tous ont jugé leur intervention très utile, mais onéreuse, du moins dans le cas de l'Afrique du Sud. Il semble que l'important soit de faire appel à un consultant qui possède une longue expérience de l'application du droit de la concurrence, plutôt qu'à une personne ayant fait toute sa carrière dans le secteur privé. C'est l'une des conclusions d'un document portant sur le renforcement des capacités soumis par l'OCDE au Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC en 2002⁴³.

48. L'agence du **Maroc**, la plus jeune de toutes celles ayant répondu au questionnaire (la création officielle du Conseil de la concurrence date de janvier 2009), a défini des priorités formelles pour ses deux premières années d'existence, conformément aux conclusions des études décrites dans la première partie de ce document. Parmi les jeunes agences « plus anciennes », les **Républiques slovaque et tchèque** (alors Tchécoslovaquie) se sont également engagées dans un travail de planification préalable :

. . . Un groupe d'experts a été constitué en 1989, soit avant la création du Bureau [de la concurrence], au sein du ministère des Finances. Ce groupe, épaulé par des juristes spécialistes des questions de concurrence, a préparé la loi sur la concurrence et des concepts généraux (définition du marché pertinent, classification des ententes, etc.), qui ont été utilisés lorsque le Bureau a commencé à faire appliquer le droit de la concurrence.

La **Hongrie** et les **Pays-Bas** ont fait de même.

49. Pratiquement tous les répondants ont souligné l'importance de la transparence pour une nouvelle autorité. La publication de procédures internes et de lignes directrices de fond constitue un instrument de promotion de la transparence. Toutefois, rares sont les nouvelles autorités qui semblent en avoir fait une priorité. **Israël** justifie sa progression plus lente dans ce domaine :

La mise en place des procédures internes et l'élaboration des règles et lignes directrices pour mettre en œuvre la nouvelle législation doivent se dérouler de façon progressive. L'application du droit de la concurrence varie d'un pays à l'autre. Les caractéristiques propres à chaque pays et les spécificités de son système juridique doivent être prises en compte. Une approche pas à pas, qui s'appuie sur l'expérience réelle plutôt que sur la simple théorie, est probablement plus efficace.

⁴³ Communication de l'OCDE présentée au Groupe de travail de l'interaction du commerce et de la politique de la concurrence de l'OMC le 22 avril 2002. Voir le document WT/WGTCP/M/17, par. 40.

50. Néanmoins, certains pays ont établi des réglementations et des lignes directrices à un stade précoce. C'est le cas de l'**Indonésie** :

La première étape a consisté à élaborer différents règlements internes, portant notamment sur la gestion des ressources humaines et la mise en œuvre de la législation sur la concurrence. Différents textes fondateurs ont été mis en place : code de conduite, plan stratégique, procédure de traitement des dossiers et autres.

La **Papouasie-Nouvelle-Guinée** a fait de même. L'une des cinq recommandations essentielles formulées était la suivante :

Mettre en place, le plus tôt possible, des procédures et des manuels pour faire en sorte que l'autorité respecte les normes de gouvernance les plus élevées, même (et surtout) si elle doit se distinguer en cela d'autres organismes publics.

51. Enfin, plusieurs réponses soulignent l'importance de l'assistance technique pour une autorité qui fait ses premiers pas. L'assistance à long terme (conformément aux résultats d'autres études sur le sujet) est la plus recherchée. Par exemple, la **Tunisie** apprécie beaucoup l'assistance apportée par la France. La **République tchèque** explique :

Il convient de mentionner que la formation spécialisée a été accélérée ; dès 1991, le Bureau [de la concurrence] dispensait à ses agents une formation très pointue et à long terme en partenariat avec la FTC et le ministère américain de la Justice et organisait de nombreux séminaires d'experts, préparés par l'Office fédéral allemand des cartels (*Bundeskartellamt*). Il a également œuvré en faveur de l'évolution professionnelle permanente de son personnel en participant aux réunions de l'OCDE.

52. La **Hongrie** évoque le rôle de son examen par des pairs dans le processus de construction de son autorité de la concurrence (GVH) :

L'examen de la réforme de la réglementation en Hongrie mené par l'OCDE en 1999 a largement influé sur le « programme de développement » de la GVH. En Hongrie, la politique de la concurrence, ainsi que toutes les activités de la GVH, ont fait l'objet d'un examen par les pairs et donné lieu à des recommandations. Cet examen (aussi bien l'équipe envoyée en mission en Hongrie que le rapport rédigé) était non seulement approfondi et de grande qualité, mais a été mené au bon moment ... pour faire la différence. En outre, il a fourni des arguments pour faire pression sur les décideurs ne faisant pas partie de la GVH afin d'obtenir leur soutien.

La Hongrie a également employé la méthodologie de l'OCDE décrite dans la première partie de ce document à des fins d'évaluation et d'auto-amélioration.

53. Les pays en transition candidats à l'adhésion à l'UE ont tiré parti de leur association avec les États membres et avec la Commission au cours du processus dit de l'*acquis communautaire*. Le programme de jumelage de la Commission met en relation les États membres et les pays candidats afin de faciliter l'élaboration de différentes politiques publiques dans le pays candidat. Le Programme de consultation à l'intention des nouvelles autorités de la concurrence établi par l'ICN suit une logique analogue.

54. Les **Pays-Bas**, économie de marché en phase de maturité, ont répondu au questionnaire en qualité de jeune agence, dans la mesure où la législation néerlandaise sur la concurrence a été adoptée pendant la période de 20 ans visée par le questionnaire. C'est pourquoi ce pays constitue un cas unique. Il a rencontré moins de difficultés à ses débuts que les jeunes autorités des pays en développement. Néanmoins, la NMa,

l'autorité néerlandaise de la concurrence, a dû relever des défis. Sa description du processus suivi pour recruter son personnel peut être utile à d'autres pays.

La première étape suivie par la NMa pour recruter son personnel a été de répertorier les agents du ministère intéressés par un poste au sein du nouvel organisme. Le groupe d'étude a organisé des entretiens avec les candidats, à la suite de quoi des personnes compétentes ont été nommées. Dans un second temps, une campagne a été menée auprès de la population active afin de trouver du personnel qualifié. Les agents provenant du ministère ont été incités (notamment par des incitations financières) à rechercher des candidats qualifiés potentiels parmi leurs connaissances personnelles. Cette stratégie s'est révélée payante dans la mesure où les nouvelles recrues se sont bien intégrées à l'agence, et étaient motivées et compétentes.

La **Tunisie** a elle aussi largement puisé dans les effectifs d'autres organismes publics, avant d'organiser des formations poussées destinées aux nouvelles recrues.

Culture et défense de la concurrence

Veillez décrire les efforts déployés les premières années par votre autorité pour promouvoir une culture de la concurrence dans votre pays. Ces efforts ont-ils produit des résultats mesurables ? Quelle résistance avez-vous rencontrée ?

55. Partout, la culture de la concurrence faisait défaut au moment où la nouvelle autorité a pris ses fonctions. De nombreux pays ont engagé des programmes pour y remédier, en recourant aux mesures habituelles : publication des décisions, rapports annuels, réglementations et directives ; création d'un site Internet ; établissement de relations avec la presse ; discours et séminaires. Toutefois, les améliorations ont été lentes et sporadiques. Selon des observations empiriques, quelle que soit l'ampleur du programme mis en œuvre, il faut du temps avant qu'il ne produise ses effets. **El Salvador** et la **Papouasie-Nouvelle-Guinée**, deux autorités nouvelles, ont rapidement déployé d'impressionnants programmes de sensibilisation, mais avec des effets modestes les premières années. En revanche, la **Lituanie**, dont l'agence existe depuis beaucoup plus longtemps, a signalé des progrès sensibles.

La diffusion de la culture de la concurrence, la sensibilisation du public et l'éducation des entreprises et des consommateurs en faisant largement connaître les prescriptions de la loi sur la concurrence comptent parmi les principales réussites à porter au crédit du Conseil de la concurrence.

56. **L'Afrique du Sud** a suivi une approche innovante dans ce domaine. Elle a créé, au sein de la Commission de la concurrence, une division distincte chargée de l'application du droit, investie du mandat spécifique d'« encourager, de faciliter et de contrôler le respect volontaire des dispositions légales par les milieux d'affaires ». L'autorité hongroise a elle aussi mis en place une telle unité. En Afrique du Sud, cette division était responsable de toutes les activités d'éducation et de sensibilisation de la Commission. Ses efforts ont été couronnés de succès, en dépit des obstacles rencontrés. Elle a ainsi eu du mal à nouer des relations de travail avec des instances de réglementation sectorielle établies de plus longue date, qui se sont opposées à ce que la Commission « empiète » sur leur domaine. À la différence de la plupart des pays où les consommateurs n'attendaient pas grand-chose de la nouvelle autorité de la concurrence, les consommateurs sud-africains en espéraient trop. Ils comptaient sur elle pour contrôler les prix, par exemple, et pour imposer des sanctions plus sévères que la loi ne l'y autorisait.

57. À chaque fois, les circonstances que rencontrait l'autorité d'un pays pour promouvoir une culture de la concurrence étaient uniques. La réponse de l'**Indonésie** est intéressante à cet égard et décrit comment elle a surmonté un obstacle :

Nous avons d'emblée rencontré des difficultés du fait que le public percevait la KPPU comme une . . . institution [dotée de pouvoirs excessifs] jouant plusieurs rôles à la fois : enquêteur, agent de police, procureur et juge. En effet, la KPPU travaillait en toute indépendance à l'égard des autres organismes publics. Toutefois, grâce à ses efforts de communication et aux résultats obtenus dans l'application du droit, la perception du public a commencé à changer ; aujourd'hui, la KPPU est considérée comme une institution importante pour le développement économique du pays.

58. En **Tunisie**, les progrès ont été lents après l'adoption de la législation sur la concurrence en 1995. Cela s'explique en partie par les malentendus, parmi les entreprises, concernant l'objet du droit de la concurrence et les avantages pouvant en découler :

. . . des difficultés persistent au niveau de la méfiance des entreprises qui préfèrent passer par l'administration pour régler leur différend au lieu de porter les affaires devant le conseil. Cette méfiance se justifie, selon ces entreprises, par la protection de leur réputation commerciale au cas où une sanction serait infligée et même par le coût et la longueur de la procédure contentieuse.

59. Les nouvelles autorités ont compris qu'il était essentiel, pour forger une culture de la concurrence, de convaincre les consommateurs des avantages que la concurrence peut leur procurer. Néanmoins, **El Salvador** et la **République tchèque** ont signalé des difficultés pour coopérer avec des organisations de défense des consommateurs plus solidement établies dans leur pays. La **Jamaïque** a connu un problème différent. La nouvelle Commission de la concurrence a décidé à juste titre qu'elle devait apparaître comme une agence au service des consommateurs, avant de conclure qu'elle avait consacré trop de ressources aux affaires de protection des consommateurs et pas assez aux questions de concurrence.

Cette situation a produit des effets délétères sur la Commission avant son dixième anniversaire dans la mesure où la connaissance qu'avaient les entreprises locales du droit et de la politique de la concurrence était très limitée. . .

60. Quelques contributions soulignent un aspect essentiel à prendre en compte pour développer une culture de la concurrence : les discours, séminaires et sites Internet ne sont pas suffisants. L'autorité doit aussi démontrer qu'elle applique le droit avec efficacité. La **République tchèque** insiste sur ce point et constate l'effet favorable sur l'opinion publique produit par l'issue positive des poursuites intentées contre les ententes dans le secteur du café, des services de taxi et de télédiffusion des matchs de football.

La décision [dans le secteur du football], qui autorise les chaînes de télévision à enregistrer les matchs de football, a montré à des millions d'amateurs de ce sport les avantages concrets procurés par une application efficace du droit de la concurrence, et convaincu le grand public de la pertinence des interventions du Bureau de la concurrence.

61. Il en va de même de l'intervention réussie en faveur de la concurrence auprès des instances de réglementation sectorielle. L'**Indonésie** souligne les initiatives de sensibilisation déployées par la KPPU dans le secteur aérien qui ont permis de faire baisser les prix au bénéfice des consommateurs.

Affaires et enquêtes liées au comportement – abus de position dominante et accords restrictifs

Quels problèmes avez-vous rencontrés les premières années lors des enquêtes et des poursuites liées à des cas d'abus de position dominante ou d'accords restrictifs ne constituant pas une entente, et comment y avez-vous fait face ? Quels succès avez-vous connus et selon vous, quels sont les facteurs qui y ont contribué ?

Quelles difficultés avez-vous rencontrées lors de l'élaboration d'un programme de lutte contre les ententes, et comment y avez-vous fait face ? Combien de temps a-t-il fallu pour que votre programme commence à porter ses fruits ?

62. Les nouvelles autorités de la concurrence ont rencontré trois obstacles quasi universels à une mise en œuvre efficace des dispositions législatives relatives au comportement : (1) des outils d'investigation et des pouvoirs de sanction inappropriés, (2) des compétences insuffisantes de la part des spécialistes et (3) une absence de sensibilisation du public à la législation et aux avantages qu'elle procure aux consommateurs, et partant, une faible coopération avec les enquêteurs dans ces affaires. Le premier point a été amélioré dans la plupart des pays grâce à l'adoption de lois nouvelles et modifiées. Des progrès ont été réalisés sur les deuxième et troisième points dans bien des pays, mais souvent avec lenteur.

Abus de position dominante

63. Là encore, la situation des pays en transition au regard des cas d'abus de position dominante est particulière. Les nouvelles autorités de la concurrence ont hérité d'une économie précédemment caractérisée par des monopoles d'État dans de nombreux secteurs. Certains étaient toujours en place, sous forme d'entités publiques ou de structures nouvellement privatisées. Les dispositifs réglementaires faisaient défaut dans divers secteurs. Ainsi, les affaires d'abus de position dominante, mettant souvent en cause des entreprises publiques, ont prédominé au cours des premières années ainsi que l'explique la **Lettonie** :

Les manquements à la Loi sur la concurrence étaient essentiellement imputables aux entreprises publiques et municipales, qui étaient majoritairement des monopoles naturels. Il est à noter que l'un des principaux objectifs de [la] Loi sur la concurrence était de faire en sorte que les monopoles d'État ne nuisent pas à la concurrence et que le Conseil de la concurrence la mette en œuvre sans tenir compte de l'actionnariat des entreprises fautives.

Dans les pays en transition, la situation était plus complexe car un grand nombre de ces affaires impliquaient des pratiques alléguées d'exploitation d'une position dominante, notamment des prix excessifs, désormais considérées comme difficiles à réprimer et, en définitive, improductives au regard du rétablissement de la concurrence. Au fil des ans, toutefois, avec la fin du processus de privatisation et le développement du secteur privé, la fréquence des affaires d'abus de position dominante a diminué dans ces pays.

64. La **Pologne** et d'autres pays en transition se sont heurtés les premières années au fait que l'autorité de la concurrence n'avait guère la liberté de rejeter les plaintes des parties privées qui étaient manifestement dépourvues d'intérêt.

D'après l'expérience de l'OCCP, dans 80 % des affaires découlant d'une demande d'une entreprise, aucun manquement à la législation antitrust n'a pu être établi. La nouvelle solution [énoncée dans une modification apportée à la législation sur la concurrence en 2007], dans une large mesure, a raccourci les procédures. Elle a aussi permis au Bureau de définir ses priorités d'action dans les secteurs de l'économie où il est essentiel d'agir.

65. La **République tchèque** décrit une autre situation existant dans divers pays en transition. La première loi qu'elle a introduite a créé une présomption de position dominante fondée sur la part de marché (dans le cas de la République tchèque, 30 %) et imposé aux entreprises détenant une part de cet ordre d'en informer le Bureau de la concurrence ou de s'inscrire auprès de lui. Le Bureau a ainsi dû consacrer beaucoup de temps et de ressources à faire respecter cette obligation d'information. À la longue, il est apparu que ces règles étaient arbitraires et impossibles à mettre en œuvre, et elles ont été supprimées lors de la première modification apportée à la loi.

66. Ailleurs, le nombre d'affaires d'abus de position dominante paraissait relativement faible, vraisemblablement parce que ce sont celles où il est le plus difficile de faire aboutir les enquêtes et les poursuites. **Singapour** présente le problème en ces termes :

Fin novembre 2008, la Commission de la concurrence de Singapour (CCS) n'avait encore statué dans aucune affaire d'abus de position dominante ou d'accord restrictif ne constituant pas une entente. Concernant les enquêtes pour abus de position dominante, la Commission a des difficultés à définir le marché de produits concerné ou à déterminer le type d'abus commis dans certaines affaires. Il arrive que le comportement allégué ne corresponde pas aux formes d'abus ou aux cas de jurisprudence couramment observés et que des facteurs propres à l'affaire rendent son évaluation complexe. À cet égard, la Commission énonce les théories possibles au regard des préjudices occasionnés avant de demander des informations aux parties, et consulte des gestionnaires de dossiers expérimentés d'autres juridictions plus confirmées.

67. Les pays n'ont pas été invités à analyser les affaires, mais ceux qui l'ont fait ont décrit les cas d'abus de position dominante à l'aide de théories différentes et parfois controversées. Les trois premières affaires traitées en **Algérie** concernaient des abus de position dominante impliquant des pratiques discriminatoires. L'**Afrique du Sud** décrit une affaire de prix excessifs et une autre de discrimination. La première portait sur des médicaments antirétroviraux, et bien qu'une analyse stricte de la concurrence n'eût peut-être pas permis de prouver l'existence d'un comportement illicite, celui-ci a été retenu au vu de l'épidémie de sida que connaît le pays. Dans l'affaire de discrimination, aucun manquement n'a pu être établi en définitive par les tribunaux, mais on peut noter l'objectif affiché dans la législation sur la concurrence de protéger les petites et moyennes entreprises.

68. Le **Chili** décrit les difficultés qu'il a rencontrées dans les affaires d'abus de position dominante. Il semble que dans ce pays, certaines pratiques pouvant faire l'objet de poursuites pour abus de position dominante soient protégées par des droits constitutionnels ou de la propriété garantissant la liberté d'entreprise. L'autorité de la concurrence (FNE) s'est aussi heurtée à la résistance des autorités de tutelle, pour des motifs juridictionnels, lorsqu'elle a engagé des poursuites pour abus de position dominante dans les secteurs relevant de leur compétence.

Ententes

69. La majorité des pays ont eu du mal à concevoir rapidement un programme de lutte active contre les ententes. Certains ont connu des succès précoces dans leur lutte contre les ententes conclues par naïveté (la première année, la **République tchèque** a engagé des poursuites dans 15 cas), mais cela n'a pas duré. La plupart des législations initiales sur la concurrence n'avaient pas prévu les outils nécessaires : les perquisitions-surprises étaient interdites et les sanctions disponibles n'étaient pas suffisamment sévères. Plusieurs pays ont adopté un programme de clémence, mais la plupart n'ont pas eu d'effet immédiat, soit parce que la menace de sanctions drastiques n'était pas crédible, soit parce que le programme lui-même présentait des lacunes (transparence insuffisante ou incertitude quant aux conditions à remplir pour bénéficier du programme, par exemple).

70. Dans de nombreux pays, la situation a commencé à changer. Les nouvelles législations prévoient des outils plus indiqués. Les programmes de clémence ont été adaptés, et commencent à produire des résultats. Les pays qui signalent des progrès croissants dans leur lutte contre les ententes sont notamment l'**Afrique du Sud**, l'**Algérie**, le **Brésil**, la **Bulgarie**, **El Salvador**, la **Hongrie**, **Israël**, la **Lituanie**, la **Pologne**, la **République tchèque**, **Singapour** et la **Slovénie**. En Afrique du Sud, par exemple :

Quelques années après sa création, la Commission de la concurrence sud-africaine (CCSA) s'est parfois vu reprocher de s'attacher davantage à réglementer les fusions qu'à enquêter sur les pratiques restrictives ou tenter de les empêcher. À l'époque, l'autorité de la concurrence était plus connue pour ses décisions concernant des opérations de fusion-acquisition que pour ses efforts visant à détecter et à réprimer les comportements d'entente dommageables. Pour résoudre ce problème, la Commission de la concurrence a élaboré en 2004 une politique de clémence à l'égard des entreprises (*Corporate Leniency Policy*, ou CLP), visant à mettre en évidence les ententes injustifiables. De plus, elle a lancé une campagne d'information sur sa CLP et reçu sa première demande en janvier 2007. Depuis, la Commission a reçu une dizaine de demandes de clémence et a également revu sa politique pour qu'elle soit davantage axée sur l'utilisateur. La Commission considère la CLP comme un outil extrêmement performant pour détecter les ententes et engager des poursuites.

71. Les **Pays-Bas** ont mis au point plus rapidement leur programme de lutte contre les ententes. L'autorité néerlandaise de la concurrence (NMa) a tiré parti de la mise au jour, peu après sa création, d'une vaste et complexe entente dans le secteur de la construction. Les poursuites engagées à son encontre lui ont donné une excellente occasion de renforcer ses compétences.

72. D'autres pays demeurent à la traîne, même s'ils sont de plus en plus conscients des raisons justifiant les efforts à déployer et disposés à les entreprendre.

Fusions

Si votre nouvelle législation ne prévoyait aucun contrôle des fusions, avez-vous rencontré des problèmes parce que vous ne disposiez pas de ce pouvoir ? Quels avantages vous confère, le cas échéant, cette absence de contrôle des fusions ?

Si vous disposez d'un pouvoir de contrôle, avez-vous été confrontés à des problèmes de ressources durant vos premières années d'activité ? En d'autres termes, les ressources que vous avez dû consacrer à l'examen des fusions ont-elles dépassé le niveau que vous jugiez efficient ? Dans l'affirmative, quelles mesures avez-vous prises ? Dans la négative, comment avez-vous évité cet écueil ?

Si vous disposez d'un pouvoir de contrôle, cela a-t-il représenté une part importante et utile de l'activité de votre organisme durant ses premières années d'existence ? Quels succès avez-vous connus lors de la mise en œuvre de votre programme de contrôle des fusions et quelles difficultés avez-vous rencontrées ?

73. Parmi les pays répondants, seules la **Jamaïque** et l'**Indonésie** ne disposaient pas de pouvoir de contrôle des fusions. En Indonésie, une réglementation des fusions a été rédigée, mais elle n'a pas encore été approuvée. Dans sa réponse, la Jamaïque déplore cette absence de contrôle.

Selon le personnel, le fait d'être dépourvu de cette compétence risque de saper les progrès que nous avons réalisés dans d'autres domaines de l'application du droit de la concurrence. À ce stade, notre crainte dans l'immédiat est que notre incapacité à examiner les fusions n'entame la confiance du public dans l'aptitude de la Commission à préserver son bien-être. Nous faisons tout particulièrement référence aux évolutions intervenues récemment sur le marché de la télévision payante (par câble) en Jamaïque, où un nouveau venu a étoffé sa clientèle en rachetant plusieurs

prestataires de services historiques. Dans certains cas, ces acquisitions ont abouti à des monopoles et à un renchérissement de l'abonnement pour les consommateurs. En mars 2008, les protestations du public contre les effets des acquisitions ont atteint leur paroxysme. Rien n'empêchant le nouveau venu de racheter des concurrents dans certaines des régions où il exerçait ses activités, l'absence d'intervention de la part de la Commission a été considérée à tort par le public comme une preuve de son manque d'empressement, plutôt que comme notre incapacité à agir dans l'intérêt de la concurrence et du bien-être des consommateurs. Cette inquiétude s'étend à d'autres secteurs où les fusions ont été consommées sans avoir été examinées par la Commission, par exemple dans l'assurance-maladie et la banque de dépôt.

74. Dans d'autres pays, le contrôle des fusions évolue. Les règles de notification changent, de même que les procédures d'examen et les normes de fond. Au **Brésil**, par exemple, le processus de contrôle des fusions était lent et inefficace. La situation a évolué en 2003.

Récemment, en 2003, une « procédure accélérée » a été introduite pour les affaires simples, libérant ainsi des ressources. Actuellement, 75 % des affaires sont examinées selon cette procédure simplifiée, et des ressources supplémentaires peuvent donc être mobilisées pour des affaires plus complexes. De plus, la Commission n'a cessé de restreindre le champ des examens obligatoires, afin d'éviter que soient notifiés des cas affichant une probabilité négligeable de nuire à la concurrence.

75. Là encore, certains aspects du contrôle des fusions sont communs aux pays en transition. Plusieurs d'entre eux ont immédiatement entrepris d'examiner les opérations en raison des programmes de privatisation engagés sur leur territoire. Leurs procédures d'examen étaient cependant inefficaces. Parfois, les règles de notification reposaient sur la part de marché, un indicateur connu pour son imprécision dans ce contexte. Dans bien des pays, les seuils de notification étaient trop bas, de sorte que les notifications étaient trop nombreuses. Ces imperfections ont néanmoins été gommées avec le temps. Pour les pays candidats à l'adhésion à l'Union européenne, ce processus a impliqué une refonte des programmes de contrôle des fusions, afin de les mettre en conformité avec ceux de la Commission européenne et d'appliquer des normes de fond cohérentes. Le cas de la **République slovaque** est particulièrement révélateur.

Au tout début, après la création du Bureau, 60 % environ de ses capacités étaient consacrées aux fusions. Cette situation, due à des seuils de notification des fusions relativement bas, était aussi liée à la vague de privatisations observée en République slovaque au début des années 90.

S'agissant des critères de notification en vigueur lorsque le Bureau a commencé ses activités, il convient de préciser que la part de marché constituait l'un des seuils de notification possibles – les entreprises étaient tenues de signaler une fusion lorsque la part de marché atteignait 20 %, puis ce seuil a été porté à 25 %.

Compte tenu . . . de l'absence de transparence de la part de marché en tant que critère de notification, depuis 2004, les critères de notification des fusions aux termes de la Loi sur la protection de la concurrence ne sont plus fondés sur la part de marché.

La forte baisse du nombre de fusions notifiées, revenu de 200 à 250 par an à 70 environ, est également liée à l'adhésion de la République slovaque à l'Union européenne en 2004.

76. Quoi qu'il en soit, certains pays, en transition ou non, continuent de batailler pour fixer les seuils de notification qui conviennent. L'**Afrique du Sud** est l'un d'eux. Elle a vu le nombre de notifications progresser de 143 % depuis 2002-03 et elle craint qu'il ne double de nouveau d'ici 2010. Elle propose donc

de relever les seuils. Néanmoins, les pays n'ont pas tous connu ce problème, en particulier ceux qui ont lancé leurs programmes récemment. **El Salvador** a fixé des seuils de notification suffisamment élevés pour ne pas avoir à en examiner un trop grand nombre. **Singapour** a tiré parti d'un report de la mise en œuvre du contrôle des fusions de 18 mois après avoir commencé à appliquer sa législation. Il a pris cette décision :

. . . afin de laisser aux entreprises et aux juristes le temps de se familiariser avec le droit de la concurrence à Singapour. La Commission de la concurrence (CCS) a ainsi pu gérer ses ressources avec plus d'efficacité au cours de ses premières années d'exercice, en concentrant ses efforts sur les enquêtes relatives aux accords anticoncurrentiels et aux abus de position dominante, ainsi que sur la défense et la promotion de la concurrence. Des agents ont été détachés auprès de la Commission australienne de la concurrence et de la défense des consommateurs (*Australian Competition and Consumer Commission*), de la Commission de la concurrence britannique et de la Commission du commerce néozélandaise, afin de se renseigner sur l'évaluation des fusions et d'être suffisamment armés avant l'entrée en vigueur du régime applicable aux fusions.

77. Dans trois pays répondants ayant mis en place un contrôle des fusions, à savoir le **Chili**, la **Papouasie-Nouvelle-Guinée** et **Singapour**, les notifications ne sont pas obligatoires. Cela réduit également la charge de travail associée à l'examen des notifications, même si à l'évidence, cela peut aussi susciter d'autres problèmes, notamment une incapacité à instruire les dossiers relatifs à des fusions anticoncurrentielles avant que celles-ci se concrétisent. Le Chili décrit une difficulté tenant à ses procédures, à savoir que toutes les fusions problématiques doivent être résolues par son tribunal de la concurrence, ce qui ne semble guère efficient. À cet égard, certains pays font spécifiquement observer qu'il est utile de mettre en place des procédures de consultation préliminaire des parties à la fusion, au sujet des obligations de notification et des questions de fond soulevées par l'opération.

78. Tous les pays ayant introduit le contrôle des fusions le jugent utile et important. La **Zambie** a eu et a toujours beaucoup de mal à établir un programme de mise en œuvre, mais elle a relativement mieux réussi en ce qui concerne les fusions.

La Commission a accompli un travail considérable dans le domaine des fusions et c'est dans ce secteur qu'elle a connu d'éclatantes réussites. Des fusions ont été notifiées dans de nombreux secteurs de l'économie. La plupart ont été validées, et les cas de rejet sont rares.

79. La **Lettonie** est aussi un pays où l'autorité a bataillé durant ses premières années, mais qui a accompli un travail précieux en matière de fusions :

. . . [Les premières années] le contrôle des fusions représentait une part significative des activités de l'autorité, les opérations réalisées à l'époque étant d'une importance considérable pour la poursuite du développement des marchés concernés. Un autre avantage de ce contrôle réside dans les informations recueillies par l'autorité sur différents marchés.

La Lettonie n'est pas le seul pays à noter qu'elle a tiré un avantage indirect de son programme de contrôle des fusions, à savoir une collecte d'informations sur divers marchés et secteurs qui lui est précieuse pour des affaires ultérieures, à la fois en matière de comportement et de fusions.

Recours judiciaires

Les décisions prises par votre organisme peuvent-elles donner lieu à un recours devant les tribunaux ? Dans l'affirmative, êtes-vous satisfaits de votre taux de réussite dans ces procédures ? Du délai nécessaire pour trancher les affaires qui ont été portées devant la justice ? Si vous avez rencontré des

problèmes, quelles en sont les raisons, selon vous ? Si vous avez connu des succès, quels sont les facteurs qui y ont contribué ?

Votre organisme a-t-il conçu un programme pour dialoguer avec les juges et les aider à se familiariser avec l'analyse de la concurrence ? Dans l'affirmative, veuillez en donner une brève description.

80. Les réponses à la première question sont idiosyncratiques, puisque chaque système judiciaire est unique. Dans certains pays, des recours ont été formés devant des juridictions de droit commun. Dans d'autres, le tribunal de première instance est une juridiction d'attribution, qui traite tantôt exclusivement des affaires liées à la concurrence (**Afrique du Sud, Chili, Israël, Pays-Bas, Pologne**), tantôt essentiellement des affaires commerciales (**Jamaïque, République tchèque** (les premières années), **Singapour**). Il semble que dans un premier temps, les systèmes fondés sur des tribunaux d'attribution aient connu moins de problèmes, ce qui n'a peut-être rien de surprenant. Le délai courant jusqu'à la décision définitive était plus court, les résultats mieux argumentés, ainsi que le note l'**Afrique du Sud** :

Dans les affaires transférées de la Commission de la concurrence vers le Tribunal de la concurrence (CTSA), l'autorité de la concurrence n'a pas rencontré de problème quant au délai nécessaire au CTSA pour rendre une décision, peut-être parce que la Commission et le Tribunal traitent exclusivement de la concurrence. Les membres du CTSA qui statuent dans des affaires liées à la concurrence doivent posséder les compétences requises en économie ou en droit pour remplir leurs fonctions et ils continuent de se former au gré de leur travail.

81. La **République tchèque** représente un laboratoire intéressant, car avant 2003, les recours dans les affaires de concurrence pouvaient être formés uniquement auprès d'une division (ou « collège ») de la Haute cour, au sein de laquelle un juge se consacrait exclusivement aux affaires liées à la concurrence. À partir de 2003, les recours formés dans ces affaires étaient examinés dans un premier temps par une juridiction régionale de droit commun.

En résumé, la République tchèque a expérimenté d'une part une juridiction à un degré, strictement spécialisée et centralisée de tribunaux chargés des affaires de concurrence (jusqu'en 2002) et de l'autre, un système de juridiction à deux degrés, généraliste et partiellement décentralisée. Ces deux systèmes présentent des avantages et des inconvénients. Compte tenu de la complexité et de la faible fréquence des affaires portant sur la concurrence, une certaine spécialisation peut s'avérer nécessaire. Mais dans le même temps, si cette spécialisation est trop forte (de sorte qu'un seul collège statue dans toutes les affaires ayant trait à la concurrence), une conception unique risque de dominer sans qu'il soit réellement possible d'y remédier.

82. Néanmoins, les pays dans lesquels les recours sont formés devant des tribunaux de droit commun n'ont pas tous signalé des difficultés. L'**Albanie**, la **Bulgarie**, la **Hongrie**, la **Lituanie** et la **Roumanie** ont connu des succès devant ces juridictions. D'autres se montrent moins positifs, comme la **République slovaque** :

Dans les affaires importantes [devant le tribunal de première instance, une cour régionale, la] Cour annule les décisions du Conseil du Bureau, bien que dans la majorité des cas, les défaillances du Bureau au cours de la procédure ne soient pas clairement identifiées et la Cour ne formule pas d'avis juridique particulier. L'autre point négatif réside dans les allègements infondés et disproportionnés des sanctions imposées. Le manque d'expérience des juges en matière de droit de la concurrence et, partant, [leurs] . . . décisions empêchent toute application efficace des règles de la concurrence.

83. **El Salvador** indique que les recours judiciaires constituent son « principal problème ». Les retards sont la norme. Aucune affaire ayant fait l'objet d'un recours durant l'existence de cette jeune autorité n'a été tranchée. La **Lettonie** connaît également de sérieuses difficultés avec les tribunaux. Au cours de l'existence bien plus longue de cette autorité, 59 décisions ont donné lieu à un recours, et 10 seulement ont été tranchées. Au **Brésil**, il faut 7 à 10 ans pour statuer sur une affaire. L'expérience de la **Jamaïque** est mitigée. En 2003, une réforme judiciaire a accéléré le processus de décision, connu pour sa lenteur. Néanmoins, les décisions rendues dans les affaires liées à la concurrence n'étaient pas toujours suffisamment argumentées. Jugées sans importance, les affaires de concurrence n'étaient guère prioritaires aux yeux des juges. Les tribunaux ont parfois poussé à des règlements considérés comme déraisonnables par l'autorité de la concurrence (FTC). La FTC s'est vu imposer des frais de dossier qu'elle était dans l'impossibilité d'acquitter.

84. Les recours judiciaires ont posé des difficultés considérables au **Mexique** de 2000 à 2004. Toutefois, la CFC a récemment obtenu de biens meilleurs résultats devant les tribunaux, en partie grâce aux modifications de sa législation sur la concurrence mentionnées ci-dessus, mais elle s'est aussi livrée à une introspection pour résoudre le problème.

Notre expérience montre que les critères de sélection des affaires sont d'une importance capitale pour une autorité de la concurrence. Avec la pratique, la qualité des affaires jugées recevables s'est améliorée, ainsi que celle des analyses réalisées par la CFC. Notre taux de réussite devant les tribunaux a sensiblement augmenté, en grande partie parce que nous avons tenté de comprendre pourquoi nous avons perdu dans certaines des affaires initiales. Outre les enseignements que nous avons tirés de nos erreurs, nous prenons désormais l'initiative devant les tribunaux, et nous nous attachons activement à présenter notre point de vue durant toute la procédure et à faire mieux comprendre les problèmes liés à la concurrence aux membres du pouvoir judiciaire.

85. Tout bien considéré, on pourrait dire que les problèmes judiciaires ont tendance à s'estomper avec le temps. Dans certains pays, cette amélioration est le fruit d'une vaste réforme du système judiciaire (**Jamaïque, Lettonie, Slovaquie**). Les systèmes judiciaires des pays qui ont fait du chemin vers l'adhésion à l'Union européenne ont tiré parti de ce processus et de la pertinence des décisions des tribunaux de l'UE (**Bulgarie, Hongrie, République tchèque, Roumanie, Slovaquie**). Il est aussi possible que cette amélioration se soit tout simplement produite parce que les juges et les tribunaux se sont familiarisés avec les affaires portant sur la concurrence (**Fédération de Russie, Indonésie, Ukraine**).

86. À cet égard, la majorité des pays sont conscients de l'importance des programmes en cours afin de familiariser les juges aux principes de la concurrence et se sont dotés de programmes de ce type sous une forme ou une autre. La **Fédération de Russie** indique que les juges de droit commun avaient du mal à saisir des concepts comme la définition du marché et la position dominante, et que les liens existant entre le droit de la concurrence et le Code civil russe les laissaient perplexes.

De ce point de vue, l'autorité de la concurrence a fait tout son possible pour organiser des réunions conjointes avec les juges, afin d'expliquer les particularités du droit de la concurrence en vue de parvenir à une position commune du monde judiciaire sur l'interprétation du droit de la concurrence russe. Ce travail a abouti à l'adoption, lors de la séance plénière de la Cour suprême d'arbitrage de la Fédération de Russie, de deux documents décisifs : une lettre d'information intitulée « Examen des pratiques de règlement des différends en matière de lutte contre les monopoles » (1998) et la Décision « sur certaines questions d'administration de la législation antitrust pour les tribunaux arbitraux » (juin 2008), qui coïncident avec la vision qu'a l'autorité de la concurrence de la majorité des aspects fondamentaux de l'interprétation du droit de la concurrence.

Ressources

Votre organisme était-il doté de ressources, financières et humaines, suffisantes pour démarrer ses activités d'application du droit de la concurrence ? Disposait-il de ressources pour se développer les années suivantes ? Si vous jugiez votre budget inapproprié, quelles stratégies avez-vous déployées pour l'étoffer ?

87. Aucun pays, à l'exception des **Pays-Bas**, n'estime avoir eu de ressources adéquates au départ. Les carences ont surtout touché les effectifs. Un budget inadapté impliquait des salaires peu élevés, et donc une forte rotation du personnel. Le cas de la **Lituanie** illustre bien cette situation :

Le Conseil de la concurrence s'est aussi heurté à la rotation des effectifs – c'est-à-dire à la difficulté de garder des experts en son sein. Ce problème tenait en partie aux disparités de salaire entre les employés de l'Administration du Conseil de la concurrence et les autres salariés des secteurs public et privé. Les employés du Conseil de la concurrence percevaient des rémunérations inférieures à celles des agents occupant des fonctions comparables au sein des ministères. Ainsi, de nombreux experts extrêmement compétents, attirés par des salaires plus élevés, sont partis vers d'autres organismes ou vers le secteur privé.

88. De plus, qu'elles aient disposé ou non des fonds voulus, les autorités ont souvent manqué de collaborateurs disposant des qualifications nécessaires. Ce fut le cas de l'**Afrique du Sud**, qui a fait face au problème de plusieurs façons :

L'une des entraves initiales était le manque d'expertise juridique et économique en matière de droit de la concurrence. Le Comité de la concurrence (*Competition Board*), l'ancêtre du Conseil de la concurrence (*Competition Council*), était un organisme relativement restreint dépourvu des pouvoirs prévus par la Loi sur la concurrence de 1998. Même si le Conseil de la concurrence avait gardé plusieurs employés expérimentés du Comité, il a fallu organiser pour l'ensemble du personnel une formation approfondie sur les questions liées à la concurrence. Le Conseil a donc lancé un programme de formation sur 6 mois avant de démarrer ses activités. Une fois en exercice, il a engagé un programme afin que des consultants travaillant au sein d'autorités de la concurrence établies assistent des employés du Conseil dans leurs enquêtes relatives aux plaintes déposées et dans les évaluations des fusions. Le Conseil de la concurrence a aussi lancé plusieurs initiatives de renforcement des capacités pour tenir les employés en poste au courant des dernières évolutions de la concurrence.

89. Avec le temps, la plupart des organismes qui avaient démarré avec des financements insuffisants ont noté une amélioration, mais celle-ci n'a pu se faire sans un certain cheminement. Les progrès ont en effet été réalisés à mesure que la culture de la concurrence se développait dans le pays, comme en **Bulgarie** :

Lors de sa création, la Commission de la protection de la concurrence (CPC) disposait de maigres ressources, financières et humaines, au regard de la tâche difficile qui lui incombait – protéger la concurrence et les intérêts des opérateurs économiques dans tous les secteurs de l'économie bulgare. Toutefois, en menant une politique de la concurrence ferme et en favorisant l'émergence d'une culture de la concurrence, la CPC a su convaincre l'élite politique et la société dans son ensemble de l'importance de sa mission et les années suivantes, son budget a atteint un niveau approprié.

90. **Israël** a souligné les liens existant entre la réussite perçue d'une autorité de la concurrence et son budget :

Il semble qu'il y ait une certaine corrélation entre l'efficacité de l'autorité de la concurrence et la volonté des pouvoirs publics de la doter de ressources supplémentaires. Depuis la création de l'IAA en 1994, on a observé un net gonflement des effectifs et du budget, essentiellement parce qu'elle est désormais considérée comme un organisme efficace et professionnel qui obtient des résultats dans des affaires pénales et administratives et en matière de contrôle des fusions et de sensibilisation. En conséquence, les jeunes autorités de la concurrence doivent impérativement s'efforcer d'atteindre des résultats significatifs le plus rapidement possible.

91. Dans la quasi-totalité des pays répondants, les ressources des organismes demeurent soumises à des contraintes sous une forme ou une autre, et elles le resteront sans doute inévitablement dans un avenir proche, comme pour leurs homologues plus anciens dans d'autres pays. Si tous les organismes s'emploient à accroître leur budget, ils doivent aussi utiliser leurs deniers avec la plus grande efficacité possible. C'est ce qu'a fait le **Mexique** :

Compte tenu de la pénurie permanente des ressources de la CFC, il s'est avéré nécessaire de prendre des mesures pour les utiliser de façon plus efficace et d'obtenir l'appui d'organisations internationales bilatérales et multilatérales sous forme de programmes de coopération. Ces mesures englobaient aussi une restructuration interne, et la promotion de la collaboration entre spécialistes de disciplines différentes, et le renforcement du travail d'équipe.

Indépendance

En tant qu'organisme récent, avez-vous eu le sentiment d'être suffisamment indépendants ? Dans la négative, quelles en sont les raisons, selon vous, et quelles mesures avez-vous prises pour y remédier ?

92. Les pays répondants ne perçoivent pas l'indépendance comme un problème. Ils se répartissent pratiquement à parts égales entre ceux dont l'autorité est un organisme distinct, indépendant d'un quelconque ministère, et ceux où elle fait partie de l'administration. Quoiqu'il en soit, aucun pays n'a déclaré souffrir d'un manque d'indépendance opérationnelle – c'est-à-dire de l'aptitude à statuer sur les affaires sans ingérence des pouvoirs publics. Certains ont exprimé des inquiétudes quant à leur manque de prise sur leur budget (**République slovaque, Ukraine**). Quelques pays ont précisé qu'ils n'avaient pas été suffisamment indépendants durant leurs premières années d'exercice, mais que cela a été le cas par la suite, généralement grâce à une nouvelle législation (**Afrique du Sud, Lettonie, Lituanie, République slovaque**).

Cinq actions essentielles ; cinq pièges

Veillez citer (a) les cinq actions essentielles que vous recommanderiez à une nouvelle autorité de la concurrence pour bien démarrer ses activités et (b) les cinq pièges qu'elle doit éviter.

93. Pour les pays ayant répertorié les cinq actions essentielles à leurs yeux, on distingue trois priorités qui ont été recommandées par de nombreux pays : (1) s'employer à forger une culture de la concurrence (soit l'un des aspects de la défense de la concurrence) ; (2) s'attacher à développer et à garder les ressources humaines ; et (3) promouvoir de bonnes relations et la cohérence de l'action menée avec d'autres organismes publics et autorités de réglementation sectorielle (un deuxième volet de la défense de la concurrence). Parmi les autres recommandations formulées par plusieurs pays figurent : développer la coopération avec d'autres autorités de la concurrence et prestataires d'assistance technique ; définir des priorités ; obtenir un budget adapté ; s'assurer que la législation est bien conçue et confère les pouvoirs nécessaires ; nouer des relations de travail avec les juges ; acquérir l'indépendance.

94. Les pays ont été moins nombreux à répondre à la seconde partie de la question concernant les cinq pièges, sans doute parce qu'elle faisait pendant à la première : les erreurs les plus graves sont

commises par omission – c'est-à-dire parce qu'on a manqué de faire ce qui était jugé essentiel. Les réponses corroborent cette affirmation.

95. Les **États-Unis** ont répondu en qualité d'organisme arrivé à maturité. Ils se sont concentrés sur la dernière question – les recommandations et les pièges essentiels. Parmi leurs recommandations positives figurent des références à des thèmes familiers : les ressources humaines, la définition des priorités, le développement d'une culture de la concurrence et la mise en place d'outils d'enquête et de sanctions appropriés. Ils ont également formulé des observations intéressantes sur la sélection des affaires :

Les ressources devraient être réservées aux affaires dont on peut dire selon toute probabilité que faute d'intervention de l'autorité de la concurrence, le comportement en question portera préjudice au bien-être des consommateurs et/ou à l'efficacité économique. Les économistes sont formés pour évaluer des questions relatives à l'impact du comportement sur le bien-être des consommateurs ou sur l'efficacité ; sans leur contribution, la mise en œuvre risque d'être inefficace. Les juristes, en revanche, sont formés pour se demander si des preuves suffisantes démontrent l'existence d'un manquement, comment constituer un dossier qui résiste à l'examen d'une cour ou d'un tribunal indépendant et si les droits de la défense et les règles de procédure ont été observées. Sans leur contribution, la mise en œuvre risque encore une fois d'être inefficace. Il est donc capital de mettre en place une structure organisationnelle qui associe précocement les disciplines juridique et économique dans le processus décisionnel.

96. S'agissant des pièges, les États-Unis ont recommandé d'empêcher les « stimuli externes » – notifications de fusion et plaintes privées insignifiantes en trop grand nombre – de détourner l'autorité de ses objectifs principaux ; de ne pas essayer d'utiliser le droit de la concurrence pour soigner tous les maux de la société ; de ne pas recourir aux amendes à l'exclusion d'autres mesures correctrices de nature à améliorer la concurrence ; et de ne pas négliger d'autres instances, dont les tribunaux et le pouvoir législatif.

97. La **Japon**, dont l'autorité est également en phase de maturité, a aussi souligné l'importance d'une application ferme de la loi :

La principale tâche incombant à une autorité de la concurrence est de faire strictement respecter la législation en la matière. Il ne suffit pas d'interdire les activités anticoncurrentielles ; il faut aussi les détecter et y mettre un terme en se fondant sur le droit de la concurrence. Au Japon, entre 1955 et 1970 environ, la mise en œuvre de l'AMA était en sommeil et certains observent que le manque de rigueur de l'application de la loi durant cette période a produit des effets si négatifs que les chefs d'entreprise considèrent depuis lors les manquements à l'AMA comme des infractions mineures, ce qui se traduit aujourd'hui par des ententes et des truquages des offres sans fin. Il convient de faire activement appliquer le droit de la concurrence en traitant les affaires-types qui influent sur l'économie nationale ou locale, tout en disposant des pouvoirs d'enquête voulus pour détecter les activités illicites, ainsi que de sanctions efficaces pour mettre un terme à ces activités.

III. CONCLUSIONS

98. Les nouvelles autorités de la concurrence sont confrontées à des défis nombreux et divers. La majorité sinon la totalité de ces défis trouvent leur origine dans une situation fondamentale existant dans un pays novice en politique de la concurrence : l'absence de culture de la concurrence. Au-delà, un des obstacles identifiés par les pays répondants est très fréquemment cité : le développement des ressources humaines. Les pays ont des difficultés à trouver, attirer et fidéliser des collaborateurs compétents, pour plusieurs raisons, dont le budget de l'autorité, l'importance du vivier de talents existant dans le pays,

l'expérience, la formation et la perception de l'autorité comme un lieu de travail intéressant et attrayant. L'assistance technique assurée par des pays plus expérimentés et par des organismes internationaux peut jouer un grand rôle à cet égard.

99. Les réponses au questionnaire fournissent de nouvelles indications précieuses sur d'autres sujets. Le contrôle des fusions était jadis considéré comme un problème pour les nouvelles autorités de la concurrence. Certains experts estimaient qu'il était tout à fait inutile dans les petites économies et dans tous les cas, qu'il risquait de mobiliser les maigres ressources au détriment de tâches plus importantes. La quasi-totalité des répondants évoquent néanmoins leur expérience du contrôle des fusions en des termes positifs. Parmi ses avantages figure la visibilité, qui peut contribuer à renforcer la culture de la concurrence. Les affaires de fusion ayant abouti peuvent montrer au public les bienfaits qu'il peut tirer d'une politique de la concurrence efficace. Il est néanmoins essentiel que les pays fixent les règles de notification et les seuils qui conviennent.

100. Hormis l'expérience des pays en transition au cours des premières années, les jeunes autorités se sont débattues avec des affaires d'abus de position dominante, parce que les faits sont difficiles à démontrer dans ce type d'affaires et que les théories s'appliquant au comportement d'une seule entreprise demeurent incertaines. Bien que les questionnaires n'aient pas apporté d'éléments empiriques, il semble que le taux d'occurrence des affaires d'abus de position dominante diminue.

101. L'inverse est néanmoins vrai dans les affaires d'entente. De nombreux pays commencent à surmonter les obstacles auxquels ils se heurtaient précédemment dans leurs programmes de lutte contre les ententes – inadéquation des outils d'enquête et de sanction, expérience insuffisante et faible soutien du public pour les poursuites à l'encontre des ententes. Les programmes de clémence commencent à porter leurs fruits et le nombre d'affaires d'entente semble croître, bien que là encore, les réponses ne contiennent pas d'éléments empiriques attestant cette tendance.

102. Il est difficile de tirer des conclusions universelles sur la politique de la concurrence et les tribunaux. La situation diffère d'un pays à l'autre. Apparemment, l'examen juridique des affaires liées à la concurrence n'obéit pas à un modèle unique et privilégié. Quoi qu'il en soit, lorsqu'on constate des problèmes significatifs dans ce domaine, dont le plus important est l'extrême lenteur des procédures, les effets produits sur l'application du droit de la concurrence sont désastreux. La résolution de ces problèmes peut ne pas entrer dans les attributions de l'autorité de la concurrence – lorsque cela exige une réforme en profondeur du système judiciaire, par exemple – mais l'autorité doit s'efforcer d'améliorer ses résultats devant les tribunaux en procédant à une sélection plus fine des affaires et en faisant mieux valoir son point de vue.

103. Obtenir un financement adéquat reste d'une importance décisive pour l'ensemble des autorités, qu'elles soient jeunes ou non. Comme la plupart des autres défis à relever pour assurer une application efficace des règles, cela passe par un renforcement de la culture de la concurrence. Les autorités doivent néanmoins saisir toutes les occasions d'accroître l'efficacité en interne. Enfin, l'indépendance de l'organisme chargé de la mise en œuvre compte aussi, mais les réponses au questionnaire indiquent qu'il ne s'agissait pas d'un problème notable pour les nouvelles autorités.

104. Par conséquent, la recette du succès pour appliquer le droit de la concurrence est désormais relativement bien définie : commencer par introduire une législation adaptée, définir les priorités, élaborer des procédures internes efficaces et transparentes, obtenir un budget adéquat, mettre rapidement l'accent sur la défense de la concurrence, afin de développer une culture de la concurrence et d'influer sur les décisions des pouvoirs publics et des autorités de réglementation sectorielle qui ont un impact sur la concurrence, acquérir des compétences dans la mise en lumière des ententes et dans les poursuites à leur encontre, concevoir un programme efficace de contrôle des fusions, procéder à une sélection minutieuse

des affaires et élaborer un programme pour dialoguer avec les juges au sujet de la politique de la concurrence.

105. Mais même en suivant la recette à la lettre, la réussite ne sera ni rapide, ni aisée. Il faudra du temps et des efforts soutenus. William Kovacic a émis un commentaire sur ce point :

Il est . . . déraisonnable d’escompter des résultats significatifs au bout de 5 ou 10 ans. Les donateurs et les prestataires d’assistance technique devraient savoir que la mise en place de l’organisme voulu tient plus du marathon que du sprint⁴⁴.

⁴⁴ Kovacic, *Lucky Trip*, *supra*, n° 5, p. 324.

ANNEXE

QUESTIONNAIRE SUR LES DÉFIS QUE DOIVENT RELEVÉ LES JEUNES AUTORITÉS DE LA CONCURRENCE

I. Pays ayant activement mis en œuvre une législation sur la concurrence sur une période relativement brève**A. Structure de l'autorité et tâches préliminaires**

Il s'agit d'un moment unique dans la vie d'une autorité de la concurrence – mettre en place un nouvel organisme et le préparer à appliquer une nouvelle législation. Il faut par exemple recruter des dirigeants, des cadres et des agents administratifs, trouver des locaux et du matériel, définir des objectifs et des priorités pour les premiers mois et les premières années, établir des procédures internes et édicter des réglementations et des directives de mise en œuvre de la nouvelle législation.

1. *Veuillez décrire comment vous avez mené à bien cette phase de conception. Quels ont été vos réussites et vos échecs ?*

B. Culture et défense de la concurrence

Mettre en place une culture de la concurrence dans un pays novice en matière d'application de la concurrence – sensibiliser le public à la politique de la concurrence et aux travaux de l'autorité et obtenir son soutien en leur faveur – est déterminant pour la réussite de la politique de la concurrence. Dans ces pays, cette culture n'existe pas et l'autorité joue un rôle éducatif important en contribuant à son développement.

2. *Veuillez décrire les efforts déployés les premières années par votre autorité pour promouvoir une culture de la concurrence dans votre pays. Ces efforts ont-ils produit des résultats mesurables ? Quelle résistance avez-vous rencontrée ?*

C. Affaires et enquêtes liées au comportement – abus de position dominante et accords restrictifs

Au départ, enquêter sur des comportements et instruire des affaires dans ce domaine peut s'avérer difficile. L'autorité de la concurrence et les entreprises sont peu coutumières des normes juridiques et de preuve créées par la loi, et les enquêteurs n'ont guère l'expérience des affaires de ce genre. Les outils d'enquête (recueil des faits) et les pouvoirs de sanction (amendes et mises en demeure) prévus par la nouvelle législation ne sont pas toujours adaptés aux tâches considérées. Les procédures de traitement des dossiers peuvent être lourdes et inefficaces.

3. *Quels problèmes avez-vous rencontrés les premières années lors des enquêtes et des poursuites liées à des cas d'abus de position dominante ou d'accords restrictifs ne constituant pas une entente, et comment y avez-vous fait face ? Quels succès avez-vous connus et selon vous, quels sont les facteurs qui y ont contribué ?*
4. *Quelles difficultés avez-vous rencontrées lors de l'élaboration d'un programme de lutte contre les ententes, et comment y avez-vous fait face ? Combien de temps a-t-il fallu pour que votre programme commence à porter ses fruits ?*

D. Fusions

Certains pays, notamment les plus petits, ont choisi de ne pas intégrer le contrôle des fusions dans une nouvelle législation sur la concurrence. Selon leurs conclusions, cela mobiliserait des ressources trop importantes par rapport aux avantages qui pourraient en découler en termes de concurrence. Ils réservent parfois ce contrôle à second temps. Cependant, la majorité des pays mettent d'emblée en place un contrôle des fusions. Pour certains, les phases initiales de ce programme se déroulent sans heurts majeurs. D'autres ont néanmoins rencontré des difficultés en raison de procédures d'examen inefficaces, de régimes de notification trop vastes ou de l'application aléatoire de règles de fond.

5. *Si votre nouvelle législation ne prévoyait aucun contrôle des fusions, avez-vous rencontré des problèmes parce que vous ne disposiez pas de ce pouvoir ? Quels avantages vous confère, le cas échéant, cette absence de contrôle des fusions ?*
6. *Si vous disposez d'un pouvoir de contrôle, avez-vous été confrontés à des problèmes de ressources durant vos premières années d'activité ? En d'autres termes, les ressources que vous avez dû consacrer à l'examen des fusions ont-elles dépassé le niveau que vous jugiez efficient ? Dans l'affirmative, quelles mesures avez-vous prises ? Dans la négative, comment avez-vous évité cet écueil ?*
7. *Si vous disposez d'un pouvoir de contrôle, cela a-t-il représenté une part importante et utile de l'activité de votre organisme durant ses premières années d'existence ? Quels succès avez-vous connus lors de la mise en œuvre de votre programme de contrôle des fusions et quelles difficultés avez-vous rencontrées ?*

E. Recours judiciaires

Dans la plupart des pays, les décisions de l'autorité de la concurrence peuvent donner lieu à un recours devant les tribunaux. Les systèmes judiciaires varient d'un pays à l'autre. Dans certains, les affaires relatives à la concurrence font l'objet d'un recours, du moins en première instance, auprès d'un tribunal disposant d'une compétence d'attribution limitée aux affaires de concurrence ou plus généralement aux affaires commerciales. Dans d'autres, les affaires relevant de la concurrence sont jugées par des juridictions de droit commun. Si dans certains pays, les procédures judiciaires se déroulent relativement en douceur et de façon prévisible, ailleurs, l'examen judiciaire représente un obstacle majeur à la mise en œuvre efficiente et efficace du droit de la concurrence. Les juges sont parfois peu au fait des principes de l'analyse de la concurrence. L'autorité peut perdre un nombre inacceptable de ses affaires devant les tribunaux. Les procédures judiciaires peuvent être bien trop lentes, faisant échec dans les faits à l'application de la loi.

8. *Les décisions prises par votre organisme peuvent-elles donner lieu à un recours devant les tribunaux ? Dans l'affirmative, êtes-vous satisfaits de votre taux de réussite dans ces procédures ? Du délai nécessaire pour trancher les affaires qui ont été portées devant la justice ? Si vous avez rencontré des problèmes, quelles en sont les raisons, selon vous ? Si vous avez connu des succès, quels sont les facteurs qui y ont contribué ?*
9. *Votre organisme a-t-il conçu un programme pour dialoguer avec les juges et les aider à se familiariser avec l'analyse de la concurrence ? Dans l'affirmative, veuillez en donner une brève description.*

F. Ressources

Toutes les autorités de la concurrence sont confrontées à des problèmes de budget. Les nouvelles autorités peuvent être particulièrement vulnérables sur ce point, car selon toutes probabilités, ceux qui fixent leur budget ne saisissent pas bien la mission de l'organisme ou ne l'apprécient pas à sa juste valeur.

10. *Votre organisme était-il doté de ressources, financières et humaines, suffisantes pour démarrer ses activités d'application du droit de la concurrence ? Disposait-il de ressources pour se développer les années suivantes ? Si vous jugiez votre budget inapproprié, quelles stratégies avez-vous déployées pour l'étoffer ?*

G. Indépendance

Les autorités de la concurrence doivent être aussi indépendantes que possible vis-à-vis des autres instances publiques et des intérêts particuliers, tant en termes de budget que de gestion ou d'application de la loi.

11. *En tant qu'organisme récent, avez-vous eu le sentiment d'être suffisamment indépendants ? Dans la négative, quelles en sont les raisons, selon vous, et quelles mesures avez-vous prises pour y remédier ?*

Conclusion

12. *Veillez citer (a) les cinq actions essentielles que vous recommanderiez à une nouvelle autorité de la concurrence pour bien démarrer ses activités et (b) les cinq pièges qu'elle doit éviter.*

II. Pays ayant activement mis en œuvre une législation sur la concurrence sur une période plus longue

1. *Pour chacun des points A à G de la partie I ci-dessus, en vous fondant sur l'expérience acquise en mettant en œuvre votre droit de la concurrence et sur vos échanges avec des pays commençant à appliquer une législation, donnez votre point de vue sur les pratiques exemplaires que devraient adopter les nouvelles autorités de la concurrence.*
2. *Veillez citer (a) les cinq actions essentielles que vous recommanderiez à une nouvelle autorité de la concurrence pour bien démarrer ses activités et (b) les cinq pièges qu'elle doit éviter.*



CALL FOR CONTRIBUTIONS

TO ALL GLOBAL FORUM PARTICIPANTS

RE: CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

GLOBAL FORUM ON COMPETITION (FEBRUARY 19 - 20, 2009)

SESSION III

1. Session III of the Global Forum on Competition will discuss “Challenges Facing New Competition Agencies.” Three and a half hours will be set aside on the morning of 20 February for this discussion. A panel of competition authorities will open the session with short presentations in the plenary room. Countries will then have the opportunity to develop a more informal dialogue in breakout sessions scheduled to last for 2 hours.

2. There are special problems encountered by countries beginning to create a competition policy, and a synthesis and discussion of these issues will benefit both those countries that are still in the initial phases of enforcing their competition law and those that will begin to do so in the future. For that purpose we provide below a questionnaire to your country on this topic. The Secretariat will draft a background note for the discussion incorporating the responses.

1. Background

3. Competition agencies are often at different stages of development, depending on how long they have been established. Some have been in operation for only a short period – perhaps only a few years. Others have been active for much longer, for example 15 or 20 years, but nevertheless may still be considered relatively young given their establishment during what some regard as the “modern era” of competition policy. Others have existed considerably longer. While the experiences of these older agencies in their formative years may not be as relevant to this particular discussion, they provide an important perspective given their capacity building activities with these younger agencies.

4. The questionnaire below has two parts. The first contains more detailed questions, targeted at “younger” countries. We recommend that countries that began their enforcement activities after 1991 respond to this section. The second section is aimed at the “older” countries, whose perspective as a provider of technical assistance will be of key interest.

5. Respondents should focus their efforts on those questions most relevant to their particular circumstances.

2. Administrative Issues

6. Please provide your response **i) by 8 December (non-members); and ii) by 5 January 2009 (members and observers to the Competition Committee).** Send it electronically to Jennah Huxley (Jennah.huxley@oecd.org) in the Secretariat, copying Hélène Chadzynska, Administrator, at helene.chadzynska@oecd.org and John Clark, Consultant, at johnclark3@cox.net.

QUESTIONNAIRE

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

I. Countries that have been actively enforcing a competition law for a relatively short time

A. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. *Describe how you conducted this organisational phase. What went well, and what didn't?*

B. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. *Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?*

C. *Conduct cases and investigations – abuse of dominance and restrictive agreements*

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. *What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?*
4. *What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?*

D. *Mergers*

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. *If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?*
6. *If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?*
7. *If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?*

E. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. *Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?*
9. *Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.*

F. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. *Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?*

G. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. *As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?*

Conclusion

12. *State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*

II. Countries that have been actively enforcing a competition law for a longer period

1. *For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.*
2. *State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*



APPEL À CONTRIBUTIONS

À TOUS LES PARTICIPANTS AU FORUM MONDIAL

OBJET: LES DÉFIS QUE DOIVENT RELEVER LES JEUNES AUTORITÉS DE LA CONCURRENCE

FORUM MONDIAL SUR LA CONCURRENCE (19-20 FÉVRIER 2009)

SESSION III

La huitième réunion du Forum mondial de l'OCDE sur la concurrence se tiendra à Paris (France) les 19 et 20 février 2009. L'un des thèmes de l'ordre du jour est « Les défis que doivent relever les jeunes autorités de la concurrence ». (Session III). Des problèmes spécifiques se posant aux pays qui commencent à mettre en place une politique de la concurrence et une synthèse, ainsi qu'une étude de ces questions, bénéficieraient à la fois de l'expérience des pays qui se trouvent dans les phases initiales de la mise en œuvre de leur droit de la concurrence et de ceux pour lesquels cette phase débutera à l'avenir. À cette fin, nous avons joint ci-dessous un questionnaire adressé à votre pays sur ce sujet. Le Secrétariat établira une note de référence intégrant les réponses à ce questionnaire en vue de la discussion.

Les autorités de la concurrence se trouvent souvent à des stades de développement différents, selon l'ancienneté de leur mise en place. Certaines ne fonctionnent que depuis une courte période – parfois seulement quelques années. D'autres fonctionnent depuis beaucoup plus longtemps, par exemple 15 à 20 ans mais peuvent néanmoins être encore considérées comme relativement jeunes du fait qu'elles ont été créées au cours de ce que certains considèrent comme « l'ère moderne » de la politique de la concurrence. D'autres existent depuis beaucoup plus longtemps. Si les expériences qu'ont connues ces autorités plus anciennes au cours de leurs années de formation peuvent être moins pertinentes pour cette discussion particulière, elles peuvent fournir un éclairage précieux étant donné leurs activités de création de capacités avec ces autorités de la concurrence plus jeunes.

Le questionnaire ci-dessous comporte deux parties. La première contient des questions plus détaillées, ciblées sur les pays « plus jeunes ». Nous recommandons aux pays dont les activités d'application du droit de la concurrence ont débuté après 1991 de répondre à cette section. La seconde section s'adresse aux pays « plus anciens » dont le point de vue en tant que fournisseurs d'assistance technique sera d'un intérêt essentiel.

Dans leurs réponses, les pays qui répondront à ces questions devront mettre l'accent sur celles qui sont les plus pertinentes compte tenu de leur situation particulière.

Vous êtes prié d'adresser votre réponse **d'ici le 8 décembre au plus tard**. Vous pouvez l'envoyer par voie électronique à Jennah Huxley (Jennah.huxley@oecd.org) au Secrétariat, avec une copie à Hélène Chadzynska, Administrateur, à l'adresse suivante helene.chadzynska@oecd.org et à John Clark, Consultant, à l'adresse suivante johnclark3@cox.net.

QUESTIONNAIRE

LES DÉFIS QUE DOIVENT RELEVÉ LES JEUNES AUTORITÉS DE LA CONCURRENCE

I. Pays qui s'efforcent activement d'appliquer le droit de la concurrence depuis une date relativement récente

A. Organisation de votre administration et préparation des travaux

Il s'agit d'un moment exceptionnel dans l'existence d'une autorité de la concurrence – la création d'une nouvelle organisation et les mesures prises pour la préparer à appliquer une nouvelle législation. Les opérations nécessaires comprennent le recrutement de hauts fonctionnaires et d'agents de niveau professionnel et administratif, l'obtention de locaux à usage de bureaux et de biens d'équipement, la fixation d'objectifs et de priorités pour les premiers mois et les premières années, l'établissement de procédures internes et la création de réglementations et de lignes directrices pour l'application de la nouvelle législation.

1. *Décrivez la manière dont vous avez mené cette phase organisationnelle. Quels sont les aspects qui ont été satisfaisants et ceux qui ne l'ont pas été ?*

B. Culture de la concurrence et sensibilisation à la concurrence

La mise en place d'une culture de la concurrence dans un pays qui commence seulement à appliquer le droit de la concurrence – le fait de sensibiliser le public à la politique de la concurrence ainsi qu'aux travaux de l'autorité de la concurrence et l'obtention de son soutien – est essentielle au succès d'une politique de la concurrence. Dans les pays où la politique de la concurrence est nouvelle, une telle culture n'existe pas et l'autorité de la concurrence joue un rôle éducatif important en contribuant à la créer.

2. *Décrivez les efforts entrepris par votre autorité de la concurrence au cours des premières années dans la promotion d'une culture de la concurrence dans votre pays. Avez-vous obtenu des succès quantifiables ? Quelles résistances avez-vous rencontrées ?*

C. Litiges et enquêtes concernant le comportement des entreprises – abus de position dominante et accords restrictifs

Il peut être difficile dans un premier temps de mener des enquêtes et des procédures judiciaires concernant le comportement des entreprises. Les normes juridiques et celles concernant les éléments de preuve que la loi a créés sont peu familières à l'autorité de la concurrence et aux milieux d'affaires et les enquêteurs ne disposent pas d'une expérience suffisante pour traiter des affaires de ce type. Les instruments d'enquête (collecte de données) et les pouvoirs de sanction (amendes et injonctions) prévus par la nouvelle législation peuvent ne pas être adaptés à la tâche à accomplir. Les procédures de traitement des affaires peuvent être lourdes et inefficaces.

3. *Quels problèmes avez-vous rencontrés dans le cadre des enquêtes et des poursuites concernant les abus de position dominante et les accords restrictifs ne constituant pas des ententes au cours de vos premières années d'activité et comment les avez-vous traités ? Quels ont été vos succès et quels sont, selon vous, les facteurs qui ont contribué à ces résultats satisfaisants ?*

4. *Quelles difficultés avez-vous rencontrées dans la mise au point d'un programme de lutte contre les ententes et comment les avez-vous traitées ? Combien de temps a-t-il fallu pour que votre programme de lutte contre les ententes commence à faire apparaître des résultats ?*

D. Fusions

Certains pays, notamment ceux dont les économies sont de petites dimensions, préfèrent ne pas prendre introduire le contrôle des fusions dans une nouvelle législation sur la concurrence. Ils estiment que cela nécessiterait un montant de ressources trop élevé comparé aux avantages qui pourraient en résulter pour la concurrence. Ils pourraient envisager de commencer à contrôler les fusions ultérieurement. Cependant, la plupart des pays instaurent un contrôle des fusions dès le début. Pour certains, les premières phases de ce programme ont fonctionné d'une manière relativement harmonieuse. D'autres ont en revanche rencontré des problèmes liés à des procédures d'examen inefficaces, à des régimes de notification trop détaillés ou à des incertitudes dans l'application des règles de fond.

5. *Si votre nouvelle législation ne prévoyait pas de contrôle des fusions, avez-vous rencontré des problèmes du fait que vous ne disposiez pas de ce pouvoir de contrôle ? Quels sont, pour vous, les avantages qui résultent, le cas échéant, de ne pas disposer d'un contrôle des fusions ?*
6. *Si vous appliquez un contrôle des fusions, cela vous a-t-il posé des problèmes de ressources au cours de vos premières années de fonctionnement, en d'autres termes cela vous a-t-il obligé à affecter à l'examen des fusions un montant de ressources supérieur à ce que vous estimiez nécessaire pour une action efficiente ? Dans l'affirmative, quelles mesures avez-vous prises à cette fin ? Dans le cas contraire, comment avez-vous évité ce problème ?*
7. *Si vous appliquez un contrôle des fusions, était-ce un élément important et utile des activités de votre administration au cours de ses premières années de fonctionnement ? Quelles ont été vos réussites dans la mise en œuvre de votre programme de contrôle des fusions ? Vos problèmes ?*

E. Recours judiciaires

Dans la plupart des pays, les décisions de l'autorité de la concurrence peuvent faire l'objet de recours devant les tribunaux. Les systèmes judiciaires varient selon les pays. Dans certains cas, les affaires de concurrence font l'objet de recours, du moins en première instance, auprès d'un tribunal ayant des compétences spécifiques, qui ne porte parfois que sur les affaires de concurrence ou, plus généralement, sur les affaires commerciales. Dans d'autres pays, les affaires de concurrence sont traitées par des tribunaux à compétence générale. Bien que, dans la plupart des pays, les procédures judiciaires fonctionnent de manière relativement satisfaisante et prévisible, dans d'autres, le contrôle judiciaire s'est avéré un obstacle important à l'efficacité et à l'efficacité de l'application du droit de la concurrence. Les juges peuvent être insuffisamment familiarisés avec les principes d'analyse de la concurrence. L'autorité de la concurrence peut estimer qu'elle perd un nombre inacceptable d'affaires devant les tribunaux. La procédure judiciaire peut être trop longue, ce qui compromet effectivement l'application de la loi.

8. *Les décisions de votre autorité de la concurrence peuvent-elles faire l'objet de recours devant les tribunaux ? Dans l'affirmative, avez-vous été satisfait de votre taux de réussite dans les affaires judiciaires ? Quels sont les délais nécessaires pour que les affaires soumises aux tribunaux fassent finalement l'objet d'une décision ? Si vous avez rencontré des problèmes,*

quelles en sont à votre avis les raisons ? Dans la mesure où vous avez obtenu des succès, quels sont les facteurs qui y ont contribué ?

9. *Votre autorité a-t-elle mis en œuvre un programme de coopération avec les juges en vue de les familiariser à l'analyse de la concurrence ? Dans l'affirmative, prière de donner une brève description.*

F. Ressources

Chaque autorité de la concurrence rencontre des problèmes budgétaires. Une nouvelle autorité de la concurrence peut être particulièrement vulnérable à cet égard, car ceux qui déterminent son budget ne sont probablement pas en mesure de comprendre ni d'apprécier totalement la mission de cette autorité.

10. *Votre autorité a-t-elle disposé de ressources financières et en personnel suffisantes pour commencer à exercer vos activités d'application de la loi ? Disposait-elle de ressources qui devaient augmenter au cours des années ultérieures ? Si vous avez estimé que votre budget était insuffisant, quelles sont les stratégies que vous avez utilisées pour essayer de l'accroître ?*

G. Indépendance

Une autorité de la concurrence doit être indépendante, dans toute la mesure du possible, des autres secteurs de l'administration et des intérêts particuliers, que ce soit sur le plan du budget, de la gestion ou de l'application de la loi.

11. *En tant que nouvelle administration, avez-vous eu l'impression de bénéficier d'une indépendance suffisante ? Dans le cas contraire, quelles en étaient à votre avis les raisons et quelles mesures avez-vous prises en conséquence ?*

Conclusion

12. *Indiquez (a) les cinq mesures les plus importantes que vous recommanderiez à une nouvelle autorité de la concurrence pour qu'elle s'assure un démarrage réussi et (b) les cinq écueils à éviter pour une nouvelle autorité de la concurrence.*

II. Pays qui ont appliqué activement le droit de la concurrence depuis plus longtemps

1. *Pour chacun des points A à G de la partie I ci-dessus, sur la base de votre expérience dans l'application de votre droit de la concurrence et de vos relations avec les pays qui commencent à appliquer ce droit, quelles seraient, selon vous, les bonnes pratiques d'une nouvelle autorité de la concurrence ?*
2. *Indiquez (a) les cinq mesures les plus importantes que vous recommanderiez à une nouvelle autorité de la concurrence pour qu'elle s'assure un démarrage réussi et (b) les cinq écueils à éviter pour une nouvelle autorité de la concurrence.*



CONTRIBUTION BY ALBANIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Albania--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The new Law on competition protection, approved on 28 July 2003, came into force on 1 December 2003. The institution started its activity in March 2004. The Albanian Competition Authority (hereafter referred to as ACA) is a public entity, independent in performing its tasks. The ACA is comprised of two bodies, the Commission and the Secretariat. The Commission is the decision-making body of the Authority, whereas the Secretariat is the administrative and investigative body (having market monitoring and investigative powers). The duties and responsibilities of each body are regulated by the Law on Competition Protection.

In its early stages the ACA had limited human and financial sources and only in May 2007 the Parliament approved the new structure with a total number of 35.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Albania has little experience of market economy and for this reason we have a lack of competition culture. For this reason, one of the main objectives of the Competition Commission was to improve the competition culture through a number of activities, such as: road shows with business community supported by GTZ in the most important districts; comments and opinions regarding the law and competition policy; publications; seminars; Internet access of different users of our webpage, etc.

The business community has no information about law and institutions regarding competition and at this stage it is difficult to apply the law and competition policy in all areas of the economy and to secure the necessary cooperation.

1.3. *Conduct cases and investigations – abuse of dominance and restrictive agreements*

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact

gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

Regarding the abuse of a dominant position at the very first stages of investigation we did not have the cooperation parties because one of undertakings refuses to give the requested information.

Regarding the restrictive agreements, we find some difficulties because a number of undertakings were not aware of competition law and policy, so we had to deal with naïve “cartels” such as in bread producers.

We think that the success was that we identified the infringements of competition law and we suggest a number of remedies for undertaking behaviour. Also, we identified the administrative problems and made our suggestions to government and regulatory bodies to open the market for competition.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

We have not yet applied the anti-cartel programme. We made offers to undertakings and explained the leniency program to them and what benefits they will gain, but so far no applications have been made.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Our law is in compliance with *acqui communautaire* and such does provide for merger control procedures.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

We build up a sector in charge of merger procedures and our staff has the necessary experience to deal with concentration procedures. We had notified approximately 10 cases per year of merger control.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The Competition Commission had taken a number of decisions in its early years with the intention to not allow the enforcement of any dominant position in the market. We have had a successful experience in control of mergers and the decisions of the CC have contributed to free and effective competition in the market.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

The decisions of CC are subject to appeal before the first instance court of Tirana. We must emphasise that the jurisdictional system in Albania is independent and the decisions of the court are based on the court objectivity and their judgment. In so far the decisions of the court in some cases have been in favour and the same with the decision taken from the Competition Commission of Albania. The court procedures need a lot of time to be issued and this may be a problem especially in cases of the execution of the fine (where the CC has given a sanction decision against the undertakings). Problems have been raised and are encountered because the competition field is a new one for both judges and the business community alike. However, it must be said the Competition Authority has had success in the court procedures, because the representatives of the CA has explained in detail how the law provides and functions and what the behaviour of undertakings consist of and that was against the law "On Competition protection".

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

The Competition Authority is trying to organise workshops and seminars with judges, the Magistrate School and legal offices etc, to explain the competition law, the competition policy and also to respond to every unclear issue that may arise. In the coming year we plan to organise a workshop with all the above parties when we will explain the primary and secondary law.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

In 2007 the Albanian Assembly approved the new structure of the Competition Authority and in 2008 the Competition Authority had a new and complete staff, in order to act according the law and its enforcement. It must be emphasised that the financial resources are not enough to enable all training necessary, but ACA, through OECD (RCC), GTZ, TAIEX etc, has been able to train its staff and to share experience with the most experienced countries in the EU.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The Competition Authority of Albania is an independent one. The Competition Commission is elected from the Albanian Assembly and has the necessary power to take decisions independently regarding the market and the potential infringement of the undertakings in the market. Also, according the law the Competition Commission can give recommendations to public institutional and the government regarding decision, orders or legal acts that impede or restrict the free and effective competition in the market.



CONTRIBUTION BY ALGERIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Algeria--

1. Introduction

1. Algeria is currently in the implementation phase of a process of substantial economic reform launched in the 1980s, including a comprehensive policy to open up its economy to the international market. One milestone in the process has been the signing of an Association Agreement with the European Union.

2. Furthermore, Algeria is negotiating membership of the WTO and has also launched a process that should lead to a trade agreement with the EFTA countries.

3. Algeria has accordingly begun implementing a programme to bring up to standard the legal and institutional framework of its economy, with a view to optimizing the conditions under which it will join the process of globalisation and trade with the European Union.

4. With this in mind, and to ensure the continuity of the economic reform process under way for several years now, the Algerian government adopted Order No. 95-06 of 25 January 1995 on competition. The Order was subsequently repealed and replaced by Act No. 89-12 of 5 July 1989 on prices.

5. As part of the comprehensive upgrade of its legislation and regulations, that Order was then reviewed and replaced by Order No. 03-03 of 19 July 2003 on competition.

6. Following an assessment and diagnosis of its application, the above Order was recently amended by Act No. 08-12 of 25 June 2008, amending and supplementing Order No. 03-03 of 19 July 2003 on competition, with a view to further enhancing the effectiveness of this legislative framework.

7. The current legislation therefore complies with international standards and the requirements of a market economy.

8. The purpose of these arrangements is to establish a genuinely competitive market. They accordingly lay down rules to safeguard competition and ensure transparency and fair competition in business relations.

9. Within that context, the legislative framework has reviewed the human aspects of the Competition Council, which is the autonomous authority in charge of regulating/monitoring the market and imposing penalties for anticompetitive practices. The Council has also been afforded every prerogative to carry out its mandate and responsibilities. Furthermore, it has the authority to sign co-operation agreements with regulatory authorities at home and abroad.

2. Legislative arrangements relating to competition

2.1 Order No. 03-03 of 19 July 2003

10. Order No. 03-03 of 19 July 2003 on competition is aimed at establishing a competitive market environment, preventing restrictive practices and controlling economic concentrations in order to boost economic efficiency and enhance consumer welfare.

11. The Order covers the following:

1) Restrictive practices:

- Cartel agreements;
- Abuse of dominant position;
- Abuse of economic dependence (**Article 11**);
- Creating monopolies by means of exclusive procurement contracts (**Article 10**);
- Predatory pricing (**Article 12**).

12. The current Order also includes a new provision establishing a preventative, instructional measure to counter cartel agreements and abuse of dominant position, through the introduction of negative clearance.

13. The new provisions also introduce **leniency measures**, whereby the Competition Council may decide to reduce a fine or refrain from imposing a fine.

2) Economic concentrations:

With regard to economic concentrations, the new Order reasserts the Competition Council's competence in this field. Economic agents must notify the Council of any concentration transactions that might undermine competition and exceed a threshold of 40% of sales or purchases in a given market.

3) Competition Council:

- The Competition Council is an autonomous authority, with a legal personality and financial independence;
- It acts in an advisory and adjudicatory role;
- It may work and exchange information with sector-specific regulatory authorities and with its counterparts abroad.

To that end, membership of the Council has been reduced to **nine permanent members**.

Of those nine members, two are magistrates while the other seven are chosen from among key figures renowned for their legal or economic competency or their expertise in matters of competition, distribution or consumer affairs.

2.1 Act No. 08-12 of 25 June 2008 amending and supplementing the Order on competition

14. Here, the new arrangements include improvements to the Competition Council's remit, organisation and *modus operandi*. The review and enhancement of the Council's organisational and legal framework were prompted by the fact that it had been in existence for a number of years and by the mismatch between its *modus operandi* and the role that this type of institution should play in regulating the economy and implementing the rules on competition.

15. The improvements made to this piece of legislation include:

- 1) Extending the Competition Council's mandate to cover public procurement, which is a potential source of uncompetitive practices;
- 2) Prohibiting any action or contracts conferring exclusivity for an activity, in order to prevent economic agents from achieving a monopoly position on a market;
- 3) Conferring on the Competition Council a mandate to regulate the market and enhance the way distribution channels are organised and run on the domestic market;
- 4) Giving the Competition Council powers to take any necessary steps to consolidate its autonomy, in the form of regulations, directives or circulars to be published in the Official Bulletin on Competition, given that competition is a complex field that requires ongoing extension work;
- 5) Organising and developing co-operation and the exchange of information between the Competition Council and all sector-specific regulatory authorities;
- 6) Refocusing the organisation, mandates and composition of the Competition Council, which will now comprise twelve members, drawn from three categories, namely:
 - 6 legal/economic experts, with responsibilities in the field of competition, distribution, consumer affairs and intellectual property;
 - 4 professionals with experience of production, distribution, self-employed crafts, services and the liberal professions;
 - 2 representatives of consumer associations.

This is aimed at strengthening the Council's economic expertise and its powers to penalise restrictive practices;

- 7) Raising the fines imposed by the Competition Council to a level that is genuinely dissuasive, since the amounts currently imposed as penalties are very much out of date;
- 8) Setting criteria to guide the Competition Council in setting penalties, referring in particular to the harm done to the economy, the profits made by the offending parties and the size of the enterprise concerned. This approach is intended to ensure rationality and equity in this field, thereby enhancing the institution's credibility.

3. Overview of the work of the Competition Council

3.1. Cases resolved

16. The main cases of distortion of competition resolved by the Competition Council can be summarised as follows:

1) Competition Council versus the SNTA (*Société Nationale des Tabacs et Allumettes*) :

The Competition Council imposed a fine of 768 000.00 DA on SNTA, the national tobacco/match corporation, for abuse of dominant position, and even monopolistic and discriminatory behaviour towards its clients. The case was brought before the Council by a client who had been a victim of such practices. The evidence concerned the following breaches:

- Discriminatory selling: the SNTA was favouring some of its clients by supplying as many as 1 000 packets per shipment, while others were receiving only 100 packets or seeing their orders refused;
- Speculative holding: the SNTA was withholding its goods in order to speculate by influencing market trends.

2) Competition Council versus the ENIE (*Entreprise Nationale des Industries Électroniques*) :

The Competition Council fined the ENIE (national electronic industry corporation) some 4 348 560.00 DA for abuse of dominant position and discriminatory practices towards its business partners.

The case was brought before the Council by a group of economic agents that were victims of these anticompetitive practices, which worked as follows:

- Certain clients were provided with storage space on ENIE premises, which constituted preferential treatment, as this lowered or eliminated their storage costs;
- Selective supplying (some clients received more goods than ordered, while others received no goods at all);
- Clients were subject to discriminatory terms of payment, with some being asked for an advance payment of only 19% of the full cost and others for 30%;
- Business partners were given discounts for large orders. As the enterprise was a selective supplier, the discounts were confined to preferential clients only.

This enterprise abused its dominant or even monopolistic position on the market, which it had gained through its status as the country's leading distributor of electronic goods, its vast distribution network (sales/display outlets and after-sales service centres) and its flourishing financial situation. Furthermore, the operator had no real or potential competitors capable of competing for its market share.

3) Competition Council versus SAFEX:

In 2000 the Competition Council reached an out-of-court agreement that SAFEX (Algerian fairs and exhibitions corporation) would stop discriminating against some of its clients. The public corporation had been abusing its dominant position by not charging its affiliates for using exhibition and sales venues, while other economic agents had to pay a fee.

3.2. Cases currently before the Council (see Annex 1)

4. Assessing application of the law

17. An assessment has shed light on the following points:

- Competition culture:

Currently inadequate, it is hampering the introduction of rules on market competition.

The greatest challenge facing the Competition Authority is the lack of a competition culture.

The fact that the competition culture is inadequate is hampering the development of competition policy. While the economic and institutional environment is marked by management rules appropriate for a market economy, there is still evidence of hesitant and uncertain behaviour on the part of economic players, and of a reliance on the State.

- The informal market:

The informal market virtually took over the entire domestic economy back in the early 1990s, when it became a refuge for a small portion of the labour force seeking a means of subsistence.

However, the opening up of the export market turned the informal market from a marginal phenomenon that was tolerated into a social phenomenon that is currently said to account for an estimated 35% of GDP.

The phenomenon covers virtually every sector of activity and involves secret, fraudulent practices that prevent the free play of competition on the market.

- Training and information:

There is a need to provide more training for judges, particularly in specialised fields such as competition law. Ignorance of specific economic legislation among some judges has meant that some particularly complex disputes have been mishandled.

Furthermore, inadequate investigative resources, poor training and the need for better skills among those in charge of enforcing competition regulations, compounded by a lack of economic information on the status and running of the market and on market players, mean that the necessary inquiries cannot be conducted.

5. Challenges and outlook

18. On the basis of the above appraisal, and to remediate the basic inadequacies it has revealed, the requisite measures should focus on the following:

- Developing a comprehensive inter-sectoral approach (including the Competition Council, Customs, and the Finance Inspectorate) to ensure the necessary efficiency in combating the informal sector. When the informal sector is restricted, unfair practices decline and the rules of competition become a motivating factor;
- Selecting the members of the Competition Council on the basis of clear competency-related criteria to ensure its efficiency and credibility;
- Putting into place a general framework for all kinds of co-operation in the field of competition so that the Competition Council can work in partnership with foreign Competition Authorities and draw on their experience;
- Instituting a standardised framework for the exchange of competition-related information and experience among the institutions in charge of competition (government departments, the Council and the competition authorities);
- Ensuring that businesses and consumers are familiar with the new reflexes based on the rules governing the market economy, and that this is reflected in their behaviour. Establishing and developing a competition culture is of prime importance in effectively enforcing the law;
- Making the activities of the Competition Council more dynamic and enabling it to play its full role in regulating the market, with a view to promoting competition and creating a ratchet effect among firms and consumers;
- Providing staff in charge of competition (including management, investigators, and Competition Council rapporteurs) with further training that will also promote a competition culture.
- Introducing a mechanism to observe the market and detect anticompetitive practices;
- Building a competition databank;
- Launching initiatives media and extension on competition issues, targeted at institutions and economic players and using modern communication methods such as the Internet;
- Launching a competition newsletter for the dissemination/extension of competition law and publishing any decisions by the Competition Council that create a precedent (Court of Appeal, Supreme Court, State Council);
- Promoting competition in the marketplace. This is in fact the main task of the Competition Council, obliging it to go on the offensive with regard to economic players, and to develop investigative instruments serving to detect, prosecute and penalise breaches of competition law. One means of achieving this is to give the Council full jurisdiction, thereby enabling it to broaden its scope and make its presence felt on the ground.

ANNEX 1

CASES CURRENTLY BEFORE THE COMPETITION COUNCIL

1. Abuse of economic dependence

Business of the plaintiff enterprise	Defendant	Claims by the plaintiff	Sector	Market structure	Comment
Sale and distribution of mobile telephony (telephones, microchips, pre-paid cards)	Private mobile telephone operator	- Abuse of economic dependence - Breaking off business relations solely on the grounds that the partner refuses to accept unjustified business terms	Mobile telephones	The defendant, at the time of the alleged breach, was the only private operator on the mobile telephone market	Case currently before the Council

2. Collusive practices, price fixing

Competing party	Defendant	Claims	Market	Distributor market share	Evidence of anti-competitive behaviour	Comments
Large firm distributing consumables and accessories/equipment for diagnostic imaging	Three enterprises with the same market niche	Price-fixing	- Radiology centres - Diagnostic imaging centres - Public health structures	None of the four enterprises is in a dominant position - the brands represented by these distributors share the market with other major foreign brands	Price fixing between distributors in the presence of the brand's representative	Currently before the Council



CONTRIBUTION DE L'ALGÉRIE

QUESTIONNAIRE SUR LES DÉFIS QUE DOIVENT RELEVER LES JEUNES AUTORITÉS DE LA CONCURRENCE

--Algérie--

1. Introduction

1. L'Algérie se trouve dans une phase dynamique de mise en œuvre d'un processus de réformes économiques substantielles entamé depuis les années 80 à la faveur notamment d'une politique globale d'ouverture de son économie sur le marché international. Cette politique a été concrétisée notamment par la signature de l'Accord d'Association avec l'Union européenne.

2. En outre, l'Algérie est en cours de négociation pour accéder à l'OMC et notre pays a entamé, par ailleurs, un processus pour la conclusion d'un accord commercial avec les pays de l'AELE.

3. L'Algérie a engagé la mise en œuvre, dans cette optique, d'un programme de mise à niveau du cadre juridique et institutionnel de son économie nationale, dans le but d'assurer les meilleures conditions de son intégration dans le processus de mondialisation et d'échanges avec l'Union européenne.

4. A cet effet et dans le cadre de la continuité du processus de réformes économiques entrepris depuis plusieurs années, le gouvernement algérien a adopté l'ordonnance n° 95-06 du 25 janvier 1995 relative à la concurrence. Cette ordonnance a abrogé et remplacé la loi n°89-12 du 05 juillet 1989 relative aux prix.

5. Dans le cadre de la mise à niveau globale de sa législation et de sa réglementation, ce dispositif a été revu et remplacé par l'ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence.

6. A la faveur de l'évaluation de son application et du diagnostic établi en la matière, ce texte a récemment fait l'objet d'un amendement à travers la loi n° 08-12 du 25 juin 2008 modifiant et complétant l'ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence et ce, à l'effet de rendre ce cadre législatif encore plus efficient.

7. De ce fait, le dispositif en vigueur actuellement est adapté par rapport aux standards internationaux et répond aux exigences d'une économie de marché.

8. L'objectif de ce dispositif est de permettre la consécration d'un marché réellement concurrentiel. A ce titre, il définit les règles de protection de la concurrence et vise à assurer la transparence et la loyauté dans la réalisation des relations commerciales.

9. Dans ce contexte, ce cadre législatif a revu la composante humaine du Conseil de la Concurrence, en tant qu'autorité administrative autonome, chargée de la régulation et de la surveillance du marché ainsi que de la sanction des pratiques anticoncurrentielles. En outre, cette institution est dotée de toutes les prérogatives lui permettant d'assumer ses missions et attributions. Par ailleurs, elle a faculté de conclure tout accord de coopération avec les autorités de régulation nationales et institutions étrangères de la concurrence similaires.

2. Présentation du dispositif législatif relatif à la concurrence

2.1 L'ordonnance n°03-03 du 19 juillet 2003

10. L'ordonnance n° 03.03 du 19 juillet 2003 relative à la concurrence a pour objectifs de fixer les conditions d'exercice de la concurrence sur le marché, de prévenir toute pratique restrictive de concurrence et de contrôler les concentrations économiques afin de stimuler l'efficacité économique et d'améliorer le bien-être des consommateurs.

11. Le contenu de l'ordonnance est présenté comme suit:

1) Pratiques restrictives de concurrence :

- les pratiques d'ententes illicites ;
- les abus de position dominante ;
- l'abus de l'état de dépendance économique (**art. 11**) ;
- la constitution de monopoles par le biais de contrats d'achats exclusifs (**art. 10**) ;
- et la pratique de vente à des prix abusivement bas (**art. 12**).

12. Par ailleurs, l'ordonnance en vigueur intègre une nouvelle disposition qui consacre une mesure préventive et pédagogique en matière d'ententes et d'abus de position dominante, à travers l'instauration de l'attestation négative.

13. Le nouveau dispositif institue également **des mesures de clémence**. Il s'agit d'une procédure par laquelle le Conseil de la Concurrence peut décider de réduire le montant de l'amende ou de ne pas prononcer du tout d'amende.

2) Concentrations économiques :

S'agissant des concentrations économiques, la nouvelle ordonnance reconduit la compétence du Conseil de la Concurrence en la matière. En effet, les agents économiques doivent notifier au Conseil leurs opérations de concentration lorsqu'elles sont de nature à porter atteinte à la concurrence et qu'elles atteignent un seuil de plus de 40% des ventes ou achats à effectuer sur un marché.

3) Conseil de la Concurrence :

- Le Conseil de la concurrence est une autorité administrative autonome, jouissant de la personnalité juridique et de l'autonomie financière ;
 - Il a un rôle consultatif et contentieux ;
- Il peut coopérer et échanger des informations avec les autorités de régulation sectorielles ainsi qu'avec les autorités étrangères homologues.
- Il peut coopérer et échanger des informations avec les autorités de régulation sectorielles ainsi qu'avec les autorités étrangères homologues.

Dans cette optique, le nombre des membres du Conseil est ramené à **9 membres permanents**.

Sur les 9 membres, 2 sont des magistrats et les 7 autres membres sont choisis parmi des personnalités connues pour leur compétence juridique, économique ou en matière de concurrence, de distribution et de consommation.

2.1 Compte tenu de la loi n° 08-12 du 25 juin 2008 modifiant et complétant l'ordonnance relative à la concurrence

14. A ce titre, le nouveau dispositif des enrichissements en ce qui concerne les attributions, l'organisation et le fonctionnement du Conseil de la Concurrence. La révision et l'amélioration du cadre organisationnel et juridique du Conseil sont motivées par la notamment années passées et par l'inadéquation de son organisation et de son fonctionnement par rapport à l'importance du rôle que doit jouer une telle autorité en matière de régulation économique et de mise en œuvre des règles de la concurrence.

15. Les enrichissements apportés aux dispositions du texte concernent notamment :

- 1) l'élargissement du champ de compétence du Conseil de la Concurrence au domaine des marchés publics, qui constitue une source potentielle de pratiques anticoncurrentielles ;
- 2) l'interdiction de tous les actes et contrats conférant une exclusivité dans l'exercice d'une activité, afin de prévenir toute position monopolistique d'un agent économique sur le marché ;
- 3) la prise en charge et la mise en œuvre par le Conseil de la Concurrence de la mission de régulation du marché, à l'effet d'améliorer les conditions d'organisation et de fonctionnement des circuits de distribution au niveau du marché national ;
- 4) l'octroi au Conseil de la Concurrence de la faculté de prendre toute acte utile sous la forme de règlement, de directive et de circulaire à publier au Bulletin Officiel de la Concurrence, en vue de consolider son autonomie, compte tenu du fait que le domaine de la concurrence est complexe et nécessite en conséquence un travail de vulgarisation permanent ;
- 5) l'organisation et le développement des relations de coopération et d'échange d'informations entre le Conseil de la Concurrence et les différentes autorités sectorielles de régulation ;
- 6) le recentrage de l'organisation, des missions et de la composition du Conseil de la Concurrence dont le nombre a été porté à 12 membres répartis dans 3 catégories, à savoir :
 - 6 experts dans les domaines juridiques et économiques, ayant des compétences en matière de concurrence, de distribution, de consommation et de propriété intellectuelle ;
 - 4 professionnels ayant une expérience dans les secteurs de la production, de la distribution, de l'artisanat, des services et des professions libérales ;
 - 2 représentants des associations de protection des consommateurs.

Cette démarche vise à renforcer les pouvoirs d'expertise économique et de sanction des pratiques restrictives de concurrence dudit Conseil ;

- 7) l'actualisation des sanctions pécuniaires prononcées par le Conseil de la Concurrence, afin de leur conférer un réel caractère dissuasif, eu égard au fait que les montants des sanctions en vigueur se trouvent largement dépassés ;

- 8) la fixation de critères devant guider le Conseil de la Concurrence dans le prononcé des sanctions, par référence notamment au préjudice causé à l'économie, aux bénéfices cumulés par les contrevenants et à l'importance de l'entreprise mise en cause. Cette approche est de nature à garantir une rationalité et une équité dans ce domaine ; ce qui renforcera la crédibilité de cette institution.

3. Aperçu quant à l'activité du Conseil de la concurrence

3.1. Affaires tranchées

16. Les principales affaires d'atteinte à la concurrence tranchées par le Conseil de la Concurrence peuvent être résumées comme suit :

- 1) Affaire Conseil de la Concurrence contre la SNTA (Société Nationale des Tabacs et Allumettes) :

Le Conseil de la Concurrence a sanctionné la SNTA en lui infligeant une amende pécuniaire de 768.000,00 DA pour abus de position dominante voire monopolistique et pratiques discriminatoires envers ses clients. Le Conseil a été saisi par une requête d'un client victime de ces pratiques. Les infractions constatées sont les suivantes :

- les ventes discriminatoires : la SNTA approvisionnait certains clients de façon privilégiée jusqu'à hauteur de 1.000 paquets par livraison contrairement aux autres acheteurs qui recevaient uniquement 100 paquets voire voyaient leurs demandes d'approvisionnement rejetées ;
- le stockage spéculatif : la SNTA procédait à un stockage spéculatif de ses produits pour influencer sur la tendance du marché.

- 2) Affaire Conseil de la Concurrence contre l'ENIE (Entreprise Nationale des Industries Électroniques) :

Le Conseil de la Concurrence a condamné l'ENIE à une amende pécuniaire de l'ordre de 4.348.560,00 DA pour abus de position dominante et pratiques discriminatoires envers ses partenaires commerciaux.

Le Conseil a été saisi par un groupe d'agents économiques victimes de ces pratiques anticoncurrentielles qui peuvent être présentées comme suit :

- mise à la disposition de certains clients des entrepôts de stockage de l'ENIE, ce qui dénote en la matière un traitement de faveur au profit de ceux-ci, qui voyaient ainsi leurs charges de stockage être réduites voire supprimées ;
- approvisionnement sélectif des clients (satisfaction excédentaire des commandes de certains clients au détriment d'autres qui n'étaient pas desservis) ;
- discrimination dans les modalités de paiement consenties aux clients puisque certains ne devaient payer qu'une avance réduite de 19 % par rapport au prix total alors que les autres acheteurs se voyaient appliquer un taux de 30 % ;

- réduction de prix pour les partenaires commerciaux achetant de grandes quantités de produits. Or, sachant que l'approvisionnement était sélectif, le bénéfice de la politique de réduction des prix ne bénéficiait qu'aux clients privilégiés.

Cette entreprise a abusé de sa position dominante voire monopolistique sur le marché que lui conférait son statut de principale entreprise nationale de distribution des produits électroniques, l'envergure de son réseau de distribution vaste et lourd (espaces de vente, d'exposition et structures de service après-vente) et sa situation financière florissante. Par ailleurs, cet opérateur n'avait pas de concurrents réels ou potentiels capables de lui disputer sa part de marché.

3) Affaire Conseil de la Concurrence contre SAFEX :

Le Conseil de la Concurrence a conclu en 2000 un arrangement à l'amiable avec la SAFEX (société algérienne des foires et expositions) afin qu'elle cesse de faire des actes discriminatoires entre ses clients. En effet, cette société publique a abusé de sa position dominante en ne faisant pas payer ses filiales auxquelles elle louait gratuitement ses espaces d'exposition et de vente alors qu'elle faisait payer les autres agents économiques (taxes).

3.2. Affaires en cours (cf. Annex 1)

4. Diagnostic quant à l'application du dispositif

17. L'application du dispositif faire ressortir les enseignements suivants :

- La culture de la concurrence :

L'insuffisance de sa propagation freine l'instauration des règles de la concurrence au niveau du marché.

Le plus grand défi auquel doit faire face l'Autorité de concurrence est principalement le manque de culture de la concurrence.

L'insuffisante émergence de la culture de la concurrence est un obstacle au développement de la politique de la concurrence. Alors que l'environnement économique et institutionnel est marqué par les règles de gestion propre à l'économie de marché, il est constaté encore que le comportement des acteurs économiques est emprunt d'hésitation et d'incertitude ainsi que d'un état d'esprit de dépendance à l'égard de l'État.

- Le marché informel :

Le marché informel a pratiquement envahi l'ensemble de l'économie nationale dès le début des années 1990 ; au début de son apparition le marché informel représentait un refuge pour une fraction de la population active à la recherche d'un revenu de subsistance.

Cependant, l'ouverture du marché extérieur a transformé le secteur informel en tant que phénomène marginal pouvant être toléré en un phénomène de société dont la part dans le PIB serait actuellement estimée à 35%.

En outre, ce phénomène qui couvre pratiquement la plupart des secteurs d'activité, exerce des pratiques occultes et frauduleuses qui empêchent le libre jeu de la concurrence sur le marché.

- La formation et l'information :

Il y a lieu de relever le faible niveau de formation des juges et plus particulièrement dans les domaines spécialisés tel que le droit de la concurrence. En effet, l'ignorance des lois spécifiques en matière économique par certains juges donne lieu à une mauvaise prise en charge des contentieux en égard à leur nature complexe.

En outre, l'insuffisance des moyens d'investigation, l'absence de formation et de mise à niveau des personnels chargés de veiller à l'application des règles de la concurrence ainsi que l'absence de l'information économique sur l'état et le fonctionnement du marché et sur les acteurs du marché ne permettent pas également de réaliser des enquêtes pertinentes.

5. Défis et perspectives

18. Sur la base du diagnostic précité et dans le but de corriger les insuffisances essentielles mises en évidence, les mesures à engager pour y remédier devraient porter sur les aspects principaux suivants :

- Développer une démarche intersectorielle d'ensemble (Conseil de la Concurrence, Douanes, Inspection des Finances ...) en vue d'assurer l'efficacité nécessaire à la lutte contre le marché informel. En effet, lorsque le secteur informel est circonscrit, les pratiques déloyales diminuent et les règles de la concurrence deviennent valorisantes ;
- Choisir les membres du Conseil de la Concurrence en fonction de critères précis de compétence pour garantir son efficacité et sa crédibilité ;
- Mettre en place un cadre général de coopération multiforme dans le domaine de la concurrence afin que le Conseil de la Concurrence puisse travailler en partenariat avec les Autorités de Concurrence étrangères et bénéficier de leurs expériences ;
- Instaurer un cadre normalisé d'échange d'informations et d'expériences dans le domaine de la concurrence entre les institutions chargées de la concurrence (administration, Conseil et autorités de la concurrence) ;
- Familiariser et ancrer dans les comportements des entreprises et des consommateurs, les nouveaux réflexes induits par les règles de l'économie de marché. En effet, la consécration et le développement d'une culture de la concurrence est de première importance pour une application efficace de loi ;
- Dynamiser les activités du Conseil de la Concurrence afin qu'il joue pleinement son rôle de régulateur du marché pour promouvoir la concurrence et assurer l'effet d'entraînement en direction des entreprises et des consommateurs ;
- Procéder à la formation de façon continue des personnels en charge de la concurrence (cadres, enquêteurs, rapporteurs du Conseil de la Concurrence,...etc.) permettra aussi de promouvoir la culture de la concurrence.
- Mettre en place un mécanisme d'observation du marché et de détection des pratiques anticoncurrentielles ;
- Constituer une banque de données dans le domaine de la concurrence ;

- Mettre en œuvre des actions de médiatisation et de vulgarisation de la concurrence au profit des institutions et des acteurs économiques en utilisant des méthodes modernes de communication tel que « internet » ;
- Instituer un bulletin de la concurrence pour diffuser, vulgariser le droit de la concurrence et assurer la publication des décisions du Conseil de la Concurrence faisant jurisprudence (Cour d'Appel, Cour Suprême, Cour d'État) ;
- Promouvoir la concurrence sur le marché. En effet cette action constitue la mission essentielle du Conseil de la Concurrence qui le met dans l'obligation d'être offensif à l'égard des acteurs économiques, de développer les instruments d'investigation de recherche, poursuite et de sanctions des atteintes à la Concurrence à travers notamment les auto-saisines qui lui permettront d'élargir son champ de compétence et de marquer sa présence sur le terrain.

ANNEX 1

DOSSIERS EN COURS D'INSTRUCTION PAR LE CONSEIL DE LA CONCURRENCE

1. Abus de dépendance économique

Objet social de l'entreprise demanderesse	Défendeur	Griefs formulées par la partie saisissante	Secteur d'activité	Structure du marché	Observation
Vente et distribution de matériels de téléphonie mobile (téléphone, puces, carte prépayer)	Opérateur privé en matière de téléphonie mobile	- Abus de dépendance économique - Rupture d'une relation commerciale ou seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées	Téléphone mobile	Le défendeur à la date des faits était le seul opérateur privé sur le marché de la téléphonie mobile	Dossier en cours d'instruction

2. Pratiques et actions concertées, ententes sur les prix

Partie concurrente	Défendeur	Griefs	Le marché	Part de marché des distributeurs	Comportement anticoncurrentiels relevés	Observation
Entreprise important et distribuant des consommables et accessoires et équipements pour l'imagerie médicale	3 entreprises ayant le même créneau	Entente sur les prix	- Cabinet de radiologie - Centres d'imagerie médicale - Structure sanitaires publiques	Aucune des 4 entreprises n'est en position dominante - les marques représentées par ces distributeurs se partagent le marché avec d'autres grandes marques étrangères	Ententes sur les prix entre les distributeurs en présence du représentant de la marque	En cours d'instruction



CONTRIBUTION BY BRAZIL

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Brazil--

1. Countries that have been actively enforcing a competition law for a relatively short time

In 1994, the Law #8884 was enacted and turned the Council for Economic Defense (CADE) into an independent agency¹. That law also improved the regulation of competition in Brazil in several other issues. The institutional changes expected with the law were consolidated during the last decade. Although the aforementioned Law has also shaped the Brazilian Competition Policy System competencies in competition matters, this questionnaire refers exclusively to Cade experience.

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

First of all, it is worth mentioning that Law # 8884/94 states that the Executive Power should have drafted a Bill on CADE's permanent staff (number, examination) within 60 days of its approval. However, it has never been drafted and this issue was only addressed in a recent Bill (pending approval) which restructures the BCPS.

In the first two-years of existence under Law # 8884/1994, CADE's structure was precarious. It was headquartered inside the building of the Ministry of Justice and had a very short staff. It was only in 1996 that CADE rented a new building for its exclusive use and obtained additional staff from the Ministry of Planning, Budget and Public Management. These two measures were paramount to the restructuring of CADE.

CADE's President at the time set a group of general and interdependent objectives ("the pentagonal strategy") to help building the institutional framework of the Brazilian competition policy. These objectives were: (i) timely decision-making (ii) promotion of competition culture, (iii) development of an international agenda (FTAA, Mercosur, bilateral agreements), (iv) harmonisation with public policies, and mainly (v) capacity building, including the formation of the CADE's Public Attorney Office.

The Internal Regulation was enacted in 1998, based upon the learning of the first years of CADE experience. It was completely reformulated in 2007.

The aforementioned objectives (ii) and (iv) were not satisfactorily reached in the first years. For this reason, in 2008 specific measures were launched in order to pursue them.

¹ CADE was created in 1962 and had different attributions, considered the interventionist period in Brazil.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Promoting competition culture was one of the targets set in 1996, as mentioned in question 1. Some of the actions taken in this regard were: (i) the establishment of the Permanent Forum for Competition Policy, (ii) the creation of CADE's website, (iii) the creation of a permanent program for students, (iv) the edition of the Brazilian Journal of Economic Law organised and published by CADE, (v) the lectures given by Cade staff, (vi) the publication of CADE's jurisprudence, (vii) the issuance of an annual report, and (viii) the issuance of "warning letters" to the business community regarding non-notified mergers.

Relative resistance was encountered (mainly after the first complex divestiture imposed by the Board) due to the long period of interventionist state and closed economy in the country.

The outcomes of these actions were positive. In five years of existence CADE stepped forward to improving competition awareness within the government, business community and society.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

It is worth mentioning that Cade is not in charge of carrying out investigations. The Secretariat of Economic Law, linked to the Ministry of Justice, and the Secretariat for Economic Monitoring, linked to the Ministry of Finance, are the agencies in charge of carrying out investigation either in conduct cases or in merger review within the Brazilian Competition Policy System.

In the early years, however, there was no Leniency Program, an important tool for cracking cartel cases. It was only in 2000 that the Law # 10149 was enacted in order to allow Leniency Agreements and search and seizure procedures, factors that have contributed to successful outcomes, sound procedures and decisions, and richer evidences.

At the same time, the Secretariat of Economic Law has developed several advocacy programs also important for the success of competition policy in Brazil.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

As mentioned above, CADE is not responsible for investigating and prosecuting.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

As mentioned above, CADE is not responsible for investigating and prosecuting.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Yes, CADE used to spend more resources than though efficient in merger control.

As mentioned in question 1, timely decisions (rapid and efficient decision-making procedures), was one of the objectives set in 1996. In this regard, the Board enacted some Regulations aiming to reduce the merger review period in order to better allocate resources.

Recently, in 2003, the "Fast-Track System" for simple cases has been introduced, which freed up resources. Currently, 75% of the caseload is being reviewed under this simplified procedure, allowing for additional resources for more complex cases. Moreover, the Commission has made consistent efforts to narrow the mandatory merger review, so as to avoid the notification of cases with negligible probability of competition harm. For instance, in 2004, the Brazilian authorities modified the interpretation of the law so that the turnover criteria that triggered the mandatory merger control (R\$ 400million, or approximately US\$200 million) started being verified only in connection to the parties (and respective economic groups) activities in Brazil. Until then, the worldwide turnover was considered. As a result, there has been a substantial reduction in the number of mandatory merger review cases.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Although merger control was the most time consuming activity in its early years, the main problem in implementing it was related to the lack of awareness of the society.

Promoting competition and the reduction of merger review period were important tools for the success of the programme.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Cade decisions can be appealed to the courts.

The Brazilian Competition Policy System is an administrative system whose acts and decisions are subject to judicial review. Indeed, the constitutional warranty that no harm or threat to rights shall be barred from judicial review empowers the parties to take any issue to be reviewed by the judiciary.

Approximately 65% of court cases are favourable to Cade, which is a fairly satisfactory rate of success. The major problem with judicial review, though, is related to the delay of merger notification and, as a consequence, the effectiveness of Cade's decision.

The average time that it takes for the cases that reach the courts to be finally decided is 10 years. (if we consider preliminary orders and injunctions, the average decrease roughly 7 years) As a matter of fact, it is an effectiveness issue to be dealt with in Brazil.

Preliminary order granted to parties in order to suspend a decision is also an issue. These examples demonstrate that private interest can apparently prevail over public interest based on the idea of existing "*periculum in mora*". However, the Public Attorney Office has been succeeding in reducing the judicial average time as well as it has been achieving better results in court.

The success is due to some actions taken by the General Attorney and his staff. The Public Attorney Office underwent restructuring, became more proactive and is investing in the credibility of the Office by means of advocacy actions.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

CADE has organised seminars as well as dedicated two editions of the Antitrust Law Journal (the Journal issued by CADE) to topics related to "competition and the courts", which were distributed to judges in charge of deciding on competition matters.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

In the first years, Cade's resources were scarce. Cade's President and some key-advisors at that time organised the Cade's Annual Report, and presented it to the Congressmen as a strategy to increase its budget. Currently, the budget is 5-6 times bigger than it was in 1996.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Cade has sufficient independence. Two organisational features were particularly important to grant independence to Cade since its early years. First, Commissioners, once appointed, cannot be withdrawn by the executive branch during their term. Second, Cade procedures are absolutely transparent, making it less vulnerable to the pressure of any particular interest group.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Recommendations

To ensure a successful start a new competition agency might count on a permanent staff. A permanent staff not only contributes to maintain the agency memory after ending the chairman's and commissioners' mandate, but also gets more experienced over the years. The decision-making person (chairman and commissioners), however, should possess a mandate and be pointed as technically as possible (less political and more technical nominations). Mandate guarantees independence from special interests. The independence might also concerns to budget and management.

The law enacted might state the procedures for administrative revision of agency's decision.

Besides, some actions might be taken in order to promote competition within the judiciary and society in order to avoid enforcement shortcomings.

At last, case prioritisation is important in a new agency in order to better allocate the scarce resources.

Pitfalls

Although the international experience may be of great importance, a new antitrust agency should refrain from applying foreign doctrine and precedents without understanding the differences between

the respective economies, markets and institutional framework. Different environments may require different approaches towards similar questions.

Under no circumstance the due process of law may be disregarded. It would compromise not only the enforceability of a specific decision, but the very credibility of the agency.

New antitrust agencies should not be tolerant with anticompetitive behaviour or mergers due to the absence of an “antitrust culture”. The strict enforcement of the law is essential for the construction of such a culture.

Antitrust authorities should not surrender to political pressure in order to benefit specific groups of interest and, obviously, corruption would be abominable.

Finally, a new antitrust agency must attempt to avoid being isolated within the Government structure. Interaction with other bodies and agencies may have as much impact on the dissemination of competition values (for instance, specific rules on sector regulations) as the decisions of the antitrust agency themselves.



CONTRIBUTION BY BULGARIA

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Bulgaria--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The changes in Bulgaria since the end of 1989 have had a major impact on national legislation. Bulgaria was both willing and obliged to transform to a market-based economy, thus it had to adopt a legislation ensuring that undertakings enjoy freedom and legal certainty while operating in an environment of effective competition with clear and fair rules. Moreover, the new legislation had to ensure that consumer interests were properly safeguarded.

On 2 May 1991 the Grand National Assembly adopted the first Law on Protection of Competition (LPC), which came into force on 21 May 1991. The LPC was aimed at promoting free entrepreneurship in the production, trade and services by introducing appropriate safeguards against abuse of monopoly position, unfair competition and other practices that threaten to distort competition in the national market. Furthermore, the LPC provided for the establishment of an independent specialised institution responsible for its implementation: the Commission on Protection of Competition (CPC). With a view to the specificity of competition law, the LPC stipulated that CPC members must be lawyers and economists with proven professional expertise in the relevant area.

In those early years, the notion of competition was just beginning to emerge as a value in the political and economic reality. For this reason, the newly established CPC encountered numerous challenges and obstacles in its effort to promote competition and enforce competition law. It was provided with office space and set about recruiting educated professional and administrative staff. At first the human capital was quite limited – only about 40 people were employed in the CPC, and they were not specially trained in competition law and policy. The resources available were also scarce and equipment was acquired gradually and in the course of the years.

The CPC adopted its Organisational Rules and established Directorates specialised in major economic sectors. Those Directorates were as follows: “Heavy Industry”, “Light Industry”, “Foreign Trade, Science, Education, Communications”, “Construction and Transport”, “International Cooperation”, “Normative Economic Impact”, “Information Systematisation and Processing”, “Administrative and Business Activities”.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

In the first years since the establishment of the CPC the awareness of the general public, including the business community, lawyers, politicians and civil servants about competition law and the benefits of competition was strongly lacking in Bulgaria. Building such an awareness and promoting competition culture was quite challenging and difficult. However, the CPC received great support from USAID – this was the first international organisation which invested time and resources into the CPC. Thanks to USAID's outreach activities and technical assistance, the CPC organised various public seminars and discussions to promote its work and policy. This was a virtually important determinant of the successful introduction of the competition regime. In the course of the years, the Commission was gradually able to get the public realise the benefits which can arise from competition and attract many followers to its cause.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?

The first Bulgarian Law on Protection of Competition was adopted at a period when Bulgarian economy was undergoing transition from planned to market economy. It was a time when state monopolies were prevailing in all major economic sectors and free entrepreneurship and market initiative were substantially hindered. For this reason, the earliest version of the LPC did not contain any provisions specifically dealing with abuse of dominance or cartel agreements (cartels involve the active participation of several players and the presence of monopolies obviously excludes the existence of cartels). At that time, fighting the abusive practices of state monopolies was the biggest priority of the CPC. However, the changes in the Bulgarian economy – growing macroeconomic stability, trade liberalisation and privatisation of state owned enterprises, called for substantial review and amendment of the existing competition law. Another factor which necessitated changes in the law was the obligation for approximation of Bulgarian legislation with the *acquis* under the Europe Agreement between the European Communities and their Member States, on the one part, and the Republic of Bulgaria, of the other part. The objective was to ensure full coherence of Bulgarian legislation with the Community's competition *acquis* and establish robust legal basis for efficient enforcement of competition rules, including Articles 81 and 82 of the Treaty establishing the European Community (the EC Treaty). This was thought necessary with view to Bulgaria's future accession to the EU. Thus, in 1998 a new Law on Protection of Competition was adopted which specifically dealt with abuse of dominance and cartel cases. Chapter III of the newly adopted LPC dealt with agreements between undertakings, decisions of connected or joint undertakings, as well as concerted practices of two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition on the relevant market, while Chapter IV prohibited actions of undertakings enjoying a monopolistic or dominant position that have as their object or effect prevention, restriction or distortion of competition. Only after the enactment of the new competition law was the CPC able to make its first steps in the fight against abuse of dominance issues and cartel agreements.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

Although the first Law on Protection of Competition adopted in 1991 contained provisions on prohibited agreements, they only concerned the attainment of a monopoly position as a consequence to such agreements.

Even after the adoption of the new Law on Protection of Competition in 1998, the anti-cartel program was ineffective and the CPC encountered difficulties when dealing with prohibited agreements. The main challenges the CPC faced in anti-trust enforcement comprised gathering of evidence during the investigation; insufficient awareness of the economic players of the competition legislation dealing with prohibited agreements; a practically inactive leniency program due to the low sanctions which did not have a prohibitive effect on the violators. Moreover, the CPC did not have the power to conduct dawn raids in order to search for and seize information relevant to the disclosure of cartels. The 2003 amendments in the law vested the Commission with the power to carry out dawn raids and gradually it was able to achieve some progress in its fight against cartels.

Only recently have the investigations of cartel activities resulted in imposing pecuniary sanctions permissible by the law. However, even those may not have the anticipated deterrent effect since the fines are but an insignificant share of the violators' turnover. For this reason, some further changes in the legislature were needed in order to run a harsher anti-cartel policy. The new Law on Protection of Competition which was promulgated in the State Gazette on 28 November 2008 and entered into force on 2 December 2008 envisages the sanctions to amount to up to 10% of the companies' turnover for the preceding year. This would ensure a stronger incentive for the violators to comply with the law in order to avoid possible sanctions.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Bulgarian economy is relatively small and especially in the first years of transition its markets were highly concentrated and monopolistic. It is obvious that mergers can lead to further concentration, because they usually reduce the number of market players, and mostly increase the market shares of merging entities. For this reason, the authors of the 1991 Law on Protection of Competition thought it necessary to include provisions on merger control with the aim to protect consumers from the negative consequences of mergers and to prevent the abuse of market power. It is important to note, however, that those provisions dealt only with the attainment of market power and their enforcement in practice was quite ineffective.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?

It would not be just to say that merger control was more resource-consuming, simply because in the first years since the establishment of the CPC it was ineffective. In the transition period there were but a few private owned enterprises and merger notifications were the exception rather than the norm.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The greatest challenge for the Commission was to promote competition culture and build an awareness of the importance and value of competition law. It took some time and effort to teach the economic operators to notify the CPC of planned concentrations. Gradually, the merger control programme was becoming more and more efficient, but the greatest progress was achieved after the 2003 amendments in the law.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

The CPC decision can be appealed before two instances of the Supreme Administrative Court – before panels of three and of five judges of the College. Although in some cases the Supreme Administrative Court has overruled CPC decision, most of the Commission's rulings have been upheld by the Court, timely and efficiently.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

In the first years of competition enforcement, the judges of the Supreme Administrative Court had little or no knowledge of Competition Law. For this reason, the CPC organised and held numerous seminars and workshops to inform judges and keep them up to date with the Commission's activities and policy. The CPC regularly publishes and distributes to various target groups translated decisions of the European Court of Justice which has proved to have an enormous influence on promoting competition law among the judges.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Upon its establishment, CPC had scarce resources, both financial and human, for the difficult task that lay ahead – the protection of competition and the interest of the economic operators in all sector of the Bulgarian economy. However, thanks to its firm competition policy and the promotion of competition culture, the CPC was able to convince the political elite and the society at large of the importance of its task and in the subsequent years its budget grew to an adequate amount.

1.8. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Ever since its establishment, the CPC has been an independent and specialised state body funded through the state budget. The Commission has always enjoyed political independence to effectively apply competition law and policy.

1.9. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

2. Countries that have been actively enforcing a competition law for a longer period

1. For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.

For a new competition agency, it is very important to allocate resources for the education of its personnel. In order to run a clear competition policy, its staff must be well-trained and knowledgeable. Donor programs and outreach activities of major international organisations are a valuable tool in this respect. Also, the competition agency should impose heavy sanctions on the violators, making it clear that anticompetitive behaviour will not be tolerated in any form. It should also strive in any way possible to promote competition culture and build awareness in the society of the importance of its work.

2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

The competition agency should not distract itself with minor and insignificant cases. Rather, it should have the courage to dive into difficult issues, investigate and reach conclusions on cartels and complex cases such as joint dominance.



CONTRIBUTION BY CHILE

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Chile--

Despite the fact the FNE was created more than 30 years ago, we will answer this questionnaire as a young agency, due to the fact that deep organisational and legislative changes started taking place only last decade. These changes have amounted to the transformation of the FNE's substance and image: formerly perceived as a relatively low profile institution with a rather unimportant mission, it now stands as a nascent, effective and well respected competition agency, both locally and abroad.

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

As a young agency the FNE has faced several organisational challenges. Starting from its location, the FNE is placed in two different floors in the same building: floors 12° and 2. This can look as a very pedestrian detail but it does in fact have an impact in terms of the way people communicate and work together. Difficulties can also be observed when it comes to the filling of senior positions. This is due to the relative low income assigned to their posts, in comparison to what the private sector may offer for someone of the same experience. The same is true with respect to retaining senior professionals.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

The FNE has organised the Competition Day since 2003. This yearly event gathers government agencies, academia, business, professionals, and general public which work relate to competition.

Also, the FNE is working closely with the academia. In this regard, in August 2008, the FNE and the School of law's Competition Centre of the *Pontificia Universidad Catolica de Chile* signed a Cooperation Agreement for the Development and Implementation of Research Projects.

Furthermore, the FNE is participating in the ICN Competition Advocacy working group in order to get acquainted with the best to increase public awareness of the benefits of competition.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

Regarding prosecution of abuse of dominance and non-cartel restrictive agreements, the main problem was the confrontation with traditional arguments such as constitutional and subjective rights (property rights and freedom of enterprise).

As regards to both prosecution and investigation, the FNE has encountered problems when dealing with regulators. Here, the main source of conflict has been the definition of each agency's authority. Moreover, the FNE has had to deal with policies aiming at the promotion of SMEs and an environment customarily biased towards their protection.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The most difficult part of implementing an anti-cartel programme has been the lack of legal tools to support the development and implementation of investigative strategies. The implementation of an anti-cartel programme is still a work in progress, pending the passing of an amendment to the Chilean Competition legislation that grants more investigative powers to the FNE, and the creation of a specialised FNE Cartel group.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

The main concern that arises from the lack of pre-merger control is that, in principle, any issue that comes up in the context of a merger has to be dealt with as a controversy. Chilean legislation does not provide for compulsory pre merger notification, and therefore the FNE may either deal with it in a controversial manner before the tribunal, to prevent the merger from taking place; or in a non adversarial procedure, also before the Tribunal, to establish conditions for the operation of the merger once it has occurred

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was

it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

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1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

In order to answer this question it must first be stated that the Chilean Competition System is made up of two bodies, namely:

1. The *Fiscalía Nacional Económica* (FNE or National Bureau of Economic Prosecution), an agency with investigative power, in charge of the prevention and investigation of the offences against the competition statute (DL 211). As the FNE decisions are whether to initiate an investigation, and whether to prosecute the perpetrator of an anticompetitive conduct before the Competition Tribunal, they cannot be appealed before the Courts.
2. The *Tribunal de Defensa de la Libre Competencia* (TDLC), a competition court which is part of the judiciary system, and as such empowered to sanction anticompetitive conducts.

As follows from the paragraph above, what can be appealed are the final decisions of the Competition Tribunal before the Supreme Court of Justice. Ever since the creation of the Competition Tribunal in 2004, 27 of a total of 77 TDLC's Decisions (roughly one third) have been complained to the Supreme Court. Of these 27 decisions, 55.6% have been upheld by the Supreme Court, 22.2 % were overturned and 22.2 % were settled with relief. These figures amount to a very gratifying outcome indeed and point at the fact that both the agency and the TDLC have been gaining experience and expertise in the investigation, construction and analysis of competition cases.

It is also worth mentioning the fact that in 2008 the usual period of time taken for a Supreme Court's opinion on a TDLC's Decision decreased from an average of 5 months to 4 months.

This system allows for very knowledgeable decisions by the Tribunal. The main drawback of the system is that, as the appellate body for the Competition Tribunal's final decisions is the Supreme Court of Justice, this latter court is not very acquainted with competition issues, or with the economic analysis that may entail the examination of any given case. This in turn has resulted in several Competition Tribunal rulings being revoked by the Supreme Court of Justice. Moreover, the Supreme

Court of Justice has not always agreed on the amount of the fines imposed by the TDLC. Actually, out of 11 TDLC's decisions imposing fines, the High Court has overturned two of the fines, and reduced three others in approximately 29%.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Currently, the FNE does not have a formal programme for interacting with judges. However, the FNE is holding preliminary meetings aimed at developing such programme.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

As stated above, the FNE has had difficulties when filling and maintaining senior officers. This is due to the relative low income assigned to their post, in comparison to what the private sector may offer to someone of the same experience.

Also, the load of cases exceeds the capacity of personnel assigned to handle them.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Yes. Despite the fact the head of the National Economic Prosecutor's Bureau is directly appointed by the President of the Republic, the members of the Competition Tribunal are not. Given that it is the Tribunal and not the FNE the decisional body, the decisions may not be biased by the Executive. Bearing in mind that in other systems the competition agency can even impose fines, it is important to underline this feature of our structure. What has happened in practice is that there has never been any kind of influence of the executive over the way the National Economic Prosecutor's Bureau's Head conducts his job.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

The FNE considers that the most important actions to ensure a successful start are getting enough resources for the agency operation, hiring highly specialised human resources, providing capacity building, establishing a prioritisation of the agency goals and carrying out advocacy activities to create public awareness.



CONTRIBUTION BY CZECH REPUBLIC

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Czech Republic--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Czech Office for the Protection of Competition (hereinafter referred to as “the Office”) started its activity on 1 July 1991. Since the very beginnings the Office’s headquarters has been in Brno, where the Constitutional Court, the Supreme Administrative Court, the Regional Court and the Supreme Public Prosecutor’s Office have also their seats. The Office had a branch in Prague as well.

Until 2007 the Office’s headquarters were located in the building of the Constitutional Court. The fact that the Office seated within the premises of another institution brought some troubles. Lack of convenient premises for meetings with undertakings and their lawyers especially in cases of complex mergers, but also for meetings with companies’ representatives in other cases, can be mentioned as an example. Further, the Office was unable to organise seminars or conferences. Prague branch had to change its seat several times which was highly inconvenient for the parties to the proceedings and their lawyers. New seat of the Office, built during the years 2007 – 2008, meets all the requirements for the modern public administration body, since it provides high-quality and pleasant working conditions with sufficient number of meeting rooms including a large conference room for organizing international conferences.

Working places for the Office were delimited from several ministries at first, especially Ministry of Economy, and thus it was easier to gain expert employees with public administration working experience. Due to the fact that the Office dealt with so far unfamiliar and complicated matters, most of the staff had left the Office soon and new staff was hired, both with economic and law education. Proportion of these professions has been set approximately to fifty-fifty. It has to be mentioned that there was an expert group established in 1989, i.e. even before establishment of the Office, within the Ministry of Finance, which was, along with several competition lawyers, preparing the competition act and some general concepts (relevant market definition, cartel agreements classification etc.), which were used during the beginnings of the Office’s enforcement activities.

Organisational structure of the new Office generally followed the model of German *Bundeskartellamt*. In fact, the biggest problem lied in prompt training of a sufficient number of qualified specialists in the area of competition law, a subject that had not been taught for decades at Czech universities, a field where neither relevant judicature, nor specialised literature had been introduced, and which represented completely new area in law.

In the beginnings it happened many times that new young recruits, having gained an experience with the Office’s work, were leaving to the private law firms or to the courts. Reason for that was, as in many other countries, insufficient financial valuation. Low salaries were also reason for which the Office failed to hire external experts.

It should be mentioned that the specialised training was accelerated; already in 1991 the Office provided its employees with highly specialised and long-term training in cooperation with FTC and DoJ (USA) and many expert seminars, prepared by the *Bundeskartellamt*. Continuity of the professional growth of the staff was also secured through the participation in the OECD meetings.

From the very beginnings of the Office's existence a library has been established along with information system enabling the intranet connection within the Office.

Recommendations

- Establish a group of experts on competition law and finalise draft of the competition act before the taking up of the competition authority's activities
- Assignment of an experienced, reputable and respected manager
- Secure an adequate level of salaries and do not focus only on young staff, hire older and more experienced experts
- Profit from benefits of external assistance (OECD, UNCTAD, EC)
- Find an adequate seat for the authority
- Establish a library
- Cooperate closely with universities

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Before 1989 the economy had been centrally-planned, which didn't take into account the needs of competition control (as the competition virtually didn't exist) and establishing of the Office therefore meant a wholly new phenomenon among the rest of the central state administration bodies.

Legal awareness was in the start-up phase of the Office's activities on a very low level both among the undertakings and lawyers. This resulted into frequent confusion among cases of unfair competition which fall within the courts powers, cases which fall within the powers of different administrative bodies or municipal bodies and cases of protection of competition. As an illustration – out of total number of 169 complaints solved in the 1992 only 76 concerned the antitrust.

Moreover, cooperation with the representatives of the consumers' community was not efficient enough. The Office failed to explain comprehensively obvious achievements of its interventions losing the possibility to extend the interest of people in the Office's activity and sub-sequent support of the general public in securing the protection of competition.

To ensure the general awareness of the public as broad as possible, employees of the Office had published promptly annotation on the act, using recently gained experience from the decision-making practice. Annual report from the 1993 had stated, as one of the priorities, necessity to continue in introducing the general principles of the protection of competition to the public.

Number of press releases related to the activity of the Office increased significantly and the general public was more informed about the current activities of the Office. What should be mentioned is the decision of the Office on prohibited agreement in the area of television broadcasting of football matches, agreement on prices concluded among the coffee producers or agreement on prices in taxi services. Issuing the decision, which enabled the TV companies to make records of the football matches, provided millions of football fans with proof of real advantages which can be expected from the effective competition enforcement and convinced the general public that the Office's interventions are meaningful.

Furthermore, the competition advocacy has become an integral part of the Office's activities since the first years of its operation. Especially the process of privatisation was regarded as unique opportunity to crush or at least to weaken monopolistic or dominant position of then existing companies and to avoid emergence of newly established companies with monopolistic or dominant position in the market. That's why the Office made its efforts to obtain powers to issue its opinions on particular privatisation projects in the times of shaping the new structure of Czech economy. In these opinions the Office strived to enforce pro-competitive positions (it was especially necessary to assess the analyses of founding ministries on "potential abuse of companies' position according to the relevant market share in the period of following two years" or "competitive ability of a new enterprise". This was achieved on the basis of the governmental decree, which was put through by the Office).

In 1992 total number of 200 analyses introduced by the particular founding ministries were assessed and approximately 5 % of the Office's positions were negative regarding the pro-posed way of privatisation and potential creation of an entity with dominant position (mainly in the area of food industry). Enhanced competition advocacy played its role in the important transformation intentions, e.g. in energy sector.

As early as after one year of its existence the Office prepared a recommendation for the economic ministers' meeting to (according to the European Energy Charter) unbundle the dominant electric power producer from the transfer network operator and to create an independent electric power trader.

Through the competition advocacy the Office also supported the unbundling of the communications sector into telecommunications, radio-communications and postal services.

As successful case (i.e. when the competition advocacy proved to be a suitable tool) should be mentioned the case of possible abuse of dominant position of the *Česká pojišťovna* company through setting high rates of compulsory insurance for motor vehicles. The Office initiated an administrative proceeding with the insurance company and at the same time it elaborated an analysis and assessment for the economic ministers' meeting. Recommendations included in the document were fully accepted by the meeting.

Moreover, competition advocacy through the "passive legislation" has been a very effective tool in enforcing the pro-competitive standpoints (the Office has been the consultative body in the legislative process since 1991).

Two years after the initiation of its activities the Office elaborated, for its own purposes, an internal methodology “COMP”¹ for assessing the market structures in process of privatisation. It was an original methodology for indicative assessment of the competition environment quality in particular relevant markets, based on quantification of 5-criteria quantities, used (with several modifications) in USA and some OECD countries, for analyzing the market power of companies and conditions of their entry in the market, including the recognition of the level of market concentration in particular area (according to HHI). Barriers to entry are observed, such as fund exigency, innovative dynamism, existence of patent rights, vertical integration etc. After the “privatisation wave” the use of the COMP methodology was abandoned, though its practical application was really useful.

Recommendations

- Explain the Office’s powers and scope of activities from the very beginning
- Cooperate with consumers (consumers associations)
- Promptly elaborate annotation on the act, using recently gained experience from the decision-making practice
- Use media to bring attention of the general public to the cases which may influence wide range of consumers to demonstrate utility of the Office’s actions
- Use competition advocacy during the process of privatisation and insist on participation of the competition authority in specialised committees and legislation process
- Promote sectoral organisation in the area of energy and telecommunications in compliance with OECD standards
- Elaborate and use any methodology for assessment of competition environment (see the “COMP” methodology) as an internal rule of thumb in the privatisation process

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

1 The COMP methodology

In the 1990s, the Office created and applied a simple scale for measuring competition. This “COMP” system combined five measures:

- HHI index,
- capital requirements for entry,
- innovation (including access to intellectual property),
- vertical integration, and
- residual or excess capacity.

A value from 1-5 was applied to each element, with higher numbers related to greater competition. Observation of conditions in markets implied that competition was sufficient where the total score for a market was 16 or higher. The COMP method was used mostly in privatisation decisions. It was discontinued, at least as a regular practice, after about seven years, after the main privatisation wave had been completed. Any such measure could only be used as an internal rule of thumb. As a creation of the Office, not of the law, it could not be used to justify a decision; by contrast, something of similar authority adopted by the European Commission might be accepted as authority in Czech courts.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

In the first year of the Office's operation 15 alleged cartel agreements were examined, 14 out of that number assessed as prohibited agreements. Such a relatively high number reflects very low undertakings' awareness of the competition law at that time. On the other side, the Office had easier position in revealing such anticompetitive agreements. This period didn't last very long and detection of prohibited agreements has become more and more difficult or even – without application of Leniency program or similar tools - exceptional.

During the start-up phase the Office for example investigated a cartel of driving schools, while operators themselves provided the Office with the written agreement on tuition fees, signed and stamped by all parties to the agreement ("naive cartel"). Meanwhile it became obvious that revealing cartels would be very difficult without testimonies of witnesses, who left the companies for some reason and were aware of the cartel agreement, having contacted the Office and provided necessary information about the cartel. In one case, a witness had described exact room and particular table socket where the signed cartel agreement supposed to be, yet the Office didn't have any legitimate tool for dawn raid and therefore the evidence couldn't be obtained.

The first leniency program was adopted in 2001. Even though the material rules were drafted according to the then applied EC leniency program, it brought very poor results. The reason was lack of procedural guarantees for applicants, the ambiguity of some rules and reluctance of the Office to issue a preliminary statement of provisional applicability of the leniency in the given case. Under the 2001 leniency program, there were no significant enforcement matters mainly due to those reasons.

A new leniency policy was adopted in 2007. Compared to the previous program of 2001, it promises greater legal certainty to applicants who qualify. Unlike the previous program, the current leniency policy applies only to horizontal agreements. This has brought substantial progress in number of applications – five in 2008.

Vertical agreements represented a significant part of investigated agreements distorting competition, often in the form of applying different conditions when certain undertakings were disadvantaged (meat supplies, tires supplies, grass-seed supplies etc.) or in the form of output restriction obligations (agricultural products). Three of the Office's proceedings during the first year of its existence concerned decisions of chambers or professional associations (e.g. dental operations pricelist or real estate agencies' operational rules). Fines imposed in that period were very low, maximum CZK 1 million, but usually around app. CZK 50 thousand.

According to the original legislation, the parties entering any agreement that fell within the prohibition (even if the conditions for exemption were fulfilled) had to seek consent from the Office. Later, the Office had to grant individual exemptions in the given cases. Both systems might be appropriate in the early stage of competition enforcement, where there is a lack of awareness, expertise and experience with the competition law. It gives the parties higher legal certainty and the Office was informed of many agreements that might have been anticompetitive. However, at the same time, this system was administratively burdensome and majority of resources were devoted for this category, without possibility to focus and spent appropriate resources on real dangers to economy –

hidden and sophisticated hard core cartels. Therefore, we think, that for the later stages of competition enforcement, the system of automatic (legal) exemption from the prohibition is more appropriate.

There were two specific features of the competition law of 1991, that concern the abuse of dominance that are not very useful in later stages of enforcement, that may, however, have positive effect in the initial stages. First, there was a legal irrefutable presumption that under-taking with 30 % market share was holding a dominant position. This system might be easier for new competition jurisdictions because it provides clear cut threshold rule. On the other hand, the application of this rule might be, in many cases, in contradiction with the economic theory and real situation in the market. Identification of dominance only according to the market share of 30 % proved to be problematic even in reality. An extreme example – under this system, there could be three undertakings with dominant position in the single relevant market. This provision of the act was amended in 2001 and standard proving of the dominant position according to the market power was introduced.

The second specific feature was the notification obligation – any undertaking, holding or gaining 30% market share (and thus dominant position) had a statutory duty to notify this to the competition authority. This system has contributed to the increase of the general awareness of the competition law among the undertakings as well as it provided the Office with detailed information about the structure in the every single market. However, the criticism of the 30% threshold system is fully applied here, as well. This provision of the competition act was abolished with the first amendment to the act. Looking backwards it is good to know that a certain positive aspect emerged in the fact that many of the undertakings, especially in the time of high concentration of all sectors, became more familiar with the competition law.

In the first year of the Office's operation 20 administrative proceedings were initiated on potential abuse of dominant or monopoly position. Most frequent form of an abuse of dominant position was mere non-announcement of such position to the Office (14 cases in total). It proved, that many undertakings were unable to assess their market share or even weren't aware of the obligation to report their dominance to the Office.

There was a very high number of cases in the electricity sector, telecommunications or water supply during the first year of the Office's existence. Various types of cases were investigated: restraints to enter the market, enforcement of unfair conditions (energy), dissimilar conditions in installation of telephone stations, discriminatory conditions on petrol stations' operators, bundling (telephone line assignment subjected to the fax machine purchase).

During the start-up phase the number of the Office's interventions against local monopolies, with an immediate negative impact on consumers, was increasing. The Office stood firmly against local electric power and natural gas distributors who refused to conclude contracts on supplies from supply points unless the applicant paid the dues of the previous consumer. In-sufficient legislative and regulatory framework had also contributed to this situation.

Therefore, The Office addressed appropriate ministries (with competence in the given area) referring to the described pitfall and outlining the powers and competences for particular regulators in order to establish essential conditions for business in these markets. In the process the cooperation with energy and telecommunication regulators has been established, which contributed to the cultivation of business manners in these particular sectors.

Recommendations

- Adopt leniency program with real guarantees and clear rules

- During the cartel investigation, actively use the testimonies of former employees of investigated companies, especially those who were forced to leave
- Establish provisions enabling dawn raids while drafting the competition act
- Include the market power as a criterion for dominance into the competition act
- Local and regional monopolies create very negative and immediate impacts on consumers
- Elaborate public notice (or any other transparent document) on fines, defining evaluation of particular infringements of the competition act since the very beginning (enabling imposition of fines of adequate amount)
- Endeavour to create regulatory mechanisms in the area of natural monopolies

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Merger control has been enabled in the Czech Republic by the Act on the protection of the competition from the moment of its adoption in year 1991. Merger approval was necessary in cases when concentration distorted or was able to distort competition and market share of the merging undertakings exceed 30 % of total turnover of the product in the Czech Republic. Merger approval was also possible in cases when benefits for competition over-weighted the harm caused by the distortion of competition. In the beginning the Czech competition authority did not have a specific department that would deal only with concentrations. Merger review was conducted by the employees of the department that was responsible for the specific sector within organisation structure and in this time such organisation did not pose any problems.

During the start-up phase of the Office the privatisation of industry was in process, which meant that large number of mergers (about 50 per year) concerned the entrance of a foreign or a Czech investor into previously state companies. As many sectors were concentrated and many companies were in dominant position, the entrance of strategic investor was not able to influence market structure (except for a limited number of mergers of two independent undertakings). Nevertheless strategic investor could already have its own affiliated company in the Czech Republic and for this reason the merger was able to influence competition. Therefore the Office strictly required guarantees that possible harm would be compensated by benefits for competition. Such commitments were supposed to serve as reasons for economic benefit of the merger and were reviewed by the Office.

After two years of the merger control it was obvious that the crucial commitments for the merger approval were: securing of investments in reconstruction and modernisation of production for new technologies, securing the entrance into foreign markets, securing of know-how and technology.

Subsequently, when the Act was in force for 8 years, works on a new competition act aiming at the full compatibility with the EU competition law were started. The area of merger control was regulated in conformity with the Council Regulation 4064/89 as amended by the Regulation 1310/97. A new definition of concentration of undertakings, new notification criteria based on the turnover of the merging parties and fixed deadlines for issuing of the decision, etc., were stipulated.

The new act was adopted in 2001 and the changes in the area of mergers caused an increase in the number of decisions (about 4 times higher number) and in 8 cases the Office imposed structural remedies and commitments. A new trend was recognised, the third parties started to ask to be considered as a party to the proceeding in approval of merger or the merging parties asked for exemption from stand still clause. While reviewing mergers the Office made use of the decision-making practice of the European Commission, the European Court of Justice and other EU competition authorities.

The Office also issued large number of expert opinions to methodological questions concerning mergers and conducted number of consultation in this area. In 2003 the Office drafted another bill which aimed at an effective application of national and Community law after the accession of the Czech Republic to the EU. Significant changes concerned a new definition of notification criteria. According to the previous legal state it was necessary to notify also mergers with negligible impact on the Czech market. According to the amendment to Competition Act of 2004 only mergers with clear local nexus to the national market were to be notified, which enabled the Office to concentrate on reviewing the most significant merger cases. Following the adoption of recast Council Regulation 139/2004 on the control of consent-rations between undertakings, a full transposition of Community legal regulations was proposed – especially the application of substantive test for the merger review. An explicit change in the concept was carried out according to which the merger will or will not be approved, while the change is represented by adding combined dominance test and SLC test (substantial lessening of competition); only dominance test was used before. This enables the Office to block a merger with possible negative impact on competition, regardless if they were caused by creation or strengthening of dominant position of merging parties or by any other negative factors of such merger (especially non-collusive oligopolies). The new act entered into force on 2 June 2005 and due to specificities and demands of the merger approval procedure the new merger department was established within the Office.

Recommendations

- Give the competition authority merger control powers regardless the size of the country
- Establish an independent merger control department in order to tackle the specificity and intensity of economic analysis
- From the very beginning outline a clear definition of concentration of undertakings and notification criteria based on turnovers of merging parties; turnover criteria must be continuously reviewed and adapted to local nexus
- Apply experience of the European Commission and the ECJ and CFI
- Provide the undertakings with expert consultations
- Make the approval procedure simple
- Consider whether to apply only dominance test or only SLC test or combination of both
- For less complicated and complex merger cases introduce certain level of flexibility – simplified procedure

- Engage in pre-notification talks.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Until 1 January 2003, when the new Act on the Administrative Judiciary came into force, it was possible to appeal the decision of the Office to the High Court in Olomouc. There was no possibility of further appeal against the decisions of this court (with the exception of Constitutional Court). The High Court had a senate focused on competition issues and this senate was chaired by a lawyer who used to work for the Federal Office for the Protection of Competition of the former Czechoslovakia. This fact facilitated decision-making and above all dealing with a particular economic category of law – relevant market. After 1 January 2003 new system was established within the judiciary which extended the possibility of appeal. In the first instance the Regional Court in Brno decides on the appeal against Office's decisions and in the second instance the Supreme Administrative Court in Brno decides on appeals against Regional Court's decisions. The undertaking (plaintiff) may appeal the decision of the Supreme Administrative Court at the Constitutional court.

There is only one senate dealing almost solely with competition and public procurement issues at the Regional Court in Brno. To the contrary, the competition agenda is dividend between number of senates at the Supreme Administrative Court (at present, there are five non-specialised senates that can be assigned a competition case)

The courts are concerned principally with legal issues, but the courts may also examine the sufficiency of the evidence. The reviewing court may affirm the decision or cancel it and re-turn the matter to the Office for further proceedings. The court does not have the power to enter its own decision contradicting the Office's finding about liability. The court may, however, reduce the level of a fine.

The rate of success in court cases is simply expressed fifty-fifty. For example in 2008 (till the beginning of December) the Supreme Administrative Court ruled in 10 cases, out of which it overruled the appeal against the Office's decision in 4 cases and sustained it in 6 cases. The Regional Court in Brno ruled in 10 cases as well, out of which 5 appeals were overruled and 5 sustained. The average duration of judicial proceeding before the Regional court is approximately 2 years. Recently, it has not been exceptional that the ruling of the Regional Court was overruled by the Supreme

Administrative Court and remitted for a new decision; out of 10 judgements of the Regional Court appealed by the Office, the Supreme Administrative Court has ruled in favour of the Office in 8 cases.

After the accession of the Czech Republic to the EU it was possible to use the expert counselling help of a twinner – competition expert from Italy, who acted within the Czech competition authority. On this occasion the twinner organised several competition training courses for judges. The Office did not develop a special programme for interacting with judges but the Office regularly organises various seminars and conferences dealing with new trends in competition and the judges are always invited to attend. At the same time the experts from the Office are often invited to take part in events focusing on training of judges in the area of competition law (with respect to their independence). A mid-term training of judges in Community competition law is planned for the future, in which the Office would no doubt participate as a natural domestic partner.

To sum up, the Czech Republic has an experience with both one level, strictly specialised, and centralised jurisdiction of courts in competition matters (till 2002), on one hand, and system of two-level, non specialised and partly decentralised jurisdiction, on the second hand. Both systems have their pros and cons. Due to the complexity and low frequency of competition cases, some specialisation might be necessary. However, at the same time, if the specialisation is too intensive (so that there is only one senate deciding all competition cases), there might be a risk of dominance of a single approach without any real possibility to seek remedy. In such cases, there is certain risk of subjective point of view of an individual judge, which is in some cases hardly separable. The right of both parties (incl. the competition authority) to appeal the decision of first instance court seems to be vital feature. In addition, we think, that at least at upper instance, the competition cases should be distributed among more senates in order to prevent possible monopolisation of thinking in competition issues.

Recommendations

- Multi-instance judicial review of competition authority's decisions is in the interest of undertakings
- Special competition senate within the court might be an advantage, but avoid a monopolisation of appeals
- Relatively long time that it takes for cases that reach the courts to be finally decided seems to be an obvious phenomenon, occurring in many countries
- Try to establish a partnership with judges, share experience with them, participate in their training and invite them into the expert debates on the competition matters.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

In the chart below there are financial resources destined for the Office from the state budget and numbers of employees in selected years.

Year	Approved budget (in millions of CZK)	Number of employees
1992	16 645	52
1996	35 476	98
2008	142 000	126

It is evident that the Office did not have sufficient financial resources at the beginning of its activities. While in 1996 the budget for almost 100 employees amounted only to 35.5 million CZK, in 2008 it is 142 million CZK for 126 employees. It is possible to say that the current budget of the Office is comparable with standard budget of similar state authorities.

Personal resources to begin the agency activities were sufficient in their number, but the expertise lacked. Knowledge of competition was missing in the Czech Republic in general and moreover many employees were new graduates from universities. This perception of the Office as the time-limited starting point after graduation and also rather strict working environment caused high rate of fluctuation for many initial years, bringing about inconsistency of practice. Only in last few years (under new management) the situation has improved – by introduction of better working environment, more competence on lower decision-making levels, better perception of the Office in public (openness) etc.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The Czech Office for the Protection of Competition commenced its activity on 1 July 1991. The Office was seated in Brno, not in Prague, the centre of all state administration bodies, which should be a declaration of independence of the new competition authority's decision-making. In 1992 the Office was replaced by the Ministry of Economic Competition. The change was justified by the then running economic transformation, and, above all, by the role performed by the Ministry in the privatisation process, because thus the Ministry was allowed to interfere more effectively through its activity in the privatisation process.

At present the protection of competition in the Czech Republic is institutionally secured by the Office for the Protection of Competition in Brno. The Office began its activity under this name from 1 November 1996, following the activities of the former Ministry of Economic Competition, whose competences were preserved in full. The Ministry was transformed into the Office after parliamentary election in June 1996, when changes in the structure of central bodies of state administration were decided. The institutional change brought about the establishment of an independent competition authority.

The Office is the central body of state administration, fully independent in its decision-making activities; none of the bodies of state administration, including the government, can interfere with the decisions of the Office and political control over its decisions is out of the question. The Office, however, is bound by governmental regulations assigning both legislative and non-legislative tasks to it. The Office is headed by the Chairman, appointed by the President of the Czech Republic on the

proposal of the government. The Chairmanship is terminated when the Chairman resigns from his function, when his term of office expires, when he is divested of his capacity to legal acts or when he is found guilty of an intentional criminal act.

The Office proved its independence within the course of several merger cases review that stemmed from the privatisation decisions of the Government. For example, in 2002, the Office conditioned the approval of merger of ČEZ/electricity distributors with several substantive structural remedies that were non-compliant with the original privatisation project.

The Office also cooperates with regulatory bodies (energy, telecommunication) but is independent on them; the relationship between the Office and regulatory bodies is not regulated by law of the Czech Republic. The Competition Act applies to all sectors without exception. Whenever the Office carries out investigations in the areas subject to regulation it requires the opinion of the relevant regulatory body to the case in question. The regulatory body stand-points are non-binding regarding the decisions of the Office, just serving as a one of support materials for final decision in the case. According to the administrative procedure, each legal opinion expressed in the Office decision must be duly justified.

The above description shows that the Czech competition authority has all the prerequisites for a completely independent agency. Its initial status of a ministry was required by the general situation in the Czech industry undergoing privatisation in many sectors.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

See recommendations at the end of each chapter above.

Some general recommendations in conclusion:

- Raise Public awareness of competition rules and the importance of their enforcement. Keep both general and expert public informed about the actions and decisions of the competition authority. Promote expert discussion with private sector about the various concepts of competition policy, it provides you with necessary feedback.
- Establish good relations with other state authorities in order to implement efficient competition advocacy, but keep independence of the competition authority.
- Get in touch with more advanced and experienced competition authorities and international organisations focusing on competition in order to learn the best practice and avoid pitfalls they have already avoided.
- Create flat organisational structure (not too many managing levels) providing space for communication among individual departments and employees and get ready for flexible changes if needed.
- Create internal environment which gives the staff incentives to stay with the authority or attracts experienced professionals, avoid excessive fluctuation.



CONTRIBUTION BY EL SALVADOR

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--El Salvador--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

In the organisational phase a competition expert, former president of a competition agency in Latin America, was hired to prepare the procedures, regulations, guidelines, and the operational plan for the first 5 years of the competition agency. This plan has been followed with certain amendments due to the experience gained in the first 3 years of operation. These activities were done 6 months before the Competition Law entered in force and the competition agency initiated operations.

Recruiting the staff was one of the main challenges due to the lack of knowledge on competition matters in the civil society. In Universities, competition was not taught so the profile of the staff was set with very specific experience and skills that would facilitate them to comprehend competition policy. Also, a training plan was created so that the officials would get the sufficient skill to achieve their objectives.

The guide given by the consultant was helpful and showed the pathway to the group in charge of creating the competition authority.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

One of the Superintendence's first tasks in 2006 was to prepare a five year plan for the period 2006-2010. The plan emphasised on competition advocacy, especially that relating to educating the public about competition policy. The Superintendence made a conscious effort at the beginning of its work to concentrate on the advocacy function, and the results have been impressive. There are both advisory and educational aspects to competition advocacy. The advisory function involves providing comments and recommendations to other parts of government, especially sector regulators, on their policies that affect competition. In executing its educational responsibilities, the competition agency interacts with the public in various ways for the purpose of fostering an understanding of competition policy and support for the agency's agenda. The Superintendence has been active on both fronts. The agency continues to devote significant resources – currently about 40% – to competition advocacy.

The Superintendence encounters the public in a variety of ways: by means of press releases and articles written by staff members. Also, the Superintendent and her staff members often appear before groups of interested persons to explain and discuss the Competition Law. In any given month there are between two and eight such events. A component of the competition advocacy is to have meetings with representatives of various business associations, individual businesses, law firms, government agencies and superintendence, in order to explain the Competition Law or relevant cases. The Superintendence has been especially active in the university community. In this sense, it has entered into co-operation agreements with three universities providing for internships at the Superintendence for students in law and economics. Moreover, representatives of the Superintendence regularly conduct lectures and seminars at universities and schools. The Superintendence has also been working with judges. It participates in the country's judicial training centre, where it offers workshops on competition topics. The judges welcome such training opportunities. Also, the Superintendence has done a workshop for the staff of the Acquisitions and Contracts Units of Governmental Institutions on bid rigging. For the competition advocacy program, the cooperation with other competition agencies has been fundamental to provide the workshops, some of them given with the support of members of outside highly respected agencies. Moreover, the institutional web site is quite complete.

ACTIVITIES	2006	2007
Competition Law presentations	65	66
Opinions	9	4
Recommendations on Public Policy	9	22
Training activities	31	26
Consults about the Law and Mergers	6	7
Agreements with Regulator Entities and the Academic Sector	5	7
Agreements with counterparts	0	7
Monitoring	2	5
Sector Studies	5	6
Participation in Regional Forums (C.A.)	0	1
Organisation of International Forums	1	1

Resistance

Still, despite this level of activity by the Superintendence, anecdotal evidence suggests that the public is mostly uninformed about the Competition Law and the activities of the Superintendence. This seems to be true in the business community as well, except possibly at the level of the largest companies. It is difficult to think of any aspect of the Superintendence's advocacy programme that is lacking. That knowledge about competition policy and the competition agency has not yet penetrated to a deeper level within Salvadoran society is probably a function of two things: time – the agency has been active for less than three years; and a lack of important cases instituted so far by the Superintendence. The second is also a function of time – with effort more cases will come – but it also points up an indisputable fact about competition advocacy: it cannot be fully successful in the absence of credible enforcement by the competition agency. Despite a vigorous competition advocacy programme by the Superintendence a competition culture is not well established in El Salvador. One area that has not been fully developed in this regard is the interface between competition policy and consumer protection. Consumer protection is popular in El Salvador. In this sense, the Superintendence has proposed to the Defensoría del Consumidor that the two develop a working relationship, but the Defensoría has not yet responded.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

Even though the agreement amongst competitors is typified as an anticompetitive practice, the Competition Law only established the possibility to carry out inspections where the economic agents were notified 24 hours in advanced that the inspection was going to be done. It was not until November 2007 with the amendments to the Competition Law that the competition authority was provided with necessary tools to fight cartels. Said amendments strengthen the competition authority, vesting it with the power to carry out dawn raids with previous judicial authorisation and incremented fines, allowing the imposition of significant fines on cartels operators. In addition, the aforementioned amendments created the possibility to develop a leniency program, which is one of the tasks that the Superintendence is currently working on.

The first cartel investigation initiated on April 1st, 2008 after detecting certain traces of evidence. The investigation lasted 5 months, finalising with the final resolution pronounced by the Board of Directors.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Our law did provide merger control from the beginning. In the first year of operation merger control was just another part of the normal duties of the technical staff. In that sense, no dedicated or special resources were devoted to this activity, even though in that year the agency had to deal with very important and difficult mergers in the financial sector. It is important to mention that one key figure on the law that helps to reduce the burden of notifications and to avoid devoting too many resources

to this activity is that the notification thresholds were set at high levels, which has had the salutary effect of limiting the number of notifications.

Merger control has been an important part of the agency's activity. In the number of files opened, there is a small difference between the number of cases opened in order to investigate an anticompetitive practice and the number of merger notifications. As aforementioned, the agency had to deal with important mergers in the financial sector, electricity, telecommunications and others non regulated sectors, without any problems with the economic agents so far. However, the Superintendence has encountered a related problem, the government agency in charge of registering corporate mergers (but not asset acquisitions) has required the applicants to obtain from the Superintendence a certificate that the transaction does not have to be notified, or that, if notified, it was approved. In the case of non-notifiable mergers, this has placed upon the Superintendence a burden of examining mergers that it would not otherwise have had to look at. At the writing of this report, the Superintendence is in negotiations with the registry on this matter. Its position is that the burden of failure to notify should be on the parties to the transaction, not on the registry or the Superintendence.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Judicial appeals and final case resolution are currently the main problems the Superintendence is facing. Appeals of the decisions of the Superintendence, as well as all of the administrative bodies, are made directly to the Administrative Chamber of the Supreme Court (specifically, Sala de lo Contencioso Administrativo). The Chamber's decision cannot be appealed to the plenary Court, but if there is a constitutional issue raised in the case it could be appealed to the Constitutional Chamber, under a procedure known as amparo.

From the nine (9) cases that the Superintendence has resolved only one (1) has not been appealed before the Supreme Court. The rest of the cases were appealed and from the cases that are in judicial review not one has been finally decided. The cases in the Supreme Court can take years, suspended in some form the decision of the Superintendence until its final ruling.

The Superintendence continues strengthening the efforts in this area: educating and training judges, working closely with the Attorney General, who participates in Supreme Court cases and enforces the

Superintendence's orders, and providing well reasoned arguments and pleadings to the Supreme Court. Also, as a component of the competition advocacy activities, the Superintendence participates in the country's judicial training centre, where it offers workshops on competition topics. The judges welcome such training opportunities, and also the presentations on competition law and regulation that are given by the staff members to explain and discuss the competition law.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

When initiating its operations, the Superintendence set forth its priorities in the Operational Plan 2006-2010. In this effort a budget was elaborated but there are guidelines for all government institutions where a budgetary cap is set for every institution. The Superintendence relies on the Central Government budget even though the competition agency is an independent institution. In this sense, due to the scarcity of financial resources, the Superintendence has had to look for international technical assistance to be able to achieve the objectives set forth in its Operational Plan.

The Superintendence's resource situation is not precarious, but there are improvements that could be made. The Superintendence's budget is substantially less than that of other Salvadoran agencies considered to be its peers. The agency's budget in 2006 and in 2007 was equal, and it was increased in 2008. However, with the restrictions set forth in the Ministry of Finance's guidelines for executing the budget have prevented the agency from spending its full allotted amount. In 2008 there was a government-wide 10% reduction in the amounts that could be spent on goods and services – non-salary expenses such as computers. A further restriction is that the Superintendence can spend only 65% of its budget on personnel, which has constrained its ability to hire staff, by far its most important input. The amount allocated in 2008 as Superintendencia budget is US\$1,829,162. The Superintendence has been notified that its budget for 2009 is US\$1,894,135.

The Superintendence's agenda is broad, and its leaders ambitious. The accomplishments, especially in competition advocacy have been significant, however, more resources are required as the agency becomes more intensively involved in case work. Still, there are positive aspects to the Superintendence's resource situation. It seems to have adequate office space and equipment for the size of its current staff. Most important, its staff, while young, is widely considered to be capable and hard working. Its current Superintendent is highly respected, as is the Board of Directors. And the salary levels for superintendencies are higher than those in the central government, except for the Board of Director fees. These rates compare unfavourably with those in other superintendencies. The institution has capable staff that it requires to fulfil its broad responsibilities under the competition law, however it must have the capability to attract and retain qualified professionals and provide them with the support that they require.

Considering what the Superintendence has accomplished in its three years of existence, it cannot be said that resources were a serious constraint. The Superintendence has demonstrated its efficiency in using the resources that it has, and the Superintendent is adept at attracting funding from outside sources for special projects. The Inter-American Development Bank has been a principal source of outside funds for this purpose.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The Superintendence of Competition was created as a “publici juris” Institution, with a legal status and its own equity. It is a technical institution with administrative and budgetary autonomy to exercise the attributions and duties, as stated on Article 3 of the Competition Law. The Superintendence of Competition is one of several independent superintendencies in El Salvador. Although the institution is part of the executive branch; it has a separate budget, which is submitted through the Ministry of Economy to the Ministry of Finance.

The agency is independent on both, the budgetary aspect and the decision making process, of course always in the frame of the governing set of laws.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

By the experience in these three years of the activity of the Competition Superintendence in order to ensure a successful start in the competition defence and promotion, we can recommend to a new competition agency to do and/or obtain the following:

1. Reasonable work plan for the first stages of the institutional work and with adequate human and budgetary resources for the activities to be implemented. The human and monetary resources should properly meet the needs, quantity of work, and goals of the institution, in order to fulfil the Superintendence’s responsibilities under the law;
2. Complete independence of the competition institution in the following areas: decision making and budgetary area;
3. Insure coherence of public policies;
4. Promptly develop an effective competition advocacy programme with the Judicial Branch, universities and governmental institutions;
5. Investigative powers, especially against cartels.

On the other hand, by our experience we consider that the five pitfalls that a new competition agency should avoid are:

1. Free merger notification.



CONTRIBUTION BY HUNGARY

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Hungary--

1. First, here is an introduction to draw up a general background, including the most significant factors determining the big picture. The Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter referred to as GVH) started its operation in 1991, and therefore – for the purposes of this roundtable discussion – it falls into the category of agencies that have been actively enforcing competition law for a relatively short time.

2. The development of the GVH between 1991 and 2009 has been a long and gradual process: sudden leaps might happen, and they might be true in terms of output, but usually did not represent the nature of input needed to achieve them, since as a general rule they were based on lengthy preparations. This almost two decades included shorter time periods with different characteristics. In this submission the development process is divided into two main stages. Stage one – from 1991 (and actually from an earlier date) until around 1999 – was a start up phase under the turbulent conditions of economic transition and a deep recession. Stage two – between about 2000 and 2008 – is a more mature phase where international integration in general, and accession to the EU in particular, has somewhat different and more important effect.

3. Transition – from a socialist planning and command economy to a market economy – together with severe downturn (partly due to structural changes of the transition, partly due to macroeconomic unbalances accumulated in the 1970's and 1980's) determined the socio-economic environment of the GVH and its activity. While Hungary avoided “shock” therapy, its transition was relatively fast, with a great emphasis on privatisation, foreign direct investment and trade liberalisation. While the direct “effects” of transition gradually calmed down by stage two, the legacy of the previous socio-economic regime still has indirect effects, for example regarding attitudes towards the choice between market process and paternalism. Also, certain decisions made or arrangements set up (not necessarily in the best possible way) during transition, still exist or have consequences.

4. International organisations and foreign sister authorities have always been around and, in various stages and forms, played an important role in the development of the GVH and of the Hungarian competition law. Most of the time this manifested in technical assistance programs and other forms of co-operation. Sometimes however, the influence was based on power¹, either for the better or worse. The GVH continuously has had the attitude to learn and incorporate foreign best practices. However, this has always been accompanied with the intention to adopt rather than simply to copy.

5. The GVH has never tried to create a special regime or line of competition policy (designed for example for small economies or for economies in transition). Instead, the GVH, from the very first moment, always pursued to apply mainstream best practices. Presumably, this was not hundred percent done in all cases. Also, depending on the circumstances, the same set of general principles may lead to different outcomes in different countries. As part of this approach, the Competition Act of 1990 was a basically full-fledged competition law, covering mergers, abuse of dominant position and restrictive agreements including cartels, containing relatively strong information gathering powers (and inspired significantly by EU and German examples).

¹ For example, allegedly in the late 1980's – when due to severe macroeconomic difficulties, the Hungarian government needed very much their help – the insistence of the IMF and the World Bank urged Hungary to introducing a proper competition law and establishing an independent competition authority. At that time it was critical in making the necessary political decision.

1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

Q1. Describe how you conducted this organisational phase. What went well, and what didn't?

Stage one

6. The GVH as an organisation was created from a part of the price office, one of the main institutions of the previous state run economic model. This way, the personnel, the premises and other facilities of the part of the price office in question, were transformed into those of the GVH. Also, the first president of the GVH previously was the president of the price office. Only very little part of the staff did not have an earlier price office experience and this remained so for several additional years.

7. Well before the Competition Act of 1990 was passed by Parliament or even drafted, the price office initiated preliminary preparation for launching competition law and its application in Hungary. This composed extensive research (including study visits to and desk research of various, mainly European jurisdictions) covering substantive as well as procedural and institutional aspects and discussions. The work was done partly by price office staff, but mainly by individuals with an academic background. This resulted in a body of professional knowledge and common understanding that served as the principal professional basis of designing the Competition Act and the GVH. (This body of knowledge had a longer lasting impact, since it remained the major source of domestic professional knowledge for several years.)

8. One corner stone idea was to break away from “price office legacy”, especially price office like practice and way of thinking, including the tendency to regulate prices or making industrial planning. The determination was so serious that all in all it prevailed against the odds, sometimes perhaps even in a controversial manner – like avoiding price regulation in excessive pricing cases with fining without saying what would be the lawful price. Still, perhaps some elements of price office mentality survived in an unrecognised way longer than one would have expected.

9. About half of the members of the Competition Council – an independent body inside the GVH which takes decisions in law enforcement – were also previously senior officials of the price office. The other half had a judicial background since they were active judges previously at various courts. The latter group proved to bring a strong court like attitude and a black letter approach that had a big impact on how the Council designed its ways of operation in any respect.

10. For law enforcement, the GVH did not have explicitly identified goals and priorities other than having good law enforcement and setting up its technical (basically procedural) conditions². In fact, for various reasons – probably to a large extent historical reasons and legal traditions – the mere idea to have priorities or discretionality in law enforcement was regarded by many as dangerous and suspicious, not compatible with the rule of law, or against the principles of good administration. Neither the Competition Act encouraged setting priorities, for example, the GVH needed to investigate thoroughly every complaint. As a consequence, law enforcement became complaints driven, with insufficient resources for launching ex officio cases or dealing with supposed priority areas. Internal procedures were designed and several

² For competition advocacy however, the GVH had priorities and strategies. The two priority areas were privatisation and trade liberalisation (see also section B).

manuals were prepared, but the GVH did not issue guidelines (which again, were regarded by many the same way as setting priorities).

11. On the other hand, the GVH was quite open to pick up the mainstream approaches and doctrines and to do its job accordingly. For example it recognised and emphasised the importance of entry (as opposed to the relying on mere market shares) in the analysis, or in general the pre-eminent role of economics in competition policy. In this respect, various technical assistance programs (mainly by the OECD, and by the US federal competition agencies – and at this stage to a somewhat smaller extent – by the EU Commission) provided a great input for the mainstream of competition policy.

12. At the end of the day, a relatively “conservative”, or cautious, i.e. not really activist law enforcement developed, concentrating on abuse of dominant position rather than joint ventures or cartels.

13. Certain consumer protection responsibilities (deceptive advertisements) were also allocated into the portfolio of the GVH. This function provided a large share of the case-work, and was regarded as an important one which is actually part of a competition mission (not a consumer protection one). Nevertheless, neither the idea of realising synergies between the two functions, nor that of a substantive integration emerged.

Stage two

14. By the end of the 1990’s, many important attributes were on the right track, and several inner conditions for further development were provided. Still, the understanding of some substantive as well as procedural concepts was far from sophisticated. Also there were still a lot to be improved in terms of transparency, strategic directions, priority setting, enforcement record structure. One could compare this situation to the case of the half empty vs. half full glass.

15. From of 1999 the new president initiated major, often long term reforms in several areas. Of these, probably capacity building efforts were the largest and most successful. As a consequence, over the years the GVH, among others:

- a) became more active and much more successful in fighting secret hard core cartels by setting up a cartel section and getting proper staff and training to it;
- b) tried to focus more on exclusionary rather than exploitative abuses;
- c) increased the quantity and quality of both empirical and economic analysis by trainings and surveys and especially by hiring a Phd IO economist as a chief economist;
- d) improved professionalism in general within the organisation, partly by providing various trainings for the staff;
- e) extended the competition policy toolkit to cover sector inquiries and launched sector inquiries in important industries of electricity, mobile telephony, retail banking and media (see also paragraph 27);
- f) issued guidelines to provide greater predictability (for example on fines) and documents describing the competition policy philosophy of the GVH (including mission statement a fundamental principles);
- g) set up a Competition Culture Centre (see also paragraph 31);
- h) refined certain parts of its institutional arrangements including changing the terms of the members of the Competition Council into a fixed 6 years term (from an indefinite employment relationship);

- i) made efforts to reach out to judges (see also question 9).

16. These developments were complemented by refinement of procedural rules related to, for example, deadlines or complaints handling. These – as well as many other initiatives – required amendments of the Competition Act, which was indeed modified several times (one time even fully replaced by a new Act) both in stage one and stage two by Parliament.

17. Foreign experience was still a key source of inspiration, but in this period the European Commission played a much more substantial role, both in absolute and in relative terms. Also, the nature of interactions with sister authorities and international organisations shifted from basic technical assistance towards more sophisticated assistance and co-operation. For example the GVH was a partner, rather than a simple recipient in technical assistance programs provided by the OECD, the US or the EC for Balkan and other Eastern European countries. Another example is the CECI (Central European Competition Initiative), where the GVH and other competition authorities in the region meet to share experience and discuss particular issues with the participation of officials from DG Comp and/or older EU Member States competition authorities.

18. The process of Hungarian accession to the EU was not only the most fundamental development in this period, but also a continuous and crucial driving force behind many of the developments mentioned above. It also gives an example of the shift from basic technical assistance to co-operation, in this case within the European Competition Network.

19. The OECD regulatory reform review of Hungary in 1999 also had significant impact on the “development agenda” of the GVH. Competition policy in Hungary, including the whole activity of the GVH was peer reviewed and recommendations were made. The review (both the mission in Hungary and the report prepared on that basis) was not only of high quality and thorough, but also was carried out at the right time (at the beginning of stage two) to make a difference. In addition, it gave ammunition to be used in lobbying at non-GVH decision makers for their support.

20. Although neither of developments listed in paragraph 15 had perfect results – what is more, at the time being, some of them in fact might be on half way only – by the end of stage two the GVH became a significantly more effective and capable agency, almost in every respects. Getting more mature, the GVH increased substantially the fines imposed on firms infringing the Competition Act, which also improved recognition and repositioned the GVH and competition law in terms of importance – as a result, business and other stakeholders seem to take the GVH more seriously (including criticising it more seriously when there is a debate).

21. Most recent developments, perhaps beyond stage two, which worth mentioning include:

- a) efforts to modernise the GVH’s consumer protection activity both in terms of substance and in terms of organisation in a way which also supports greater synergy between its antitrust and consumer protection functions;
- b) a more active and an increasingly autonomous activity in providing technical assistance by the establishment and operation of the OECD-Hungary Regional Centre for Competition in Budapest (RCC) through which the GVH is even more active in providing technical assistance and by involvement in EU twinning (technical assistance) programs for Ukraine and Cyprus;

- c) a longer term strategy and management development program, launched in late 2008, with the aim of improving GVH capability to perform as an organisation³.

2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

22. Within the area of non-enforcement activities, the GVH distinguishes between competition advocacy and the building of a competitive culture. In GVH jargon the former refers to efforts to make the design or realisation of public policies, especially regulations, more competition friendly, while the latter covers efforts to improve general competition and competition policy awareness, to increase the acceptance of competition, and to support the work of the academia in competition policy issues.

Competition advocacy

23. Competition advocacy was always a very important element of the GVH portfolio. Perhaps it was even more so (certainly in relative terms) in stage one, when competition advocacy was a stand-alone, almost separate exercise, rather than one that integrated with law enforcement efforts. Though case handlers also were involved, it was nevertheless performed mainly by a dedicated staff which was also responsible for policy issues and theory. The Competition Council was extremely rarely involved.

24. The GVH followed a twofold policy in competition advocacy. On one hand, it applied “competition policy imperialism”, expressed by that time president of the GVH as “everything in transition [in economic policy] is competition policy”, so the GVH must be listened (and ideally taken seriously). The underlying thought was that when designing the fundamental institutions of a market economy – which would later determine the operation of markets and therefore the conditions of competition – competition concerns should be taken into account⁴. On the other hand, the GVH showed extreme flexibility: it regarded its own position as one representing only a fragment of the whole picture, and basically avoided confrontation by declaring that proper balancing is solely up to the policy maker, who bares also responsibility.

25. In stage one, the priority areas for competition advocacy were privatisation and trade liberalisation, even if regarding the latter the GVH had a relatively modest role in strategic decisions since they were already determined by international agreements. Sector regulations, especially on entry and pricing were also regarded important but disperse. In the second half of stage one, the issue of “regulated industries” or “natural monopolies” emerged.

26. It is difficult to measure the success of competition advocacy. There were successes, but mainly in cases where the GVH was involved already from the beginning of the process, especially regarding

³ As part of this program, the OECD Competition Division was hired by the GVH to make a complex management evaluation of the authority and to hold management seminar for GVH senior officials. It used an experimental methodology, which it developed for assessing competition authorities.

⁴ For example the GVH advocated in relation to draft legislations like the one on bankruptcy, or non-profit organisations.

privatisation transactions. Competition advocacy was probably more effective than enforcement in several ways – it yielded more competitive achievements, also provided better visibility and more widespread reputation within the administration. The twofold approach also had advantages: the GVH managed to be involved in many of the “big” or overall issues and in a way that made understanding and some influence possible, while avoided to become an obstacle in the eye of economic policy decision makers in difficult times. Mainly this approach and quality work were (rather than its enforcement record) what gave credibility to GVH advocacy.

27. In stage two, in terms of general results (including reputation, etc.), competition advocacy remained important in absolute terms but gradually less significant in relative terms, so the practical significance of advocacy and enforcement became more balanced. The privatisation process was mainly over, while first natural monopoly regulation and later EU type market opening issues in telecoms and energy (and with a lesser intensity in transport) became dominant. In addition, issues like attempts to regulate supermarkets alleged abuses with their alleged buyer power such as the prohibition of sales below cost were raised periodically. Sector inquiries provided the GVH with a substantial portion of its competition advocacy issues, proposals and a solid basis for arguing on those proposals.

28. Advocacy efforts of the GVH became more focused, more persistent and more sophisticated. GVH competition advocacy also became more integrated (consistent and sometimes even combined) with law enforcement both in terms of substance and procedures and in terms of institution (since case handlers are much more heavily involved than in stage one). It is also backed by a better enforcement credibility now. Still, it is possible that, for other reasons, competition advocacy did not become more successful, even so, the representation of competition policy considerations in key areas is constantly provided.

Competition culture

29. The idea to support competition culture was always present within the GVH in some form. Already in stage one (actually from day one) it was clear for the GVH that competition law, including its underlying philosophy, was something new and that raising awareness – especially of business and lawyers – was important. The GVH was extremely open for those knocking on the door: university students, scholars, researchers, journalists could consult very extensively with senior officials or received materials sometimes ready made for them by the GVH; GVH officials were happy to accept invitations for conferences and other events to deliver speeches and presentations for a great variety of audience. The GVH was a founding member of the Hungarian Competition Law Association⁵ – the only significant professional organisation in relation with competition law in Hungary) in the early 1990s. The GVH also experimented with issuing leaflets and launched a website in the end of the period. Nevertheless these efforts were never really systematic, many of them were not active, the GVH had not significant resources for them either.

30. In stage two, the building of competition culture received substantially more attention and resources. As a consequence, the GVH started to deal with it in a more structured way. For instance, more and better leaflets were issued, the website was made to be more informative and sophisticated, the GVH was involved in certain professional events on competition policy. Also a series of questionnaire-based surveys on competition awareness was started.

31. As a continuation of this trend, most recently the GVH established its Competition Culture Centre, a sort of subsidiary of the GVH dedicated to deal with its competition culture affairs. The activity of the Centre is complex and covers all areas of competition culture from propaganda and consumer and

⁵ The Hungarian Competition Law Association is a Hungarian branch of the LICD (*Ligue Internationale du Droit de la Concurrence* – International League of Competition Law)

business education to supporting academic research and higher education related to competition policy. It is far more extended, its scale is significantly bigger and it is more systematic than earlier competition culture building efforts of the GVH. It is financed by a percentage of fines collected in the previous year, which is allowed by a 2005 amendment of the Competition Act.

32. The results of the various competition culture related efforts linked to the GVH (and those of the GVH law enforcement and competition advocacy activity in general) vary by areas and target groups. With respect to public discussions, citizens and politicians compose one primary target group – their general knowledge is somewhat but not much better than previously. They tend to like competition, at the same time their understanding on fair competition can be quite far from the one in which competition is fierce and can produce winners as well as losers. Only very high profile cases – possibly because their links to issues perceived as significant by “traditional” standards, like party financing in highway construction cartel cases – have a lasting impression (they are recalled even years later). The impact of such type of cases is not always positive in all respect. They might put the work of the GVH in a misguided – for example political – context. Also they can provoke reactions that are not helpful from a GVH point of view⁶. Another important group in case of public discussion is government officials. In certain parts of the administration officials have a pretty good factual knowledge, or even understanding of competition law and policy. In other parts of the administration competition awareness is not really different from that of the citizens and politicians in general.

33. There are some promising results regarding shifting the interest of academic research towards competition policy issues. Nevertheless, not all of this interest results in high quality research or discussion. Actually the academia has proved to be a hopeful but challenging area for the Centre in recent years.

34. Competition policy and the GVH has a significantly bigger and better quality media coverage (primarily in the printed business and political press) now than in stage one. But better representation is presumably a consequence of improvement in “sales skills” rather than an increase in understanding of competition policy or genuine interest of journalists. In spite of increased presence, there were examples when business shouted down the GVH in press.

35. The more experience the GVH accumulates in competition culture building the more it seems to be a very long process, to which a competition authority can only contribute. This is not to say the GVH should stop this activity, but measure its ambitions and results by realistic standards.

2. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

⁶ For example a series of big cases, like the motorway construction cartel, led Parliament to strike public procurement cartels by criminalising them. However, as a result, fighting these cartels might paradoxically be more difficult for the GVH because of co-ordination with police and prosecutors (responsible for criminal cases in Hungary) was not paved, whistleblowers were less willing to co-operate with the GVH when the consequences might be as severe as a criminal punishment, and the leniency program got a “leak”.

Q3. What problems did you encounter in investigating and prosecuting abuse of dominance and noncartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?

36. All difficulties mentioned under subtitle C have arisen in the practice of the GVH. These difficulties influenced enforcement very much. For example cartels were underrepresented in GVH enforcement record before the cartel section was established and fact-finding powers were refined. At the same time, these difficulties never blocked completely enforcement as such. Active enforcement efforts, even if far less than perfect, actually were a precondition to reach improvements.

Stage one

37. The GVH was keen to follow mainstream competition policy thinking but this was connected to rather general principles (like caution due to the danger of over enforcement, especially in the “noisy” environment of economic transition), and it was also limited due to other reasons. Within antitrust, the majority of cases were related to abuse of dominance and mergers. (Deception cases also occupied a great share within the GVH enforcement record.) Almost all abuse of dominance cases were of exploitative types. Beyond the fact, that the Competition Act prohibited (and still prohibits) exploitation by dominant firms, this was a consequence of the combination of transition (characterised by economic turmoil with high inflation and radical changes in business models), the complaints “straight jacket” (because to start a case for each complaints, however minor it was, was mandatory), and the legacy of the previous socio-economic regime where price control was assumed.

38. A significant workload was imposed (or self imposed) on the GVH regarding non-cartel agreements, especially vertical restraints, even if it was drafting regulations rather than case work. Vertical restraints were originally thought to fall within the category of abuse of dominance. (This was so because they were regarded not anticompetitive without a dominant position somewhere within the arrangement, and also because the first Competition Act defined anticompetitive agreements as agreements between competitors.) However, due the process to approximate Hungarian competition law to that of the EU, Hungary needed to adopt an EU like regime with its complex block exemption regulations by the end of stage one. The GVH nevertheless tried not to copy the existing EU regime, by simply translating the various regulations into Hungarian. The reason for this – beyond legal-technical complications – was that the GVH (like the Commission itself) regarded it as not fully up to date and it was already under review anyway.

39. Results of stage one were relative but important. The biggest achievement is probably that the GVH managed to avoid making harm with too aggressive enforcement. Also, the GVH probably dealt with relatively few “strange cases”, like ones on actually contractual debates without real impact on competition and consumer welfare⁷. At the same time, by the end of stage one, it became clear that sooner or later a somewhat (but not radically) more activist enforcement would be needed for several reasons, like enforcement reputation, better consistency with competition advocacy, and the decreasing danger of an active enforcement being over enforcement at the same time. The conditions of this change were provided only in part.

Stage two

40. By (and during) stage two, the economic transition mostly faded out, the economy became more settled, the market economy became more established and the EU accession became a closer reality.

⁷ It is true however, that these sort of cases occurred in GVH practice.

Against this environment, the GVH with its increasingly mature capabilities and foreign relations aimed to join the mainstream, to channel it into the details of its operation⁸.

41. Regarding unilateral conducts, the principal GVH intention was to make a shift from exploitative to exclusionary abuses. This was realised only in part. The GVH intentions did not affect the structure of complaints many of which still concern excessive pricing allegations. Launching ex officio exclusionary cases required not only will and substantive preparation, but also resources that were preoccupied by complaints handling, consumer protection and exploitative abuses. Therefore a shift first assumed time consuming structural changes, affecting the legal framework as well as the organisation of the GVH. These changes were not fully realised. For example, the complaints “straight jacket” was reduced by amendments of the Competition Act, but only modestly. Dealing with exclusionary abuses also raised difficult issues, like the relationships between regulation and competition law or the trade offs between minimising type one errors vs. type two errors. There is significant development but there are also a lot to do to if the GVH wants to achieve the original target.

42. As far as non-cartel agreements are concerned, in stage two they were positioned in their “right” place both in terms of legislation and analysis. This is thanks to a great extent to the reform of EU competition law.

Q4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

Stage one

43. Fighting cartels on the one hand has been on the GVH’s agenda (and cartels themselves have been prohibited by the Competition Act) from the outset. On the other hand, in stage one – despite the GVH had several cartel cases – this fight was not very fierce. In the first years the GVH prosecuted “easy” cartels which often were unaware of wrongdoing, announcing their activity, and/or simply maintaining their pre-transition course of conduct – including co-ordinations – after 1990. They were treated in the usual administrative way – the parties provided the GVH with documents and GVH officials evaluated them. This approach continued later when the GVH experimented with the idea of combination of circumstantial evidences and economic analysis, but it was not proved to be productive.

Stage two

44. It became clear only gradually and only in early stage two that the nature of hard core cartels was different from that of other types of cases (including other types of agreements) and that dealing with them requires special methods, skills and staff. This recognition led to a capacity building program containing the establishment of a dedicated cartel section with the sole task to detect cartels and get proper evidence, and lobbying for strengthened investigative powers. Both targets were achieved, and the cartel section detected, within a relatively short operation period, several secret hard core cartels. A high percentage of them were large cartels operating in important industries – like construction or IT – most often they were one form or another of public procurement bid rigging. This was a good – actually better than expected – outcome, and so far it is sustained. Nevertheless difficulties have emerged recently. Cartel detection seems to become less effective, and while the GVH set up a leniency program years ago, so far it attracted only very few leniency applications.

⁸ It is intentional using „to follow” in stage one (paragraph 37) and „to join” here. The latter is partly to express deeper connection. In addition, it wants to reflect that the GVH is increasingly encountering problems that are also discussed internationally, so those discussions are more often „about us” (than they were in stage one). This is not limited to issues that are covered by this section of the questionnaire.

45. The results of stage two are regarded as great success. Not only large cartels were detected and punished and high fines were imposed, but these cases went on to the headlines and gave high profile to the GVH too. The key element was the establishment of the cartel section and the preparation for it. Refining the GVH's fact-finding powers was also essential. Paradoxically these powers were quite strong also previously on paper, but those elements crucial for cartel detection – like dawn raids – were ineffective. It is difficult to identify how much time was needed for this capacity building, since it depends on what starting point is chosen, but basically it took 2-3 years from the principal decision and starting preparation and design until the first larger case. (This time covers failed attempts and discussions too. The underlying idea at the beginning was not obvious at all. Previously there were even misunderstandings about what a cartel is – the GVH conceptually and semantically did not really distinguished sharply hardcore cartels from non-cartel agreements: they were regarded to belong to the same family, where individual assessment of the cases could lead to different solutions.)

46. Given the recently emerged difficulties in cartel detection, it is risky to predict whether this rate of success is sustainable and if so, how. It is possible that the success in stage two was “too great”: the GVH – equipped with most recent foreign experience and a new, dedicated and specialised staff, using detective like information gathering, state of the art computer forensics and strengthened fact finding powers – might have “leapfrogged” Hungarian firms which therefore became more exposed to cartel detection until they adjusted their course and increased carefulness. It is also possible that whistle blowing dried up as a consequence of the criminalisation of public procurement cartels (see also footnote 6 for paragraph 32).

4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

Q5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Q6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?

Q7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Answers to questions 6 and 7 are “merged”.

Stage one

47. Challenges and difficulties related to merger control were basically the same as in other areas of enforcement (see also paragraph 36). While the GVH had a substantial share of merger cases in its enforcement record, merger control did not take resources away from other activities. This was so probably because merger control in the early years was not very much resource intensive. In the very early years, many mergers were privatisation transactions with foreign buyers without ownership presence in Hungary – these mergers were not covered by the scope of the Competition Act. While merger control never

became a mere rubber stamp exercise, the process mostly remained paper work, with a relatively simple analysis, with intelligent guessing on market definition, calculations of certain concentration indicators, considering entry easy when no serious administrative barriers (especially barriers to imports) were identified and showing openness for vague scale efficiency considerations. This applied for non-merger cases too. Another similarity with non-merger cases was the environment – interventionism in merger control (and in general) was not regarded as a smart policy in economic transition at least in the period of the biggest uncertainties and complex consolidation processes. Many transactions arguably involved failing firms (or firms strategically close to that stage) even if, while the doctrine was known for the GVH, though taken in a simplified way, it was never used or referred. The GVH cleared all mergers until 1995. This enforcement record can be evaluated similarly to the one regarding non-merger cases (see also paragraph 39)

48. Merger control in stage one was still useful in many respects. Earlier, personnel in the price office, had daily contact with firms and was fairly well informed about what was going on in the economy and within state owned enterprises. During transition this knowledge gradually became outdated and attempts of “market monitoring” were not able to upgrade it. Merger notifications were regarded increasingly by the GVH as instrumental in getting information on developments in various industries. Merger control also made the GVH known for business in a context in which GVH – unlike in other case types – was not an “enemy”. In addition, it provided a playground both for the GVH and for law firms involved in antitrust counselling to develop professional relationships and an opportunity to build up a competition law practice for the latter.

Stage two

49. The GVH gradually became more sophisticated both in terms of substantive analysis and proceedings in merger control too. Two developments are especially worth mentioning in this context: merger remedies and economic analysis. While in theory merger remedies (conditions and commitments or undertakings) were always part of the merger control toolkit, practical application required fine tuning of the Competition Act provisions as well as preparation within the GVH. Again, economic analysis, was always important, but after establishing the post of the chief economist, it became much more advanced (not only in merger cases).

5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

Q8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

50. GVH decisions can be appealed to the court – at first level to the Metropolitan Court of Budapest, and then at the second level to the Budapest Court of Appeal have jurisdiction to review GVH decisions.

These courts are of general type, but within each court, competition cases are dealt a limited number of judges dealing with appeals of administrative decisions (administrative trials). Some of those judges deal periodically with a relatively large number of competition cases, gathering experience over the years.

51. As far as the substance is concerned, the GVH has a remarkably good rate of success in the whole period (including stage one and stage two) – GVH decisions are upheld by courts in more than 90 per cent of the cases. Court proceedings traditionally are criticised to be slow in Hungary, but they began accelerating a few years ago and the original problem was not limited to competition appeal cases anyway⁹.

52. Nevertheless, the GVH has some failures at courts and even failures of the kind which suggests that judges sometimes do not (or did not) seem to be familiar with or open towards competition policy concepts and arguments. Some of these – in particular in stage one – are similar to difficulties of judging cases related to various economic or white-collar crime and various business practices in general. In several such cases the courts tended to concentrate on procedural aspects and sending back the case to the lower level if possible without dealing with the substance. Another general difficulty is the strong tradition of rigidity in interpretation, referred in the introductory part of this submission, like the black letter approach¹⁰.

Q9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Stage one

53. The GVH tried to reach out judges and to channel incoming technical assistance into their direction too. This has been proved extremely difficult or even impossible. Several judges refused contacts or were hurt by the very idea. The majority did not even respond.

Stage two

54. In stage two, judges, courts and their organisations became more open to the idea. This change seems to be connected at least in part to the EU accession of Hungary. The preparation process required the judges to study EU law they would need to apply in certain cases later. Many EU law trainings were organised for this reason, and they often covered EU competition law, which is an important part of EU law. This created an opportunity for the GVH to re start its attempts with courts and judges with greater chances. Still, the issue – for good reasons – is very sensitive for both sides and the GVH tries to facilitate a better understanding of competition policy at courts, beyond joint events, only indirectly. This approach can benefit from the existence both of the Competition Culture Centre and the RCC¹¹. The former supports the library of the National Judicial Academy with literature on competition law, while the latter has held excellent seminars for European judges in a European competition law context, where Hungarian judges are allowed to attend in a greater number than they otherwise could.

⁹ This accelerating means that while 2-3 years are still needed in most of the cases to reach a final decision at court, the most challenging cases do not require 5 years as they did earlier.

¹⁰ For example, one time the court declared that accounting provides clear answers on what the “right price” is in excessive pricing cases, since it is required by law to be objective and reliable – irrespective of the GVH’s arguments about its limits for example in common cost allocation.

¹¹ RCC: OECD-Hungary Regional Centre for Competition in Budapest (see also paragraph 21)

6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

Q10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Stage one

55. As part of the pattern of its foundation, the GVH inherited automatically a proportionate part of the budget of the previous price office. However, high inflation during transition radically devaluated GVH budget within a few years. Mainly because of the combination of deep recession and the relatively weak bargaining position of the GVH, the budget was not “upgraded” during the whole stage one. Therefore the GVH had rather poor and even decreasing resources in real terms, including salaries. This affected every aspects of the GVH operation and made quality personnel recruitment, outsourcing and dealing actively with international affairs very difficult, if not impossible.

Stage two

56. GVH's resources has increased significantly, providing an opportunity for decent operation. Nevertheless, to keep that standard requires periodical attention and lobbying.

7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

Q11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

57. By law the GVH is institutionally an independent competition authority. Independence was surprisingly easy to achieve at the time when the GVH was established – an exceptional period at the beginning of transition characterised by the euphoria of turning Hungary into a market economy and a country under the rule of law. Regarding particular law enforcement or advocacy actions, time to time, it is needed to rely on this independence in order to fulfil GVH mission. In addition, independence has very beneficial general effects for the GVH, since the authority is less exposed to political affairs than non-autonomous government agencies. This climate of professionalism – even if the degree of professionalism is naturally often criticised by various stakeholders in particular cases – provides a better environment for GVH officials, greater trust from business, and more credibility of GVH position in competition advocacy.

58. The other side of the coin is that strong institutional independence when accompanied with court like attitude or black letter approach can lead to isolation rather than meaningful autonomy with no interest to deal with stakeholders. Such an isolation may lead to outcomes worse than otherwise in every activities, which can even be worsened by creating an image of an ivory tower and irrelevance, perhaps even ignorance. The GVH never reached this stage, but in certain periods, regarding certain activities the dangerous prospect required special attention from the management.

59. In spite of its strong institutional independence, in terms of its financing, the GVH's independence is very limited. Its budget constitutes a “chapter” of the national budget, which implies that

once adapted by Parliament, neither the government nor any particular minister can interfere with it. Nevertheless, as a rule, the agenda of the Parliament is determined by its majority group, which has obviously strong political links to the government, and the GVH has only limited influence in the budget making process. It is not clear how the financial independence of the GVH could be strengthened without harming fundamental principles (for example that tax payer's money should be allocated via a democratic process, or that law enforcement agencies should not benefit directly from fines that they imposed).

8. Conclusion

Q12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

60. Lessons – key considerations and principles rather than actions and pitfalls – from GVH experience may or may not be applicable to other competition authorities and it is possible to still any top five only subjectively.

- a) Avoiding special regimes as much as possible and trying to join to the mainstream antitrust approach regarding substance. The GVH did not see any reason to divert from the mainstream antitrust approach from a substantive point of view. From an institutional perspective it is obviously very advantageous to belong to the mainstream (see next item too).

However, mainstream in this context should mean the approach and the analytical framework rather than outcomes of the analysis. Specificities of the country or of the economy may lead to different results while applying the same analytical framework.

- b) Relying heavily on technical assistance and in general foreign experience, and trying to ensure their high quality. These can be major sources not only of knowledge on the mainstream approach, but also can provide an insight into practical know-how and institutional issues.

However, foreign practice should not be copied mechanically (or only in obvious cases). Rather it should be understood and intelligently adopted – a process which requires more efforts, but not only provides better direct result, but can stimulate the recipient's own capacity. Another – even if related – “but” is that not only getting, but also utilising the inputs from technical assistance programs and foreign experience requires effort. Sometimes they give straightforward inspiration. Usually, however, inspiration comes only if the “seed” of foreign experience falls to the “fertile soil” of an active thinking on problems and solutions or would be solutions.

- c) Sticking to professional standards, but trying as much as possible to avoid direct confrontation with politics.
- d) The GVH was never a perfect organisation, always had relative strengths and weaknesses. It worked relatively well in competition policy actions to concentrate in competition policy actions (like enforcement or advocacy) to areas of strengths, while engaging into capacity building projects in areas of weaknesses.

For example, in the first half of its operation the GVH had strengths in competition advocacy (compared to enforcement) for various reasons, and the GVH relied more on it in many respects. At the same time, a lot of investment was made to create the conditions of a subsequently more effective enforcement activity.

- e) In the case of the GVH, progress has been fairly gradual. Break-through is rare, and even more so that they could happen without other, less visible improvements and longer run preparations.

However, this does not imply minor efforts. In the experience of the GVH, even most of the small improvements are interrelated and the process requires efforts which are both persistent and intensive.



CONTRIBUTION BY INDONESIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Indonesia--

The Commission for the Supervision of Business Competition (hereafter referred to as KPPU), Republic of Indonesia was established in 2000 and can therefore be considered a young competition authority as it has been actively enforcing a competition law for a relatively short time.

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines to implement the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

In its early establishment, KPPU was led by eleven Commissioners and eleven member of Secretariat. At this time, one of the Commissioners was being appointed as a Minister, leaving ten Commissioners to start building the institution. The first step was to specify various internal orders, including human resource management and implementation of the competition law. Various orders like code of ethics, strategic plan, case handling procedure and others were formed as an initial foundation. In compiling the order Commissioners put forward various ideas which were implemented carefully by remembering high tension from the public strive for changes in the reform era.

The first case investigated by KPPU is a bid rigging case by a foreign company in Indonesia, initially it was felt that with the limitation of staff and resources makes resulted in the sub-optimal implementation of the institutional function. But this does not become resistance for KPPU in implementing its functions. This proved by the acceptance of KPPU's decision by the business actor in changes of its behaviour to comply with the decision and successfully becomes focus for all community.

The formulation of guidelines and technical guidance are based on Section 35(f) of the Law No. 5/1999 (Indonesian competition law). Constraint faced in this formulation dealt with the lack of expertise (either by KPPU or external experts) that makes this intention to be deliberated. The first guideline (in bid rigging) was published in 2005, five years after KPPU's establishment. The situation has improved since the implementation of two other guidelines for assisting KPPU and its stakeholders in understanding the application of certain articles in Indonesian competition law.

The institution's first offices were initially in the same building (different floor) as the Ministry of Trade and Industry due to our budget being linked to theirs. After two years KPPU acquired its own building which was provided by the State Secretary. Equipment and office supplies were funded by the state budget and through international donors that have the same vision to develop competition law and policy in Indonesia. Today, KPPU funds its own equipment and office supplies since its budget has increased significantly since its early establishment.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

In its early development, KPPU tried to socialise competition law and policy amongst various stakeholders through workshops and seminars on competition law in many regions. The initial socialisation was focused on five major cities in Indonesia. We encountered difficulties at first due to the public's perception of KPPU as an over power institution that acted as an investigator/police, prosecutor, and judge simultaneously. This is because KPPU worked independently of other state institutions. However, along with extensive socialisation and enforcement results, public perceptions begin to change and welcome KPPU as an important institution for economic development. This is shown by the annual increase in the number of report. Despite this achievement, we also encountered several challenges in advocating competition value due to the fact that the business actor did not always comprehend that their behaviour had breached Indonesian competition law.

This also occurs in the government. In the early implementation of competition law and policy, we often found that the government regulations clearly and unconsciously limited competition or even broke the law. One example is KPPU's advocacy of the government regulation in the airline sector that provided exclusive right to a business association to regulate and fix tariff amongst them. Cartel effort through government regulation was being advocated by the KPPU and received positive response by the government. They later revised the regulations in the sector which resulted in a competitive airline sector through an increased number of airline carriers. This led to a reduced tariff for air transportation which still can be enjoyed today.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

The main challenge in competition law enforcement is the lack of public awareness of Indonesian competition law, hence numerous people still considered KPPU as an institution without strong legal support. This hindered KPPU's ability to obtain evidence and conduct investigations. Under the circumstances, KPPU endeavoured to inform the public of the importance of competition law/policy and its institution. An increased number of reports, cooperation by summoned business actors and involvement in government's meeting for several regulations are some indications of the success of Indonesian competition law and policy.

Another challenge encountered by KPPU is the lack of experience by our staff in collecting and analysing data and information used as supporting evidence during the examination. This is also

aggravated by the lack of availability and reliability of data in Indonesia. To overcome this obstacle, KPPU developed staff capacity through training, workshops, international participation and exchange of experience with other international organisation, such as the OECD.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

In cartel enforcement, the main challenge is that the alleged parties were not aware that their behaviour breached the competition law. They often argued their behaviour in forming business association on behalf of other business actors. This clearly impedes Indonesian competition law and harms other business actors that are not part of the association. Recently, KPPU became aware of the existence of new business actors who are just a forum to exchange experience and knowledge and do not cause any violation to fair competition. KPPU in this regard, continues to monitor their behaviour to limit potential for cartel behaviour.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Not applicable.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The criteria and notifications procedures are stated within the draft on merger regulation according to the Law No. 5/1999 which was being submitted by KPPU to the Government. This regulation has not been endorsed by the Government due to their kind support to merge the draft prepared by KPPU into the revision for Private Company's Law.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The detailed criteria used in the evaluation of the effect of a merger shall be regulated by the Government. As stated in Article 28 & 29 of the Law No. 5/1999, merger or consolidation of business entities or acquisition of shares results in asset value and/or selling price thereof exceeds a certain amount. The amounts as Jurisdiction Threshold which KPPU proposed in Government Regulation are: Asset Value of merger which exceeded Rp 100 billions and Selling Price of merger which exceeded Rp 500 billions. However, due to the current status of our merger regulation, KPPU can not implement this merger control.

1.5. *Judicial appeals*

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Yes it can. However, this can only be done if the alleged party submits their objection to the District Court. District Court, according to the Law, shall decide their decision on the objection in thirty days after the objection received. With this limitation, we noted that District Court judges had difficulties in understanding the (economic) substance used by KPPU in its decision. Therefore, we continuously arrange a program for judges in understanding the economic terms/issues in competition law. This program proved to be useful to increase understanding by the judges in the objection process.

Based on our statistic from 2000-2008, we recorded 41 objections has been filed to the District Court. From this number, there were 20 District Court's decision that in favour to KPPU's decision, 12 decisions were in favour of alleged parties, and the other are work in progress. With taken into account the 50% success rate, we viewed that we shall continuously hold workshops for the District Court judges in understanding economic approaches in Indonesian competition law.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Yes we did. As we have already mentioned before, this developed through a workshop program for the judges in several major cities in Indonesia. This systemise program is designed with the cooperation of Indonesian Supreme Court and shared substances in competition law system, objection process, economic terms, and other technical substance that valued needed for the judges in handling competition cases.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Number of employees from 2000-2008

Year	No. of staff	No. of new staff
2000	12	12
2001	34	22
2002	60	26
2003	87	27
2004	98	11
2005	111	13
2006	121	10
2007	198	77
2008	238	40

The total KPPU official until 2008 is 238 people, where among them was maximised for Directorate of Law Enforcement and Directorate of Competition Policy. Among them, 29 staffs are the legal scholar and 27 staffs are the economic scholar. Based on the available data, we recorded that we still experience the lack professional in law and economic. This supported by a survey on the work load of KPPU's staffs that showed most of our staffs ought to handle a work load that should be carried out by 3-5 staffs. Furthermore, the growth of human resources for each year did not perceive much increase due to the high number of employee's turn-over rate.

KPPU's Budget from 2000-2008

Year	Amount (in Rupiah)
2000	5,994,091,000
2001	20,754,688,000
2002	15,644,482,000
2003	24,918,219,000
2004	22,990,055,000
2005	42,300,000,000
2006	84,500,000,000
2007	85,000,000,000
2008	86,939,983,000

Increased amount of budget for KPPU is valued sufficient in facilitating daily activities for competition law and policy enforcement and other supporting activities.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

In terms of management and law enforcement, KPPU has gained its independency since it was established. This was supported by the specific article in Indonesian competition law. However when we talk about budget, until the end of 2008, our budget is still part of the Ministry of Trade's budget. This has been upgraded by our intensive efforts (negotiations) in obtaining separate budget allocation for the institution. Therefore, beginning from 2009 KPPU's budget will separated from the Ministry's budget, and hence will create our full independency.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

A new competition agency shall make its effort to ensure public acceptance and thus, will assist them to internalise better sound competition value in its respective jurisdiction. Based on our experiences as one unique and young competition agency, we highlight several actions for a better start for young competition agency as follows:

1. Application of systematic and continuous public education to increase public awareness and acceptance to the new competition regime. This will need numerous publications and guidelines as the main tool to increase this awareness;
2. Developing and maintaining mutual cooperation with other law enforcement (District Court, Supreme Court, Police, etc), sector regulator, government, and other institution that related to competition law enforcement;
3. Providing more resources in strategic competition cases that have direct impact on people welfare;
4. Developing intensive competition advocacy and maintaining good relationship with the government to open access for consultation between the competition agency and government in various strategic issues (especially on essential facilities); and
5. Developing and maintaining cooperation with international competition agencies, as well as international organisations.

These actions shall be planned in a detail strategic plan as well as internal strengthening measures to ensure everything is on the right track.

Several actions that shall be avoided as a new competition agency are as follows:

1. Abusing the self confidence (independency entrusted by the Law) in developing relationship with the stakeholders;
2. Lack of transparency in competition case handling procedures shall be avoided to ensure due process of law;
3. New competition agency shall decide its priority and avoid the lack of internal controlling system (mechanism) due to the public demand on the fast result of new competition agency;
4. Communication is one of the main aspect in competition law and policy enforcement, hence one shall avoid miscommunication with its internal and external stakeholder;
5. In law enforcement, new competition agency shall avoid providing less resource in major cases and too concentrate with small cases that reported by its stakeholder.



CONTRIBUTION BY ISRAËL

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Israel--

The IAA is an independent government enforcement agency. Its mandate includes preventing market power through merger control and anti-cartel enforcement, restraining abuse of dominant position by firms and enhancing competition in the various markets. Since 1994, the IAA has gathered significant experience with respect to enforcement of competition law and competition advocacy. In light of the above, and based on its experience, the response hereafter corresponds with section II (*Countries that have been actively enforcing a competition law for a longer period*).

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The organisation of competition agencies has a significant impact on their overall effectiveness. Based on the IAA experience, the following consideration could be helpful in the organisational phase of new agency:

There is a clear advantage, in terms of independence for having a separate location for the competition agency. Locating new staff in separate offices may facilitate the introduction and implementation of working standards which are necessary for effective competition enforcement.

Competition enforcement requires human capital and other logistical and administrative resources. In addition to its statutory independence, a competition agency should be granted with functional independence which is needed for carrying out its day to day activity.

Flexibility in recruitment of staff and experts is another important ingredient to the success of young competition agencies. Preference should be given to law and economics scholar with relevant experience. In countries with no competition regime, it might be useful to recruit graduates from top academic institutions where competition law is taught. Similarly, employees with working experience at foreign competition agencies or other relevant institutions could be valuable. Naturally, there are advantages to recruiting employees with relevant academic capacity and professional experience in litigation, investigations and economics.

One of the fundamental investments which must be made by new competition agencies is a professional library with competition literature, databases, journals and other publications/subscriptions. The vast body of knowledge which exists in many jurisdictions and organisations such as the OECD and ICN should be made available and accessible to all employees.

Establishing internal procedures and creating regulations and guidelines which implement the new law should take place in a gradual manner. The implementation of competition law diverges from one jurisdiction to another. Country specific characteristics and features of individual legal systems need

to be integrated into the development. A step by step approach, which relies on actual experience rather than just theory, is likely to be more effective.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Establishing a solid competition culture is a tremendous task. The IAA's experience shows that advocacy and enforcement must go hand in hand. It is important to invest in advocacy efforts to supplement enforcement activity, however, for a young competition agency enforcement should remain at the top of the agenda.

For young agencies with limited resources who wish to engage in advocacy, it might be beneficial to collaborate with universities and other institutions in educating the public about the benefits of competition. Activities such as faculty courses as well as seminars for practitioners and businesses may serve to enhance awareness and create a competition climate.

It is important to work closely with other government branches and regulators, especially those who are likely to be suspicious towards competition agencies. The comprehensive OECD Competition Assessment Toolkit could be used instrumentally for advocacy purposes. The importance of establishing a positive reputation in Parliament cannot be overstated. Public representatives are often very receptive towards competition which enhances consumer welfare.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

In order to attain optimal results in the prosecution of cartels, it is necessary to establish clear legal rules and standards which can be followed by businesses, practitioners and the legal community at large. To this end, it may be worthwhile to engage, during the legislative process, in consultations with other jurisdictions and experts from foreign competition authorities in order to learn from their experience. Valuable guidelines and a rich body of knowledge may also be found in databases of international bodies such as the OECD and ICN.

The establishment of the IAA in 1994 significantly enhanced the level of competition enforcement. Although the original antitrust law goes back to 1959, the overall level of enforcement with respect to mergers, monopoly and restrictive arrangements was relatively poor in those years. As a result, in numerous court decisions, a distinction has been drawn between the period before 1994, and the period thereafter: Explicitly, the period before 1994 has been referred to as the "under-enforcement" period.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Merger Control is a fundamental component in any competition regime. The IAA experience in merger reviews has been a very successful one, although at first, the Israel Antitrust Law did not include any provisions with respect to mergers. Since 1988 a modern merger review regime was employed – creating a regime which draws on contemporary economic principles. The IAA has adopted the "more economic approach" that underlies merger review in the EU, and increasingly applies an effects-based approach in its evaluation of mergers. Israel's merger law enforcement is premised on the recognition of the inherent economic benefits associated with merger activity. Despite this recognition, the IAA will not allow the consummation of a merger if it creates, enhances or facilitates the exercise of market power, properly defined and measured. Such mergers are blocked in advance because the IAA recognises that the re-establishment of a more competitive environment after the market has undergone a proposed structural change will be either impossible or excessively costly. Israel's merger regime employs an ex-ante model of competitive assessment based upon sound economic analysis and taking into account the overall competitive conditions in a given relevant market. This regime is based on an effective premerger notification system, and in recent years there has been a continuous reduction in the processing time required to analyse a proposed merger.

The substantive test implemented by the Law in order to determine whether or not to intervene in a proposed merger is whether the proposed transaction presents a reasonable risk of significant harm to competition.

We believe that young competition agencies may benefit from the advantages associated with the combination of a premerger notification system with substantive merger assessment criteria. With

respect to the notification system, it is imperative to design merger notification thresholds that would enable the authority to review mergers that could potentially hinder competition.

With respect to the merger review process, the IAA allows the parties to the proposed merger to meet with the IAA's staff and senior officials in order to present the merger and attempt to remove concerns raised in the course of the merger review. Our experience shows that it is important to discuss the possible conditions through which the parties can dissipate any such competitive concerns that remain. In furtherance of the merger review process, the IAA may also grant third parties the opportunity to meet with its staff, or it may request information from such parties. For young competition agencies it might be useful to employ a similar process that would allow them, particularly during the early years, to learn more from undertakings in the markets while at the same time developing a reputation based on credibility, availability and professionalism.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

It is important to acknowledge the importance of having a judicial review system. The IAA experience shows that such a system significantly enhances the professional level and standards of the agency. In Israel, there is a designated body which hears administrative appeals over IAA decisions. An Antitrust Tribunal, sitting within the District Court of Jerusalem, has exclusive jurisdiction over non-criminal governmental antitrust proceedings. The District Court of Jerusalem has exclusive jurisdiction over criminal antitrust matters. Both criminal and civil antitrust rulings are subject to appeal before the Supreme Court.

The civil and administrative remedies for infringements of the Antitrust Law include consent decrees, injunctions and court orders granted by the Antitrust Tribunal. Having a specialised tribunal for competition matters is very advantageous, since the judges have the opportunity to gain the necessary expertise and experience.

Some procedures which are stipulated in the law rarely take place. For instance, restrictive arrangements between undertakings which are not covered by a block exemption may be exempted by the General Director or approved by the Antitrust Tribunal. In practice, there are hardly any instances in which restrictive arrangements are submitted for approval by the Antitrust Tribunal, due to the expected duration of the process. Instead, the IAA issues dozens of exemptions each year.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Resources are a fundamental condition for the effectiveness of competition agencies. The IAA's resources are limited and therefore prioritisation is inevitable.

There seems to be a degree of correlation between the effectiveness of the competition agency and the willingness of the Government to allocate additional resources. Since the IAA's establishment in 1994, there has been a significant increase in number of staff and budget. This change is mainly due to the recognition that the IAA is an effective and professional agency which delivers results in terms of criminal and administrative cases, merger control and advocacy. Consequently, it is imperative that young competition agencies strive to attain significant results as soon as possible.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The competition agency's degree of independence can affect its ability to take effective and independent action in its enforcement and advocacy roles.

Upon its establishment, the IAA was granted considerable independence in its operation.

In addition to its statutory independence, the IAA believes that its constant cooperation with industry regulators and relevant government units on reforms, privatisation processes and industry restructurings ultimately enhances the IAA's position within the government structure, and, in turn, the IAA's independence and ability to effectively enforce the antitrust laws.

For young competition agencies, it is imperative to integrate independence considerations into their structure and institutional design. In addition to its statutory independence, a competition agency should be granted functional independence which is needed for carrying out its day to day activity.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

(a) Five most important actions that you would recommend to a new competition agency to ensure a successful start:

1. Form a vision for your agency and set up clear objectives for the short and long run

2. Start from the basics - Focus on priority setting and careful selection of cases
3. Invest in recruitment and training of competent and professional staff
4. Establish independence, transparency and professional working standards
5. Create a body of case law by bringing significant cases to Court

(b) Five pitfalls that a new competition agency should avoid.

1. Make no concessions to cartels
2. Refrain from using just statements to build up deterrence - take real action instead
3. Stay away from negotiations with interest groups and lobbyists
4. Avoid creating unrealistic expectations that can not be delivered
5. Do not hesitate to reform the law if necessary



CONTRIBUTION BY JAMAICA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Jamaica--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The allocation of an Agency's resources depends to a large extent on its stage of development, the priorities it sets for itself as well as its goals and objectives. As a new Agency the Jamaica Fair Trading Commission (FTC) faced several challenges such as (a) limited human resources and expertise in the area; (b) limited funding and/or capital resource capacity; (c) an untrained judiciary; (d) inconsistent or incoherent regulatory policies; and (e) a lack of a competition culture within our society and an understanding by the general public of the tenets of Competition Law & Policy. Over time, the FTC has faced all of these challenges in several ways and to various degrees and therefore in deciding on the manner in which resources were to be allocated, due consideration was given to each of these challenges in the early years.

In the beginning we placed high priority on (a) developing our legislation; (b) building our physical infrastructure, i.e. furnishing our offices; (c) hiring competent 'trainable' personnel; and (d) using the media to sensitise the general public on its core function and role and building a relationship with consumers. The FTC sought and received a significant level of funding and support from the United States Government through the United States Agency for International Development (USAID) for the setting up of its operations and channelled it towards these priorities. Staffing and other operational expenses were financed by the Government through its monthly Subvention.

Our first venture was a visit of the offices of the United States Federal Trade Commission (US FTC) and the United States Department of Justice (DOJ) where our Commissioners, Executive Director and Legal Consultant met with key personnel of these organisations. Meetings were held with a Commissioner, the Assistant Director for International Antitrust in the Bureau of Competition, the Director for Antitrust in the Bureau of Economics, the Director of Information Support Services Division, the staff of the Bureau of Consumer Protection and the EC Competition Law & Economics study group. This visit proved extremely useful as it assisted us in the development of our organisational goals and in the setting of our priorities.

In addition to the above, the funding from the USAID was used to (a) finance the cost of consulting services to assist us in developing our legislation; (b) execute a public awareness campaign to educate the public about the Act and our role and functions; (c) pay for a two year public information campaign specifically aimed at educating business enterprises on compliance with the Act and enforcement of its provisions; (d) provide technical assistance with consumer awareness issues, information technology issues, and administrative advice and support; (e) pay for short term consultancy services for administrative challenges such as the drafting of job descriptions, finalising contracts and completing work on our Code of Conduct & Ethics and other internal procedures; (f) purchase library material, office equipment and furniture, computers and a case management and

tracking system; (g) cover the cost of field missions to, and internships at other Competition Agencies; and (h) facilitate the training of Staff.

On the other hand the Government of Jamaica provided (a) remuneration for the Staff on an ongoing basis; (b) sufficient office space for the Commission; (c) financial support to cover the day to day operations; and (d) a commitment that the plans and programmes be created in a manner that would make them sustainable, and would be continued and/or repeated in the future.

Programmes targeted at executing activities to address each of the challenges and priorities, were organised. The visit to the US FTC was the first step, and the Staff and Commissioners, though new to the area, were charged with the responsibility of creating and managing the various activities, at the same time informing themselves sufficiently. Short term Consultants were hired to better facilitate the processes in areas such as public relations and media coverage, information technology and some administrative issues.

The Commission's approach to building a competition culture in the early years was to sell itself as a consumer advocate 'defending' consumers, in order to 'win' their support and to gain popularity. It was also convenient at the time to focus on consumer issues instead of competition matters as the Commission had neither the knowledge base nor the technical capacity to handle competition matters. The public education campaign was therefore geared at educating the general public, including business enterprises, on consumer protection matters with very little emphasis on true competition issues. This had debilitating effects on the Commission before its tenth year of existence as locally based firms had developed a very limited understanding of what Competition Law & Policy is about; and it became necessary for the Commission to expend significant resources on sensitising firms on the area through ongoing activities.

Training of Staff and the Commissioners in those early years, while good at the time it was done, was not executed in a manner which made it sustainable, in that there was little information sharing and the structure to facilitate institutional memory was almost non-existent. In addition, similar to the public education campaign, training efforts such as field missions and internships were geared primarily at the handling of consumer protection matters. Exposure in the handling of competition matters and investigation techniques was provided, but it is considered by many that this training was provided at too early a stage in the Staff's development; and that it would have been more beneficial for the Staff were they to acquire a higher level of understanding of the area before embarking on such field missions and internships.

Attendance at international workshops and conferences proved very useful in the early days, where absorptive capacity was somewhat limited and there was a need to acquire the fundamentals of Competition enforcement.

With the assistance of the Inter-American Development Bank (IADB) the FTC, in its eleventh year, was able to hire two Consultants to provide us with intense training in investigative and advocacy techniques, and the practical application of many of the concepts which we had learnt over the years. It is after completing these training programmes that we now feel that the field missions and internships would have been more beneficial to us.

Further, removing key Staff from the essential tasks necessary to develop the Agency created somewhat of an information overload and the structure which was being developed could not properly channel the information. With a small Staff, the removal of senior management and technical staff from the organisation within the first year of the organisation, albeit at different times, before having a firm structure proved disadvantageous in the early years as far as building technical expertise was

concerned. However, the opportunity to attend conferences and workshops, to embark on field missions and internships resulted in our meeting representatives of other Agencies and establishing relationships with them. This proved very useful, particularly in terms of building links with those Agencies and being able to use them as information resources.

Developing technical capacity is very important and has been found to be more useful and beneficial if done on an ongoing sustained basis. Technical capacity takes many forms and the form(s) that should be used is a function of an Agency's stage of development, Staff complement and Staff's knowledge base. For example, it has been found that Competition Agencies with longer track records, more experienced and professional Staff, and an established senior leadership tend to benefit more from long-term advisors and study missions to more experienced agencies.

Activities relating to the creation of the organisational and physical structural of the Commission went very well, and the foundation that was built is, to this day, considered firm. Of course, with changes in our economy, a shift in our focus away from consumer protection, to the handling of Competition matters, changes in the composition of several key markets, a 2001 judgement by the Courts which spoke to issues of a breach of natural justice in the construct of our legislation, information technology developments, and our thrust towards Competition advocacy, we have had to adjust aspects of our structure and our operational modalities.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

One dimension of building a competition culture is from the angle that invariably, there exists opposition from business enterprises who see Competition Law & Policy as Government interference into their operations. At the same time it is important that consumers are made aware of Competition issues in order that they may be able to challenge business practices existing in the various markets. Public education and increasing public understanding was in our early years, and continues to be, one of the FTCs' most challenging and important functions.

As previously stated the Commission's approach to building a competition culture in the early years was to sell itself as a consumer advocate 'defending' consumers, in order to 'win' their support and to gain popularity. The focus was therefore on consumer issues instead of competition matters, and it was convenient because the Commission had neither the knowledge base nor the technical capacity to handle competition matters.

In the first two years extensive efforts were made through the media. Appearances by senior Staff on radio and television talk shows, the airing of notices and advertisements on the radio and television, and the publication of articles in the press were frequent. It is fair to say that consumers 'caught' the messages as they viewed us as a 'protector' of their rights and interests; and over time we developed a reputation of being a watchdog for consumers.

However, as we shifted our focus away from consumer protection matters to the handling of true competition matters we were met with challenges. Our advocacy efforts were met with little interest – businesses did not attend workshops and seminars as we would have liked and were quick to criticise

the FTC for not properly educating the public in general. Likewise, the media had a very limited understanding of the area and were not keen on attending workshops and seminars; instead choosing to criticise our work without having a clear understanding and to ‘couch’ our work in terms of consumerism.

Again, budgetary constraints exist, our budget did not allow for media campaigns which would assist in enhancing the profile of the Commission. Associated with the development of a Competition culture is the development of respect and trust for the Competition authority and its mandate. This will enable the agency to be more effective and influential in being able to achieve its goals of public awareness. The initial activities of an agency are therefore important to the agency’s future actions and development, as this constitutes a signal to the public as to whether or not it is able to handle its several responsibilities. The Commission has continued to disseminate information through the media, seminars, workshops, press releases, fliers, and websites within the constraints of its budget. Again, the IADB, over the last three years, has assisted immensely in the execution of these activities.

‘Successes’ were not realised until a few years into our existence when our Staff had developed its expertise sufficiently. Several matters related to the telecommunications, motor vehicle, furniture and appliances, and entertainment sectors are considered successes as far as competition advocacy. Details of some of these matters are available on our website, located at www.jftc.com.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

The Problems

The Fair Competition Act (FCA) prescribes that its Commissioners should investigate and hear matters in a quasi-judicial capacity. However, in 2001 (eight years after the Commission was established) the Court of Appeal found that the institutional structure of the FTC lends itself to a breach of the principles of natural justice. This ruling has limited the FTC’s ability to hear Competition matters.

Of note too, are the many ‘conflicts’ and gaps which exist within the FCA, where for example, breaches are treated under different standards whether it be rule of reason or per se. These issues have resulted in an extensive overall of the FCA itself. It is therefore important that the legislation is created as ‘correct’ as possible from the beginning as this will reduce the likelihood of successful challenges.

We are of the opinion that another major problem with curtailing anticompetitive conduct is that the penalty for breaching the competition legislation does not serve as an effective deterrence. Currently, any person found guilty of breaching the Act can be fined up to a maximum of J\$1M (equivalent to US\$13,333) whilst a business could be fined a maximum of J\$5M (equivalent to US\$ 66,667) for a business. It must be noted also that the FTC does not have the power to impose fines; it is the Court which is vested with this power. The highest fine that a Jamaican Court has ever issued for any

breach of the FCA is J\$750,000 or approximately US\$10,000. The benefit of having a cartel for example, may easily exceed the maximum fine under the FCA, hence individuals and businesses that are aware of cartel activity do not have any 'incentive' to come forward. It must be noted that for the Year 2004, the average annual Turnover of the thirty-four (34) companies which are listed on Jamaica's Stock Exchange is US\$111,643,313; and the average annual Profit before taxes is US\$15,275,002.

Section 10 of the FCA gives the FTC powers of entry and search. While the provisions contained in this Section appear sufficient, the Section does not give the FTC the power to seal off premises; it does not define "premises"; and it fails to address the question of search of persons.

Addressing the Problems

We believe that the best remedy to address the problems above would be to amend the current competition legislation so as to make the Act conform to the concerns expressed by the Court of Appeal. The amendment would address the structure of the Act as well as increased fines for breaching the Act. Fines ought to exceed the amount gained by the unlawful activity. In other words, the fines must be so high that perpetrators 'feel it' in their pockets. This would import the need for administrative fines; or the need to remove the restrictions set out in Section 47 of the FCA.

Amendments would also be necessary to (a) authorise the sealing off of premises, documents, computers, equipment, etc., during the conduct of investigations; (b) extend the power of search under Section 10 to individuals and to personal property, for example motor vehicles. Currently the Section refers to "premises", but perhaps a stipulation should be made regarding residences; and (c) extend the powers of interviewing/examining persons/witnesses to the Staff who conducts the relevant investigations. At present, this power is restricted to Commissioners.

Until such amendments have been enacted, the Commission has taken the decision to take (rule of reason) matters directly to Court. We are unable to measure how successful this position will be as we have not investigated any complaint which would warrant such an action.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

We do not have a formal anti-cartel program. We have only recently (September 2008) adopted the ICN's 'Best Practices' for conducting cartel investigation.

The Staff has never conducted an investigation into cartel activity. Some of the reasons relate to: (a) Legal Framework; (b) Peculiarities of a Small Economy; (c) Staffing of the Commission; (d) Investigative Tools; and (e) Level of Awareness of the Harm Caused by Cartel Activity.

A more detailed description of the reasons for not having a formal anti-cartel programme and the challenges faced by the FTC is contained in a paper entitled "Fighting Hard Core Cartels" which was presented at the Third Meeting of the Latin American Competition Forum, Madrid, Spain, on July 19 to 20, 2005. It is available on our website, located at www.jftc.com under News & Publications/Speeches & Presentations.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Our competition legislation does not authorise the Commission to review proposed mergers. It is the view of the Staff that not having such authority is threatening to undermine advancements which we have been making in other aspects of competition law enforcement. One immediate concern for us at this moment is that our inability to review mergers will undermine the public's confidence in the Commission as an agent for safeguarding its welfare. We make specific reference to recent developments in the subscriber television (cable) market in Jamaica whereby a single recent entrant has been expanding its customer base through a series of acquisitions of incumbent service providers. In some instances, the acquisitions resulted in monopolised markets; with higher subscription fees for consumers within these markets. In March 2008, public outcry against the effects of the acquisitions reached a crescendo. Since the entrant was not prevented from acquiring rivals in some of the regions in which it operated, the Commission's non-intervention was misconstrued by the public as evidence of our unwillingness, rather than our inability, to intervene in the interest of competition and consumer welfare. This concern extends to other industries where mergers have been consummated without the benefit of review by the Commission. These industries include health insurance and commercial banking.

The primary benefit from having merger review authority is the opportunity for the Competition Agency to prevent mergers which otherwise would increase the likelihood for anti-competitive conduct in the relevant market.

A secondary benefit is the detailed industry information generated by the review process. As it stands now, whenever we are investigating allegations of anti-competitive conduct, a significant portion of early stages of the investigation (a crucial part of the investigation process) is spent collecting background information about the industry so as to properly contextualise the alleged conduct. Accordingly, the information collected by the Commission in the post merger-review period, would assist us considerably (at least in the short-term) if we were to investigate conduct within that industry regardless of whether the Commission successfully challenged the merger.

In conclusion we do not think that we have gained any benefit from not having merger review authority.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Not applicable.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Not applicable.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Appealing to the Courts

Decisions of the FTC can be appealed to the Supreme Court of Jamaica; which is a Court of general jurisdiction. Under the Jamaican statute, the Fair Competition Act, the FTC makes 'decisions' only in the exercise of its quasi-judicial capacity. The exercise of its quasi-judicial capacity is in relation to determining whether benefits outweigh detriments in respect of particular conduct that has been alleged to be anti-competitive; such as the abuse of dominance, agreements that substantially lessen or are likely to lessen competition, exclusive dealing and market restriction.

We believe that these provisions, however, do not oust the jurisdiction of the Courts to make the decisions instead of the FTC. The FTC may proceed either by exercising its adjudicatory role or allowing the Supreme Court to exercise it. This point is important to the extent that the procedure for appeal depends on which option the agency exercises. If it exercises its adjudicatory function, then an appeal lies to the Supreme Court (to a Judge in Chambers). If, however, the adjudicatory process (decision-making) is handed over to the Supreme Court, then appeals would be made to the Court of Appeal.

Rate of Success

The FTC has enjoyed a fairly high level of success in respect of the matters pursued in Court. Since its inception in February 1994, the Agency has enjoyed a success level of at least 75%. Within the past five years, we have had a 100% rate of success level for matters pursued in the Courts. The matters have spanned a wide and diverse range of industries including the transport sector, real estate, entertainment, automobile, education and the legal profession. The type of alleged conduct has also been varied; these include misleading advertising (which accounts for the majority of the cases pursued), abuse of dominance, exclusive dealing and collusion/conspiracy.

Time for receiving Final Decisions

Shortly after establishment, the FTC struggled to obtain decisions in Court matters as they took an inordinately long time. From the commencement of a suit, a matter would take, on average, at least three years to be heard and another year or two for a final judgement at first instance. The appeal process would take at least the same length of time. These problems were due to a huge backlog of cases in the Court system as well as inadequate staffing; and ultimately prevented the timely resolution of competition cases.

In an attempt to address the backlog, among other problems, the Court issued new Civil Procedure rules which came into effect in January 2003. This engendered a new approach to litigation. The rules provide the Supreme Court with more power to dictate the pace at which a case is concluded. They are designed to reduce costs, to ensure that matters are dealt with expeditiously and that the justice system accommodates and remains on par with modern technology. This has been achieved largely and specifically by the introduction of the concept of 'Case Management,' which allows the Court to exercise powers enabling it, rather than the parties, to dictate the progress of litigation at the pre-trial stage.

The new Court rules have greatly reduced the time for Court cases to be decided. On average, matters filed within the last five years have been concluded in a little more than one year. In addition to implementing the new Court rules, the Supreme Court also established a Commercial division in January 2003 as part of its modernisation programme; and the FTC has opted to file its matters in this division. The advantage of proceeding in this way is that the time period from the commencement of a suit to the making of a decision has been reduced considerably. In fact, a date for the first hearing of the matter is usually within three months of filing suit and the case can be concluded within one year.

The filing of matters within the Commercial division of the Supreme Court has resulted in three major benefits which each have translated to the timely disposal of cases.

Firstly, the Division is specialised and houses a cadre of judges who should be experienced and particularly skilled in commercial type matters. This should result in sound decisions and good precedent for competition law matters. It is also expected that, after repeatedly hearing competition matters, these judges will develop expertise in the area.

Secondly, matters filed in this Division of the Court bypass the backlog of other cases in the civil and common law divisions and move very quickly through the Court. This has translated to early hearings and timely disposal of cases.

Finally, the Division is highly organised and has its own staff and resources. This has resulted in relatively smooth and cost effective Court preparation and proceedings.

Problems Encountered

There has been much overall improvement in the length of time taken to dispose of cases in the Courts. There is, however, still more room for improvement. The FTC has chosen to utilise the Commercial division which has served as a fast track for matters commenced in the Civil Court. Within other divisions, however, and depending on the procedure taken, matters may still take at least 3 years for a trial date and longer for a decision to be reached. A considerable backlog of cases remains in the Court system and, due to financial constraints, the technological advancements have not been as rapid as had been projected. Limited availability and accessibility of equipment that would expedite procedures considerably, such as computers, printers and fax machines, have affected

the time in which these matters are disposed of. Inadequate staffing in the Courts has also continued to pose a major problem

One problem which emerged with the issue of the new Civil Procedure rules was the increase in the costs of filing cases in Court. As an adjunct to the rules, the Rules of Supreme Court (fees) 2002 were issued in January 2003. By virtue of those rules, the previous Court fee of J\$150.00 (US equivalent approximately \$2.00) per suit was increased to a basic sum of \$2,000.00 (US equivalent approx. \$27.00) per suit for all non-monetary claims. The cost of filing in the Commercial division, depending on the sum claimed, goes up incrementally to as much as J\$30,000.00 (US\$400.00).

These fees created a financial hurdle for the FTC. In an effort to overcome this, an application was made to the Supreme Court on July 17, 2003 for a waiver of the Court fees in one particular case, on the grounds of 'hardship' being experienced by the FTC. The application was successful but the legal team recognised that such individual applications for a waiver in each Court matter would be difficult due to the time and expense involved. In an effort to circumvent this problem, the legal team made an application to the Court for a general waiver of Court fees on all matters filed by the FTC. The Court was not willing to grant such a general waiver and the FTC therefore continues to grapple with the issue of cost.

Another problem posed by the new Civil Procedure rules is that the Court's main and overriding objective is to achieve settlement of disputes and resolve matters to reduce the number of cases that may go to trial. We have discovered that this objective may sometimes be in general conflict with the objectives of competition. In support of this overriding objective, the Court has formalised the mediation process. The issue became apparent when the FTC pursued a case involving misleading advertising (involving defective goods) which had affected at least 37 persons. The Respondent refused to respond to the FTC's directives and we filed suit. Shortly before the trial date, however, the Respondent provided replacements and then advised the Court that the matter had been adequately settled. The FTC attempted to explain to the Court that there were deeper issues to be addressed other than compensation, as there was damage to the market. The Court did not, however, accept these arguments and ordered that the 'other issues' be dealt with by mediation. It held the view that the relevant issues had already been settled.

The absence of a strong competition culture (and/or positive environment for it) has meant that competition cases are generally viewed as being of low priority and as less serious in nature than other cases. This attitude became apparent when, in respect of a suit filed by the FTC which had come up for trial, the Judge commented that the Court's time should not be wasted with such trivial matters which would be better suited for arbitration and/or Dispute Resolution. In support of this view, the Judge awarded a nominal sum as a penalty.

Decisions handed down in other cases have revealed that the area of competition law is still new and the principles somewhat obscure to some judges. For instance, the Court of Appeal case of Jamaica Stock Exchange (Supreme Court Civil Appeal No. 92/97) illustrates some of the difficulties raised by the failure to apply sound principles of competition. In that case the judge, in considering whether there was lessening of competition, expressed the view that the FTC could not maintain an argument for limiting competition when the evidence showed that there was only one Stock exchange in Jamaica. He further stated that '...competition can only arise if there is another entity, real, or potential, that can offer competition'.

Factors Contributing to Success

Below are some of the factors that have contributed to the FTC's high level of success within the past five years.

1. We have been able to develop a high level of expertise over time. Although there has been a relatively high rate of Staff turnover generally, the FTC has been able to retain some of its more experienced legal and economic experts. These persons have developed a high level of skill and knowledge in the area and have been involved in most of the FTC's cases over time. This is possible only with a structured training programme and adequate library facilities.
2. As previously stated, we have been somewhat successful in sourcing external funding which has been heavily invested in the training of Staff. The training has involved competition law and policy, economics and has also been practically geared to sharpening litigation and advocacy skills.
3. We have attracted bright, highly skilled attorneys, economists and research officers in instances when more experienced ones have left. There is therefore a pool of skills, experience and knowledge to pull from in the preparation and presentation of cases. Of note is our need to maintain this pool of skills and this requires the aforementioned structured training programme and other facilities.
4. Our ability to continue facilitating Workshops for the Judiciary, to sensitise judges to competition issues. We believe that these have enabled the Judges to improve their understanding of the area; and this is reflected in the quality of the Court decisions over the past four years. Coupled with this, the decision to file matters in the Commercial division has been resulting in minimal delay and greater familiarity with the issues on the part of both judges and attorneys.
5. Through extensive training the Staff has developed expertise in choosing its battles, and in preparing and presenting its cases.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Yes, the Fair Trading Commission has facilitated "Workshops for members of the Judiciary" financed with funds provided from international bodies such as the IADB and the USAID. The Commission's decisions may be appealed in the Supreme Court. Further, the FCA provides for Private Right of Action by any enterprise or individual who has suffered loss, arising out of an anti-competitive practice. The purpose of the workshops is to sensitise participants (members of the Judiciary) to some of the issues they are likely to grapple with when presiding over competition related cases. In recognition of the vital role of the judiciary in the enforcement of Competition Law, the Commission developed and implemented a sustained training program for the Judiciary; and is geared at facilitating at least one Workshop every eighteen months.

It is important to note that the Staff of the Commission does not participate in the workshops. Rather, we secure the services of persons with the requisite experience in the practice of Competition Law to conduct the sessions and interact with participants.

To date, we have conducted four (4) workshops. In January 2003, the Commission hosted its first seminar, highlighting Competition Issues in Telecommunications. The presentation proved an eye-opener for the twenty (20) Judges in attendance. In September 2004, the Commission hosted another workshop for the Judiciary, which was a more comprehensive training programme, which introduced

the area and focused on The Judge's role in Competition Cases. It covered topics such as Cartels and Bid-rigging and Agreements between Competitors. Six (6) of the Judges who are 'assigned' to hearing Commercial matters attended this training session. It was conducted by Diane P Wood, Circuit Judge, U.S. Court of Appeals for the 7th Circuit.

A total of thirteen (13) individuals attended the third Workshop which was held in September 2006. On this occasion we extended invitations to our colleagues in Barbados and participants comprised nine (9) members of the Jamaican Judiciary; two members of the Judiciary from Barbados; and two members from the Office of the Director of Public Prosecutions in Jamaica. The Workshop was conducted by Mr. William Kovacic, then Commissioner of the United States Federal Trade Commission (US FTC). The Workshop focused on Market Definition & Market Power, Abuse of Dominance, Horizontal & Vertical Restraints, Mergers & Acquisitions, and Expert Testimony and the Evaluation of Economic Evidence.

For our fourth Workshop, held in March 2008 we sought to make it more of a regional workshop with participants from other Caribbean states; and therefore our attendance increased to nineteen (19). Participants comprised eleven (11) members of the Jamaican judiciary; two (2) members of the Barbadian judiciary; one (1) member of the judiciary of Trinidad & Tobago; three (3) Judges from the Caribbean Court of Justice (CCJ); and two (2) members of the local Telecommunications Appeals Tribunal. Presentations were made by Dr. John Hilke, economics consultant, formerly with the US FTC; Mr. Curtis Robinson, Chief, Numbering Administration & Technical Support of the Office of Utilities Regulations (the local sector regulator); and Mr. Geoffrey Myers, Director of Competition Economics of the Office of Communication, United Kingdom. The theme of the Workshop was "Competition Issues in the Telecommunications Sector", included simulation exercises of Court cases and the personal experiences of Dr. Hilke and Mr. Myers as expert witnesses.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

In Jamaica's situation budgetary support from the Government was, and is still, limited. The FTC does not have the power to impose fines. Only the Court can impose fines, and all fines are payable to the Crown. Further, the Commission has no authority to charge fees. It was noted in the UNCTAD Peer Review Report of Jamaica that a survey of the budgets of Competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of the Government's non-military expenditures. Were that to apply to Jamaica, the FTC's annual budget would move from its current J\$50M to between J\$90M and J\$120M. While the Government has increased our budgetary allocation in nominal terms over the years, in real terms it remains much the same; and the FTC is called upon to use creative methods in the running of its operations to achieve its goals. In addition, we repeatedly make requests to developmental funding agencies, and this has yielded some success.

The absence of costly resource material, a training budget and funding to access expertise/consultants results in the Staff having to work without proper/complete tools and to focus its attention on areas, such as consumer redress, that are traditionally relatively easier to handle. But with our shift in focus to the handling of competition matters it has become necessary for us to properly provide the tools

and resources that are necessary. This has become one of our priorities, and this has been communicated to policy makers urging them to provide us with the relevant funding and facilities. On occasions, financial assistance from international funding and developmental agencies assist in ‘filling the gap’.

The measures adopted to address the challenge of limited financial resources include reducing operating costs through streamlining enforcement processes; prioritising of cases based on fixed, transparent criteria; and reorganising of the agencies operations in line with its priorities at a given time. Of note is that these measures were determined over time through the development and growth of the FTC, while building its knowledge base, technical capacity and expertise through various experiences. It was very difficult in the early stages to determine the specific appropriate measures that were necessary and useful and in hindsight, this has proven to be very true. It is our experiences over the years that have assisted us in determining these measures.

For example, in looking at our work load we are able to prioritise our cases vis-à-vis our available resources by assessing them with the following criteria:

1. Extent of Detriment and Seriousness of Conduct
2. Deterrent value of pursuing
3. Level of Public Interest
4. Jurisprudential value
5. The FTC’s capacity to investigate i.e. Resources, availability of evidence

In considering the optimal allocation of resources it is useful for us to look at our experiences with facing each of the challenges listed above and then, to make a determination as to when would be the best time in the Agency’s development to deal with each and how best to deal with them.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Fortunately, we have always enjoyed sufficient independence from other Government agencies and from special interest groups; and neither have we have ever felt ‘pressured’ or been in a position where undue influence was being levelled upon us by any Government Ministry or Agency, in the conduct of our work.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Our recommendations of the most important actions are:

- Develop Technical Capacity. The labour pool from which competition agencies in developing countries recruit their Staff is unlikely to include individuals with all the skills required to undertake technical competition analyses. Most agencies will therefore have little choice but to develop the requisite skills during the post recruitment period. The first step to be mindful of, therefore, is that recruits must possess a minimum level of training in order to be trainable. For instance, it is our experience that whilst a first degree (L1.b) is sufficient for newly recruited competition lawyers, newly recruited economists must have at least a Master's degree in Economics. Once the personnel has been recruited continued on-the-job training is crucial to filling the deficiency. A successful training programme would, among other things, (i) provide Staff with access to international consultants/experts to guide them through investigation processes; (ii) allow Staff to attend overseas conferences, workshops and seminars; and (iii) establish and maintaining links with other Competition agencies. Many of these have been achieved over time through several technical assistance programmes from international funding/donor and developmental agencies such as the USAID, IADB, EU, UNCTAD and the OECD. It has been found in many jurisdictions that the optimal Staff complement is directly related to the size of a country's population, the level of acceptance or non-acceptance of Competition Law & Policy within that jurisdiction, and the level of commerce that may be affected by competition considerations. For example, given these factors, the Technical Staff complement of the FTC ought to be at least twice its current size in order to operate at its optimum level of effectiveness.
- Develop a Competition Culture. The public (consumers, suppliers, policy-makers and judiciary) must be convinced of the benefits of competition as a means of organising economic activity if the competition agency is to be effective. The first step in competition law enforcement is detecting potentially anticompetitive conduct. It is important to note that most instances of anticompetitive conducts are brought to the attention of the Commission by individuals outside of the agency. The next step would be collecting information which is necessary for the agency to conduct its investigation in order to confirm or refute an allegation of anticompetitive conduct. Further, any individual or business found guilty of contravening the competition legislation could appeal the decision in a Court of law; this means that the Judiciary is also crucial to the process of deterring anticompetitive conduct. Ensuring that the public is well informed about the types of conducts which are prohibited, and appreciates the potential harm from these conduct, will help the agency to position the public as a key ally in detecting, investigating, prosecuting and therefore deterring anticompetitive conduct. Developing this culture is especially important if the country does not have a long history of using markets as the primary means of organising economic activity. It requires the agency to, among other things, establish and promote guidelines on specific sections of the competition legislation as well as make specialised presentations to consumer groups, special interest groups and students at various levels of the education chain. It also requires us to design a competition advocacy program with the objective of informing policy-makers when their initiatives are likely to impede or hinder competition.
- Establish and maintain relationships with other government agencies, universities, international agencies, the business community, media, etc. It is with the assistance of these entities that much of the Agency's work will be channelled and the success of many programmes and initiatives

will depend on the support of these entities. The FTC has had its challenges with many of these entities in getting them ‘onboard’ and to understand what competition law and policy is about and their role with respect to competition concerns.

- Address the challenge of limited financial resources and prioritise your goals giving due consideration to available resources. It is important that resources are allocated in such a manner that is appropriate for the agency’s age and capacity, taking local conditions and culture into consideration. Activities that may be appropriate for a newer agency may be of less value to a more experienced one, and vice versa; and therefore the selected activities should be clearly linked to the goals and objectives of the Agency in its early stage of development.
- Ensure that the Competition legislation is sound. It is important that the legislation is created as ‘correct’ as possible from the beginning as this will reduce the likelihood of successful challenges. We have experienced several challenges because of weaknesses in our legislation which have resulted in amendments and an extensive overhaul of the FCA itself, both of which require a long period of time to have the weaknesses addressed. For example, the many ‘conflicts’ and gaps which exist within the FCA, where for example, breaches are treated under different standards whether it be rule of reason or per se.

At the same time it is very useful to ensure that the legislation is consistent or coherent with established Government Policies. In our situation there are just one or two statutes that recognise the FTC or the FCA. Regulations and/or Government policy were enacted without knowledge of Competition considerations, and generally, business is conducted on behalf of the Government without due regard for the requirements of the FCA. Intensive Competition advocacy is therefore necessary to educate the policy makers with a view of having them recognise the importance of Competition in many of its considerations.

Pitfalls to Avoid

- Underestimating the importance and defining the role of a Public Relations (PR) Department and a communication strategy;
- Not getting the mass media as a strategic partner sooner than later;
- Not developing from the outset, a means of screening/prioritising investigations;
- Not designing from the outset, a system of quantifying interventions of the Agency;
- Not utilising the expertise and experiences of other Competition Agencies and experts in the field.



CONTRIBUTION BY JAPAN

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Japan--

1. Countries that have been actively enforcing a competition law for a longer period

Based on Japan's past experience of enforcing competition law and policy, it is important for young competition authorities to pay special attention to the following factors regarding the topics 1.1-1.7.

1.1. Organising your agency and preparing for work

In Japan, the Fair Trade Commission (JFTC) was established as a competition authority bestowed with functions that allowed it to perform independently from the start of the Antimonopoly Act (AMA). A secretariat consisting of permanent staff is attached to the Commission.

Because competition policy is not well understood by the general public in those countries at an early stage of economic development, the existence of a competition authority that can independently pursue the implementation of competition policy with a long-term view is necessary. In addition, for the promotion of competition policy based on a long-term view, it is helpful to develop experts by employing permanent staff and training them on the job or through training programs inside the organisation. The JFTC prepares operational manuals for each section, provides periodic training for each hierarchical level and more recently started to give specialised training, such as training on how to conduct economic analyses and training managed by the Investigation Bureau for an introduction to the investigation method.

1.2. Competition culture and competition advocacy

Japanese society historically has attached more emphasis on coordination over competition and it was not easy for the newly introduced AMA to take root after World War II. With national traits that have a strong preference for solving problems by talking rather than fighting and for doing what others do, a marked effort was necessary to establish competition policy in the society.

In promoting a culture of competition, it is important to help entrepreneurs raise awareness of compliance with competition laws. Competition advocacy, which promotes compliance with competition law by deepening the understanding of business people regarding the benefits of competition for themselves in the long run, is important. It goes without saying that strict enforcement of competition law is the most important task of competition authorities, but competition advocacy promotes not only the establishment of a culture of competition but also the effectiveness of enforcement.

Competition advocacy activities require a long-sustained effort and at the same time, strategies are important that choose options with appropriate targets, effective media, and appropriate bodies in accordance with their objectives. For example, the JFTC dispatches lecturers to seminars and conferences held by businesses, responds to consultations by entrepreneurs and publishes pamphlets and leaflets to raise the effectiveness of AMA enforcement. In addition, the JFTC holds roundtables with consumer groups, sends electronic news letters, and holds classes on the AMA in junior high schools to establish a culture of competition.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

The most important task for a competition authority is the strict enforcement of competition law. It is not enough to simply ban anticompetitive activities but is important to detect and eliminate them

based on competition law. In Japan, around between 1955 and 1970, enforcement of the AMA was inactive and some point out that lack of rigorous enforcement during this period caused such a negative impact that entrepreneurs have regarded violations of the AMA as light infractions ever since, which has resulted in unending cartels and bid-rigging today. It is necessary to actively enforce the law by tackling typical cases that influence the national or the local economy while having effective investigative powers to detect illegal activities and effective sanctions to eliminate such activities.

The JFTC has strengthened deterrence against antimonopoly violations by, for example, introducing a surcharge system to the AMA in 1977, increasing the surcharge rate in 1991 (from 1.5% of sales to 6%), increasing the criminal penalties for a juridical person in the case of double punishment (fine for certain AMA violations up to 100 million yen) in 1992 and increasing the maximum penalty against a juridical person (up to 500 million yen) in 2002. In addition, the AMA was amended in April 2005, which increased the surcharge rate (from 6% to 10%), introduced a leniency program and introduced compulsory measures for criminal investigations. The effects of the 2005 Amended AMA are steadily emerging, leading to such results as the JFTC receiving a lot of leniency applications and filing criminal accusations under the compulsory measures for criminal investigations in some cases.

1.4. Mergers

Mergers and Acquisitions are an irreversible process, which change the market structure. Therefore, it is necessary not only to prohibit anticompetitive mergers under the substantive provisions but also to identify potentially anticompetitive mergers under the notification provisions. In Japan, the AMA has had merger control provisions, including a notification system, since 1947 as part of a comprehensive competition law.

Regarding the notification provisions, notification thresholds need to be stipulated at an appropriate level based on an objective criterion. Japanese notification thresholds are basically based on the total assets of the merging party, which is an objective criterion, and the level of total assets has been reviewed several times in accordance with past economic growth.

Regarding the substantive provisions, it is important to ensure clarity and transparency as well as heighten predictability for entrepreneurs. The JFTC takes actions to ensure the transparency of law enforcement and improve the predictability for entrepreneurs through publishing and revising the merger guidelines. Moreover, the JFTC publishes the results of its reviews on individual cases, which are thought to be helpful as a reference to entrepreneurs, as well as annual releases of the summaries of such cases.

1.5. Judicial appeals

Entrepreneurs dissatisfied with JFTC decisions may appeal to the Tokyo High Court to seek revocation (Article 77 and 85 of the AMA). In Japan, few cases were brought into the judicial process in the past, but recently the number of cases appealing to the court has been gradually increasing. This growing number of appeals may temporally cause an unavoidable augmentation in administrative costs, but will also contribute to increasing the general public's awareness of the importance of competition policy in Japan because the accumulated precedents serve to clarify the interpretation of the AMA and the accumulated judicial case procedures compile case examples with transparency and objectivity. Furthermore, through the application of judicial procedure to the cases, the number of attorneys and judges familiar with competition law and policy can increase.

1.6. Resources

To enhance the JFTC's capacity to plan competition policy and enforce competition law, it is vital to expand resources such as staff and budget while immediately responding to changes in the environment surrounding the economy and society. The staff and budget of the JFTC must be prepared by the Cabinet and discussed and approved in the Diet. Thus, it is important to gain support from the public and Diet members through competition advocacy as well as achieve satisfactory results from law enforcement. To this end, the JFTC has utilised proposals from outside and formulated guidelines on competition policy administration as a part of its competition advocacy activities.

In his general-policy speech on May 7, 2001, Japanese Prime Minister Junichiro Koizumi said that, "we will strengthen the structure of the JFTC, which should serve as the guardian of the market, thereby establishing competition policy appropriate for the 21st century." In response, the JFTC held meetings convened under "the Committee Considering Competition Policy Appropriate for the 21st century" comprised of outside experts from June 2001, and a report was submitted to the JFTC in November of the same year. In this report, it is said that for the JFTC "to play a core role in competition policy and actively address consumer policy, the number of personnel needs to be rapidly increased and the organisation also needs to be expanded". Furthermore, in January 2006, the JFTC published the "Grand Design for Competition Policy", which illustrated the guidelines to manage competition policy from then on and indicated that it is important to reinforce the infrastructure of competition policy for implementing key policy issues. The number of staff in the General Secretariat of the JFTC has been increasing year after year (e.g. 571 in FY 2001, 795 in FY 2008).

1.7. Independence

A competition authority that is a permanent organisation and performs independently is indispensable for the promotion of competition policy and the effective implementation of competition law. The JFTC was established with the duty to achieve the purpose set forth in Article 1 (Article 27 of the AMA). Article 28 of the AMA clearly stipulates the independence of the JFTC with regard to performing its duties, and therefore, neither other government agencies nor politicians should interfere with the JFTC in its enforcement of the AMA. In addition, Article 31 stipulates that the chairman or a commissioner may not, against his or her will, be dismissed from office while he or she is in office, except in exceptional cases falling under the same Article.

In order to ensure its independence, it is important for the competition authority to gain the public trust by strictly and aggressively enforcing the law, ensuring transparency, and fulfilling accountability. The JFTC publishes amendments of laws, regulations and administrative measures such as cease and desist orders through official gazettes, press releases, its homepage and various pamphlets, etc. to improve transparency and accountability. In addition, the JFTC annually reports through the Prime Minister to the Diet based on Article 44, Paragraph 1 of the AMA.

1.8. Conclusion

Based on Japan's experience, the following five activities are important for new competition authorities to ensure a successful start.

1. A comprehensive competition law and an independent competition authority

Having a comprehensive competition law in place is a requisite for a market economy in a modern society. To implement and rigorously enforce a comprehensive competition law and to promote competition advocacy intended to deepen the understanding of the importance of

competition policy, it is essential to establish a permanent competition authority that exercises its authority independently.

In Japan, since 1947, the AMA has existed as a comprehensive competition law that controls and regulates unreasonable restraint of trade, private monopolisation and business combination along with the JFTC as an independent competition authority. Between the 1950s and 1960s — the decades of Japan's rapid economic recovery and growth following World War II — fierce competition continued in many industries among entrepreneurs with many new market entries, while competition laws were not always aggressively enforced. However, the consistent existence of a comprehensive competition law and an independent competition authority (JFTC) made it possible to rapidly and effectively enforce competition laws when a more concentrated industrial structure and anticompetitive acts such as cartels caused problems in the Japanese economy, which enabled further economic development of Japan.

As explained in point 1.7 above, in order for a competition authority to ensure its independence, it is important to gain the trust of the general public by not only having independence as provided in the legislation, but also strictly and aggressively enforcing laws, enhancing transparency and fulfilling accountability.

2. Strict enforcement of competition law

As explained in 1.3 above, strictly enforcing competition law against all acts that cause substantial adverse effects on the national economy, such as hard-core cartels, will encourage the growth of competitive entrepreneurs and lead to the creation of a vital economy. To strengthen the ability of enforcing competition law, it is important to develop professional skills through the education and training of permanent staff within the competition authority.

3. Competition Advocacy

As explained in 1.2. above, taking advantage of the accumulated records of, and experience in, the enforcement of competition law, long-sustained competition advocacy is important to foster culture of competition, improve the effectiveness of law enforcement and establish competition policy. In carrying out competition advocacy, it is important to adopt a strategy that matches the aimed purposes of the advocacy, including the careful selection of appropriate targets, effective methods, and people responsible for performing advocacy.

4. Assuring the interests of consumers

The objective and role of competition law is to protect competition, not competitors. The principal objective of competition policy is to make the market mechanism function effectively by maintaining or promoting competition among entrepreneurs and to assure the interests of consumers by improving the efficiency of economic activities as a whole.

In order to accomplish the ultimate purpose of competition policy, that is, “to assure the interests of consumers”, it is important not only to help the market mechanism work effectively by maintaining and promoting competition among entrepreneurs, but also to create and ensure an environment in which consumers, as key players in the market, can make their decisions in an independent and reasonable manner.

While the benefit resulting from competition is large, it exists thinly and widely across the whole economy. Consequently, when we make rules and enforce laws in individual cases, we must

always be conscious that the objective and role of competition laws lie in assuring the interests of consumers, not the interests of any particular industry or group.

The JFTC published the “Grand Design for Competition Policy” in January 2006, which stipulated the need to provide appropriate information to consumers as part of the promotion of a competitive society based on rules. The JFTC is making efforts to strictly apply the AMA and the Premiums and Representations Act to eliminate violations, and to improve the appropriateness of trades with consumers by pointing out problems through fact-finding surveys on products and services that greatly attract consumer interest as well as new business areas such as e-commerce.

5. International cooperation

To strictly enforce competition policy and promote competition advocacy, it is useful to cooperate with countries that have accumulated experience in administering competition law. We can share experiences about the operation of competition laws by concluding Antimonopoly Cooperation Agreements and attending international conferences, such as the OECD Global Forum on Competition, the ICN, etc. In addition, we can develop staff ability and construct appropriate cooperative relationships with other jurisdictions through technical assistance.



CONTRIBUTION BY LATVIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Latvia--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Competition policy in Latvia dates back to 1991 when the Law “On Competition and Restriction of Monopoly” was adopted, by which the Anti-monopoly Committee was founded, just a few months after Latvia finally retrieved its independence. In 1998 Competition Law came into effect and the Competition Council was formed on the basis of the Anti-monopoly Committee. The present Competition Law was adopted in 2001 (in force from 2002) and first amendments were made in 2004, slightly before accession of Latvia into the European Union. During 2008 Competition Law was amended twice.

It has to be admitted that due to the limited resources and enforcement tools, only limited enforcement was possible before 2002. Law “On Competition and Restriction of Monopoly” was too general. Competition Law in force from 1998 already contained effective sanctions system; however it didn't contain any special measure such as inspections (understood as “dawn raids”). Competition law from 2002 broadened investigation tools, however the possibility to make dawn raids was introduced with amendments only in 2004.

Competition Council according to the Competition Law and Advertising law was entitled to supervise unfair competition and advertising cases mostly causing insignificant harm to competition, which were very time consuming and a drain on resources. Since 1 January 2009 only, unfair competition cases are left for the decision of the court, as well as advertising which doesn't cause significant harm to competition.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Due to insufficient resources in the first years no efforts were taken to promote competition culture in Latvia. At the beginning of 2000 an Internet homepage was developed to allow the public access to all public versions of the Competition Council decisions from 2002.

Competition advocacy activities started mainly after 2005 when seminars on competition for stakeholders (trade and professional associations, public institutions etc.) were introduced in the framework of EU Transition Facility Twinning Light Project “Enforcement of competition legislation implementation and competition advocacy measures for further administrative capacity strengthening of the Competition Council”. After the end of above-mentioned project in 2006, new educational seminars for stakeholders were provided during 2007 and 2008.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

The main problem over the years has been the length of litigation during which decisions of Competition Council did not take effect as it was not final, therefore infringement could continue for several years while litigation possibilities were exhausted.

The infringements of Competition Law were mainly established in activities of state and municipalities enterprises that were mostly natural monopolies. It is important that one of the main tasks of Competition Law was to provide that monopolies belonging to state do not harm competition and that Competition Council implemented it without taking into account ownership of enterprises which had made infringements.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The main difficulty at the beginning was insufficient enforcement tools which was the main reason why, at the beginning, it was hard to establish cartel infringements. Nevertheless investigation of the first significant and successful cartel cases started even before dawn raid possibility was introduced by the law. It is also important to increase awareness of Competition Law between institutions dealing with public procurements as bid rigging may contain cartel agreements on desirable results.

No leniency application has yet been submitted to the Competition Council. Therefore in previous years, the relevant regulation on leniency was more detailed and clear, as well as other possibilities on how to promote leniency are now examined.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Merger control was envisaged already by the law that came into force on 1 February 1992 "On Competition and Restriction of Monopoly" when it was performed by Anti-monopoly Committee. There is no data available on merger control before 2002 but the number of adopted merger decisions was insignificant, therefore it didn't require much additional resources then.

It can be explained with a too high notification threshold, requiring to notify merger only if it corresponds two indications together: common turnover of merger participants exceeds 25 million Lats (~35.5 million EUR) and at least one of the merger participants has a dominant position in relevant market (its market share is more than 40%).

From 2002 the threshold was diminished and if merger corresponded to only one abovementioned indication it had to be notified. These changes as well as development of the economy resulted to a significant increase of notified mergers, thus requiring more administrative resources. It has to be noted that only small number of mergers were not allowed or were allowed with obligations that preclude distortion of competition.

To avoid the overload of merger notifications by the amendments to the Competition law of 2008 40% market share threshold was abolished as well as short form of merger notifications was introduced. Also since 01.01.2009 there is no obligation to notify merger if the turnover of one merging party from two is less than 1.5 million Lats (~2.13 million EUR). As the threshold for notification of merger remains the common turnover of merging parties i.e. - exceeding 25 million Lats (~35.5 millions EUR).

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Even though in its early years the number of notified mergers was insignificant, merger control was an important part of the authority's activities as the mergers that then occurred were very significant for further development of relevant markets. Another advantage of merger control is the information authority collects regarding different relevant markets. However low thresholds for notification may cause an overload of notifications of small insignificant mergers, which are not of the interest for the authority, but which nevertheless have to be examined according to the requirements of the law.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a

major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Decisions of Competition Council of Latvia may be appealed to the Administrative Regional Court and then in cassation to the Senate of Supreme Court (Administrative department) (since amendments to the Competition law in force since 16.04.2008.) Before these amendments decisions could be appealed in three instances (1st instance Administrative District court, 2nd Administrative Regional Court and 3rd and final instance, the Senate of Supreme Court). The reason of such amendments was to save courts resources as well as to shorten the litigation period (when decision becomes final as before it was over excessive - for example one decision establishing abuse of dominant position adopted on 1999 became final only in 2007). However average duration of court proceedings was 4-5 years.

Also Amendments (in force from 16 April 2008) provides that appeal of the Council's decision doesn't suspend its enforcement except for its part on imposition of a fine.

Until the end of 2008, 59 court proceedings were initiated in respect to the Competition Council's decisions on abuse of dominant positions, prohibited agreements and mergers (including decisions on finishing the investigation without establishing infringement). Until now only in 9 cases the final judgment has been carried out and only in one case the decision of Competition Council was found unjustified. The positive results may be explained by the reason that Competition Council in its decisions constantly refers to the relevant European Commission and European Court of Justice case law.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

No particular programme for judges was developed. Educational activities for judges were carried out regularly. Last educational seminars for judges on Competition law with aim to introduce them with recently adopted amendments in Competition law were provided in last year (2008).

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Competition Council didn't have enough resources at the beginning. Limited financial resources also meant that the Competition Council was unable to properly develop its staff. The situation improved from 2006 when budget allocations allowed the agency to develop further its staff as well as to start the necessary market inquiries. These increased budget allocations was as a result of emphasising

during the years the importance of competition policy and effective competition surveillance in common economical development of the state. Increasing awareness on competition matters in society also will make easier to discuss on necessity to increase budget allowances for competition agency. This is one reason why competition advocacy is so necessary already in the early stages of the agency's establishment.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Competition Council of Latvia is a direct administrative institution subordinate to the Ministry of Economics in the form of supervision. However according to the Competition Law neither the Ministry of Economics, nor the Cabinet of Ministers, or any persons may give any prescription to the Competition Council regarding the commencement of an investigation of a matter in a specific case, as well as regarding the manner in which the investigation shall be conducted or a decision taken.

Such status of independency was already determined in the Competition Law in force from 1 February 1998 as well as was retained in the Competition law version that is in force from 1 January 2002.

From our point of view such regulation provided sufficient level of independence as also all decisions adopted in cases of authority may be appealed only in court.

Amendments (in force from 16 April 2008) for strengthening the independence of Competition Council stated that Competition Council is entitled to enter into an administrative contract in order to end the legal dispute before court without the approval of a supervising institution (Ministry of Economics). Thus the general regulation requiring such approval for conclusion of administrative contract was eliminated in respect of Competition Council. Also a duty to get authority (accept) from a supervising institution before a statement on persons rights in a specific legal situation (as an answer to the application received from that person) is issued is abolished, however this duty was not fulfilled already before amendments took effect.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

(a)

1. Competition agency should have discretion not to initiate an investigation if no serious harm to competition is established;
2. Law has to contain specific regulation to ensure possibility of self-enforcement of competition acts and especially regarding self-enforcement of advertising and unfair competition infringements, if its supervision is obliged to Competition agency, to ensure effective alternative to public enforcement;

3. Competition law has to determine that appellation may not suspend fulfilling of the obligations imposed by decision or give discretion to Competition agency to determine that in particular cases decision becomes into force immediately and appellation doesn't suspend duty to follow obligations prescribed by decision;
4. The broad use of available experience of other institutions, including European Commission and judgments of European Court of Justice;
5. Possible merger notification thresholds has to be evaluated in-depth, to ensure that most appropriate of them will be determined by Law.
6. It is very necessary that Competition agency pays significant attention to state monopolies, not taking into account ownership of the possible trespasser.

(b)

1. Situation when Law doesn't contain appropriate measures (inspection, etc.) to enforce it has to be avoided;
2. Supervision of unfair competition and advertising may require many resources that may be spent for unimportant cases; to avoid it, Law has to provide discretion not to initiate the investigation of unimportant cases;
3. Adequate attention must be paid to competition advocacy already at first moments when Competition agency starts working, even if resources are limited. Also particular education for judges has to be provided. Increasing awareness on competition matters in society also will make easier to discuss on necessity to increase budget allowances for competition agency. That is a reason why competition advocacy is so necessary already at early stages after agency is established;
4. Law has to contain effective and heavy sanctions for trespassers, as well as Competition agency has to apply them in volume prescribed by Law;
5. Litigation on decisions of Competition agency has to be provided as fast as possible.



CONTRIBUTION BY LITHUANIA

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Lithuania--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The first legal act governing competition in Lithuania was the competition law adopted in 1992. This initial law was supplemented by various regulatory provisions that together constituted the Lithuanian competition regime. The law proscribed abuses of dominance, anticompetitive restrictive agreements, acts of unfair competition and certain types of anticompetitive conduct by executive bodies of government. The law also provided for merger control. However, the law did not contain the necessary procedural rules and powers of the competition authority in respect of investigation of infringements.

Under the 1992 law the Competition Council initially existed within the Agency of Prices and Competition under the Ministry of Economy, and was formed on the basis of the former State Price Committee. In 1995, the Agency was reorganised into the State Competition and Consumer Protection Office under the Government, the director of which was appointed by the Government. The former Competition Council was under the State Competition and Consumer Protection Office. The Competition Council consisted of seven members from different institutions, who were appointed by the Government for terms of three years. Council members did not work full time; and used to meet only once-twice per month for making decisions.

The former Competition Council had enforcement responsibility also for consumer protection, monitoring state aids, and antidumping.

Such structure of the competition authority didn't work well. Council members being from outside were not involved in a daily work of the competition agency and were not motivated to go deeply into competition matters. Furthermore, having accumulated additional functions, such as antidumping and consumer protection, the former competition authority had not enough qualified recourses for dealing with quite different and even contrary to competition matters. Lack of professional staff, and office space and equipment were also among the main challenges faced by the Lithuanian competition authority.

The situation has changed after the new competition law was enacted in 1999. The law attained a dual objective: created an independent competition authority - the Competition Council and established more effective procedural rules. The new law was followed by numerous by-laws. The separate Law on Coming into Force of the Law on Competition adopted in 1999, provided for the reorganisation of the former Competition and Consumer Protection Agency into the Administration of the Competition Council. The Administration of the Competition Council was formed to fulfil the functions of the

Competition Council. Its specific structures and management procedures were elaborated and approved by the Competition Council.

In addition to the supervision of the Law on Competition, the Competition Council also carries out functions assigned by the Law on Prices, and the Law on Advertising. Additional duties with which the Competition Council was charged, namely, consumer protection and antidumping, have been transferred to other governmental institutions.

It would be almost impossible to establish competition regime in Lithuania without the knowledge and experience of consultants and experts from international organisations and mature agencies. The Lithuanian Competition authority has had support from U.S., Denmark, European Commission, Sweden, Germany and OECD, and received very extensive technical assistance in both anti-trust and state aid fields. Foreign experts provided assistance in drafting the first competition laws and secondary legislation; acted as lecturers at seminars and workshops; gave advice on everyday cases (long-term advices); and hosted Lithuanian specialists in their home authorities. The Competition Council still maintains good relations with the previous experts.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

At times of the enforcement of the first competition law in Lithuania, the level of competition culture was not adequately developed, the many hardly understood or, rather, misunderstood the purpose or the methods of operation of the competition authority, quite frequently expected from the Competition Council things falling completely out of the competence and scope of the Competition Council (e.g., the public expected that the Competition Council is in power to directly cut the prices of goods or reduce the inflation, etc.).

Therefore, to achieve a satisfactory level of the implementation of competition policy in Lithuania, it was very important not only to make competition law and competition policy public, but also to educate the public about the authority's work – to help consumers, the business community and other parts of government understand the rationale for competition enforcement and why it benefits them. A variety of means were used for doing so:

- publish all substantive decisions of the Council;
- publish annual reports describing the agency's activities and important cases;
- cultivate relations with the press; issue press releases announcing important decisions or cases;
- make speeches or other public appearances at appropriate occasions;
- organise seminars or conferences on competition policy for interested parties – lawyers; business people, consumer groups;

- publish guidelines explaining the substantive analysis that the agency employs in specific types of matters, or outlining procedures that are followed by the agency.

The Competition Council also performed an important work in preventing restriction actions of public and local authorities and actively participated in drafting and amending the legal acts prepared by different institutions seeking to harmonise the provisions of these acts with the competition rules.

Existing procedures in the government provided for submission of draft new legislation to the Competition authority for comment on issues of competition policy. In exercising this responsibility the Council commented on dozens of pieces of legislation in that period. Very often representatives of the Competition Council consulted with other ministries on specific cases or proposed regulations. However, their advice was not always heeded. The Competition Council had limited resources, so it had carefully select the matters in which it would participate and could be effective as competition advocate within the Government.

Following the requirements on harmonisation of the competition law, in 1998, the Lithuanian competition authority jointly with the Law Harmonisation Committee “Competition” drafted the Recommendations on implementation of the competition principles in the following sectors of the economy: postal services; energy sector, and transport sector. These Recommendations contained the review of fundamental EC Regulations and Directives related to promotion, enhancement and enforcement of competition in the mentioned sectors of the economy. Besides, measures were taken to review legal acts effective in the Republic of Lithuania that were regulating the functions of such sectors with allowance for their compatibility with the standards specified in the Treaty of Rome. All the ministries and other governmental institutions, that were responsible for drafting and screening of legal acts in such spheres of activity, were been made familiar with the Recommendations.

The developed competition culture, increased public awareness and educated business society and consumers through making the requirements of the Law on Competition a public domain could be regarded as one of the main achievements of the Competition Council.

The Competition Council continues to place significant emphasis on the Council’s role as competition advocate. The Council publishes its all substantive decisions, annual reports describing the Council’s activities and important cases, publishes guidelines explaining the substantive analysis that the Council employs in specific types of matters, or outlining procedures that are followed by the Council, cultivates relations with the press; issues press releases announcing important decisions or cases, makes speeches or other public appearances at appropriate occasions, develops a page on the World Wide Web (www.konkuren.lt).

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In the early years, abuses of a dominant position occurred relatively more frequently than restrictive agreements, as monopolies and dominant positions were very common in the Lithuanian economy. They usually were created by privatisation of formerly state-owned monopolies, and had significant impact upon Lithuanian consumers. Therefore, the Council confronted mostly with the abuse of dominance cases in such sectors as railway, post and telecommunications. Market definition and conditions of entry were often especially problematic to the dominance analysis in those cases.

Successful prosecution of the abuse of dominance cases related to post, railway and telecom served as a very effective tool to enhance the Council's reputation both within the government and throughout the private sector.

As regards non-cartel restrictive agreements, the 1992 law did not impose restrictions on vertical agreements unless one of the parties was a dominant undertaking. This was to a certain extent influenced by the U.S. antitrust law.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The substantive provisions prohibiting restrictive agreements in the 1992 law contained general prohibitions of agreements that restrict competition and also prohibitions of specified types of conduct. The specific prohibitions included agreements among competitors fixing prices or terms of sale, allocating markets or sales volumes, and bid rigging.

In the early year, there were only few prosecutions of cartel cases in Lithuania. Prosecuting cartels was difficult, as under the 1992 law the Lithuanian competition authority lacked sufficient powers to prosecute cartels. Evidence of illegal agreements was not easy to obtain, especially when the subjects of the investigation were not co-operative. However, it was also common that subjects voluntarily produced evidence of the illegal activity, often because they did not know that the conduct was unlawful.

The best example of a successful cartel prosecution was the intravenous solutions case of 1998. It should be noted that this was the first international cartel: the illegal agreement allocated markets between Lithuania and Latvia. Successful prosecution of that case required close co-operation between the competition agencies in the affected countries, and showed the importance of such co-operation.

Under the 1999 law powers of the Competition Council have been increased and include the application of bigger penalties and other measures. Officers of the Competition Council are entitled to enter business premises, to review and to make copies of all available documents, including internal correspondence, to seize relevant documents and other material, etc. Entering premises, reviewing and copying relevant documents is allowed only upon approval of a judge.

With the introduction of the 1999 law, detection and prosecution of cartels became a high priority within the Competition Council and it has been especially successful in prosecuting them. Some investigations were rather noticeable in terms of the scope of work involved, as well as complexity of issues addressed. This in the first place holds true for investigations of the situation in telecommunications, fuel and construction markets. The fines imposed by the Competition Council were significantly higher in comparison with previous years. Imposing of bigger fines, especially in cases of restrictive agreements, serves as a warning to companies operating in other markets that prohibited agreements will not remain undisclosed.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Both the 1992 law and the new law of 1999 provide for premerger notification and merger control. The 1992 law provided that the Council would establish the size thresholds for notifications. Those thresholds were set at a relatively low level: notification was required if the merging parties together had any of the following: annual turnover of 8 million Lt., total capital of 2 million Lt., or 300 employees. These thresholds generated a relatively large – and growing – number of notifications: 17 in 1994, 31 in 1995, 38 in 1996, 77 in 1997, and 158 in 1998. The law required the Council to adopt a decision on the merger within one month after notification. The period could be extended for up to nine months, but only with the agreement of the parties.

The law of 1999 was an improvement on the 1992 law in some respects. The notification threshold was set at combined turnover of 30 million Lt, each party having at least 5 million Lt. As it was expected, a higher threshold reduced notifications by at least one-half. The law provided that the Council must within one month after notification make a final decision on the merger or decide to extend the examination. In the latter event, the final decision had to be made within four months of notification.

According to the amendments made in 2004, the term of the four months allowed to the Competition Council to pass the final decision has been liberalised, i.e. upon a duly grounded request of the applicant undertaking it may be extended for an extra month. This may be of special importance in some individual more complex cases when the Competition Council intends to permit the concentration subject to certain conditions and obligations and the extra month is necessary for the undertaking concerned to analyze and propose the appropriate coordinated undertakings which would prevent the creation or strengthening of the dominant position.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Notified mergers have occurred in many sectors of the economy. In approximately half of the transactions a foreign economic entity was involved. All types of mergers have been notified – horizontal, vertical and conglomerate – with horizontal and conglomerate being the larger categories. To date, almost all notified mergers have been approved by the Council. Only a few mergers have been disapproved completely.

1.5. *Judicial appeals*

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

The undertakings as well as other persons who believe that their rights protected by this Law have been violated shall have the right to appeal to the Vilnius Regional Administrative Court against the resolutions of the Competition Council.

During the period of 1993-1999, the Lithuanian Competition agency considered a total of 262 cases involving possible substantive violations of the competition law. Most of the cases (108) were related to unfair competition, 47 – abuse of a dominant position, 45 – illegal concentration, 39 – activities of state government bodies restricting competition, 18 – fail to fulfil the obligations of the Competition Institution, 4 – restrictive agreements (cartels). Out of all cases only 25 cases were appealed to the court (for instance during recent two years (2006-2007) were appealed even 12 cases), and the Competition Council prevailed in most of them.

To reach the final decision (we count both the first and the appeal instances) in some cases it took about 7 months in other – about 2 years (now it takes a little bit less). Despite such long period for reaching the final decision of special significance is the fact that the court acknowledged decisions of the Competition Council as legitimate in more complex cases dealing with infringements most harmful for economy and consumers.

Therefore the judicial practice has been tangibly beneficial in terms of the efficient enforcement of the competition policy as well as consolidating the legal basis for the functioning of the national competition authority.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Up to now, the Competition Council has not developed any special programme for interacting with judges. Training of judges in the field of competition is apparently insufficient. Who is to undertake training of judges in this particular area? As of today we clearly lack appropriate training programmes for judges.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

The shortage of resources, both financial and personal was (and still is) a problem. Because of the budget that was not sufficient, there were limited possibilities to hire experts from outside in the course of investigations, if needed, to constantly train the staff, especially new employees, to employ economists or lawyers accordingly to the needs of the Competition Council. The Competition Council also had a problem with employee turnover – retaining good professionals in the agency. Part of the problem was a disparity in pay between positions in the Administration of the Competition Council and positions elsewhere in the public and private sectors. The positions in the Competition Council were paid at a lower rate than comparable positions in the ministries. Therefore, many highly qualified specialists, attracted by higher salaries elsewhere, left for other institutions or private sector.

In order to overcome the disparity in salaries, the Competition Council has worked within the Government to encourage review of these standards and sought for additional resources, however up to now, the disparity exists.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The experience accumulated by the Lithuanian Competition Council has shown that in order to be able to meet all the challenges that the young authority is facing, it is of utmost importance to ensure the independence from a variety of interests, political influence and control. Therefore, it is vital to establish the independence of the authority from the Government and the Parliament in the competition law. Should the institution fail to attain that, it will proceed being under the influence and pressure of various interests, will be in no position to ensure the efficient oversight of competition law and represent itself as an efficient instrument for the protection of competition in the country. It is particularly vital in the country in which, as a rule, the level of competition culture is not adequately developed.

The Lithuanian competition authority started its work in 1992 as a part of the Government, and was not fully free of political influence. The experience accumulated during several years has shown that in order to be able to meet all the challenges that the authority was facing, it was important to ensure its independence from a variety of interests, political influence and control.

This was particularly vital, as at that times the level of competition culture was not adequately developed, the many hardly understood or, rather, misunderstood the purpose or the methods of operation of the Competition Council, quite frequently expected from the CC things falling completely out of the competence and scope of the CC (e.g., the public often expects that the CC is in power to directly cut the prices of goods or reduce the inflation, etc.).

The Law of 1999 changed the status of the Competition Council and provided it with a greater measure of independence. The Competition Council is an independent public authority of the Republic of Lithuania, responsible for the implementation of competition law and policy. Decisions of the CC are taken without any possibility of interference by the Government. The Council is a collegiate body, composed of 5 persons who take their decisions by majority vote. The law provides that the Chairman and four members of the Competition Council are appointed by the President, according to the proposal of the Prime Minister. The Chairman serves for a term of five years, and the four members serve for a term of six years, except that initially two members serve for a three year term. The same person can not be appointed for more than two consecutive terms of office.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

a)

- to adopt an adequate legislation;
- to create an independent agency with sufficient capital resources;
- to recruit a proper staff;
- to receive a technical assistance from abroad;
- to develop a competition culture.

b)

- inadequate legislation;
- interference from the government;
- too broad range of functions (responsibilities);
- lack of human and capital resources;
- lack of international cooperation.



CONTRIBUTION BY MEXICO

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Mexico¹--

1. Competition Enforcement

1.1. Conduct cases and investigations

1. For decades, the Mexican economy was characterised by strong protectionism and heavy government intervention. As a result, most sectors of the economy were highly concentrated and presented important barriers to entry.

2. In the early 1990's Mexico initiated a process of trade liberalisation and regulatory improvement which was designed to modernise the economy, improve competitive conditions and facilitate Mexico's insertion in the global economy. The Federal Law of Economic Competition (FLEC), which created the Federal Competition Commission (CFC or Commission), came into effect in 1993 and was part of this modernisation effort.

3. The initial years after the Competition Law entered into force (1993-1995) saw very few complaints for anticompetitive practices filed before the CFC: 22 in 1993-1994 and 12 throughout 1994-1995. Most of these complaints were rejected because they did not fulfil the minimum requirements needed to initiate an investigation or because they denounced practices that were not considered as anticompetitive under the FLEC. This was not surprising given that competition policy was a new field, and economic agents had little experience in dealing with such issues and often tried to present complaints before the CFC merely as a tool against their competitors.

4. In the early years, the ex-officio investigations initiated by the CFC on relative monopolistic practices took several months or even years to resolve, and most of them without positive results. For example, in the period of 1993-1994, only 6 of the 16 ex-officio investigations, most of them on cartels, concluded with the imposition of a sanction, while 7 concluded that there was no violation to the FLEC. This was explained by the lack of experience of the CFC in taking on complex cases.

5. During our 15 years of experience, key actions have been conducted in three main areas in order to improve effectiveness in enforcement of competition law regarding abuse of dominance cases. First, a new policy has been adopted to apply more restrictive criteria when choosing what cases will be initiated, investigated, and eventually sanctioned. Second, we have developed an advocacy strategy aimed at strengthening communication between the Judiciary Branch and the Competition authority, and increase understanding of competition issues by judges. Third and perhaps most importantly, are the amendments to the FLEC in 2006 (described below). It is important to note that the amendments to the FLEC did not change the core analytical principles of the law, but they strengthened the CFC's operative tools.

6. Prior to the 2006 amendments to the FLEC, the law defined anticompetitive conducts for relative practices as i) non-price unilateral restraints, ii) resale price maintenance, iii) tied sales, iv) exclusive dealings, v) refusal to deal, and vi) exclusionary boycott. Other anticompetitive conducts were defined in the FLEC as relative monopolistic practices that unduly damage or impair the competition process and free access to production, processing, distribution and marketing of goods and services (article 10, paragraph VII). This lack of detail became the subject of legal controversy and led to the inclusion of five additional relative monopolistic practices in the 2006 amendments to the FLEC.

¹ Submitted by the Mexican Federal Competition Commission

7. One of the main changes to the FLEC was encouraged by a Supreme Court decision in 2005. After four judicial procedures in district courts, the Supreme Court analysed and resolved on the constitutionality of article 10 paragraph VII in the following terms: The Supreme Court judged that this paragraph was unconstitutional, since it only included general criteria on conducts that can hinder free market access and economic competition, and failed to establish the parameters that the CFC must follow in order to sanction the relative monopolistic practices involved.

8. In order to overcome the legal weakness pointed out by the Supreme Court with regard to the unconstitutionality of article 10 paragraph VII, the reforms to the FLEC sought to include five additional relative monopolistic practices² that were originally contained only in the FLEC's bylaw. These five conducts are typified as: a) predatory pricing, b) rebates and loyalty discounts, c) cross-subsidisation, d) price discrimination and e) raising rivals' costs.

9. The modifications to the FLEC also included specific economic concepts that firms can use to argue efficiency gains that offset the effects of anticompetitive practices. Moreover, these amendments granted the CFC limited powers to conduct on-site verifications in order to gather evidence, increased fines, and allowed for divestiture of assets as a last resort.

10. Our experience shows that the criteria for selecting cases are of vital importance for a competition authority. As we have gained experience, the quality of the cases accepted has improved, as well as that of the analysis conducted by the CFC. Our rate of success before the courts has improved dramatically, in large part because we have tried to understand the reasons why we lost some of the early cases. In addition to learning from our mistakes, we have become very proactive with the judicial tribunals, and are working actively to present our viewpoints throughout the process, and generate a clearer understanding of competition issues among the members of the judicial branch.

1.2. *Leniency*

11. The amendments to the FLEC have strengthened the CFC's enforcement capacity, by establishing a leniency program aimed at detecting and fighting collusive agreements that fix prices, segment markets or facilitate bid rigging. The leniency program is based on article 33 bis 3 of the FLEC. Its principal feature is to grant the reduction of fines to the economic agents involved in an absolute monopolistic practice (hardcore cartel) that apply to the leniency program.

12. The leniency program is aimed at the first economic agent that: i) provides evidence to prove the existence of an absolute monopolistic practice; ii) cooperates completely and continuously with the Commission during the course of the investigation and the defence of the case; and iii) undertakes necessary actions to end its participation in the cartel. The leniency program also considers a reduction in fines for those agents that are not the first to come forward, as long as they contribute information towards the investigation.

13. Anyone interested in applying for the leniency program must do so either through a voicemail message or e-mail. The Directorate General for Investigations of Absolute Monopolistic Practices and Interstate Trade Restrictions is the only department within the Commission which is authorised to process the leniency requests submitted to the Commission.

² These practices are considered illegal when the agent has substantial market power in the relevant market and whose conduct has the goal or effect of unduly displacing other economic agents, impeding their access to the market or establishing exclusive advantages in favour of one or more persons.

14. In general, cartel cases are easier to win than abuse of dominance cases, provided that there is reasonable evidence of an agreement among competitors. This is precisely because in abuse of dominance cases, the application of the rule of reason requires sophisticated economic analysis, which ultimately goes before tribunals that are not specialised in competition matters. In the early days of the CFC, most of the cartel cases won by the Commission had to do with a lack of understanding of the FLEC and of competition policy in general by the firms, primarily on the part of business and trade associations.

15. An important challenge for every young authority is the ability to sanction anticompetitive conduct in an effective manner, so as to generate the incentives and the deterrent for the practice not to be committed again. The level of fines that an authority can assess is therefore fundamental in order to create this set of incentives and deterrents. In Mexico, fines used to be extremely low (the maximum fine was approximately \$1 million dollars US), and while the 2006 amendments to the Law increased fines substantially (\$7 million dollars for cartels and \$4.5 million for abuse of dominance), they are still much lower than in other countries. Among other problems, the fact that fines remain low is a disincentive for large firms to join the leniency program. Efforts have been made recently to modify the FLEC in order to levy fines based on a percentage of yearly sales by the company involved in the anticompetitive activity, but the issue is still being debated in Congress.

1.3. Mergers and acquisitions

16. For the purpose of the FLEC, a merger is understood to consist of acquiring the control of a corporation, or any other action through which corporations, associations, stocks, equity interest, trusts and assets in general are combined amongst competitors, suppliers, customers or any other economic agents. The CFC can prohibit a merger or acquisition if the resulting economic agent would be able to fix prices unilaterally, limit supply, or facilitate any of the monopolistic practices considered in the FLEC.

17. The 2006 amendments to the FLEC focused on increasing notification thresholds, implementing a fast track for mergers that do not put in risk the competition process, and modifying the waiting period before a merger may take place.

- Increases of thresholds: Thresholds increased by 50% and 75% depending on the nature of the transaction.
- Timing: The natural days originally established in the Law were changed to business days, in order to allow for a better handling of cases.
- There is a simplified procedure that allows for a rapid treatment of operations when it is clear that the transaction is not going to affect competition
- Information is classified along the following criteria: i) confidential, ii) reserved, and iii) public.
- Increase of the sanctions: Applied to extemporaneous notification, false declaration, prohibited mergers, and non-fulfilment of the conditions imposed to authorise a concentration.

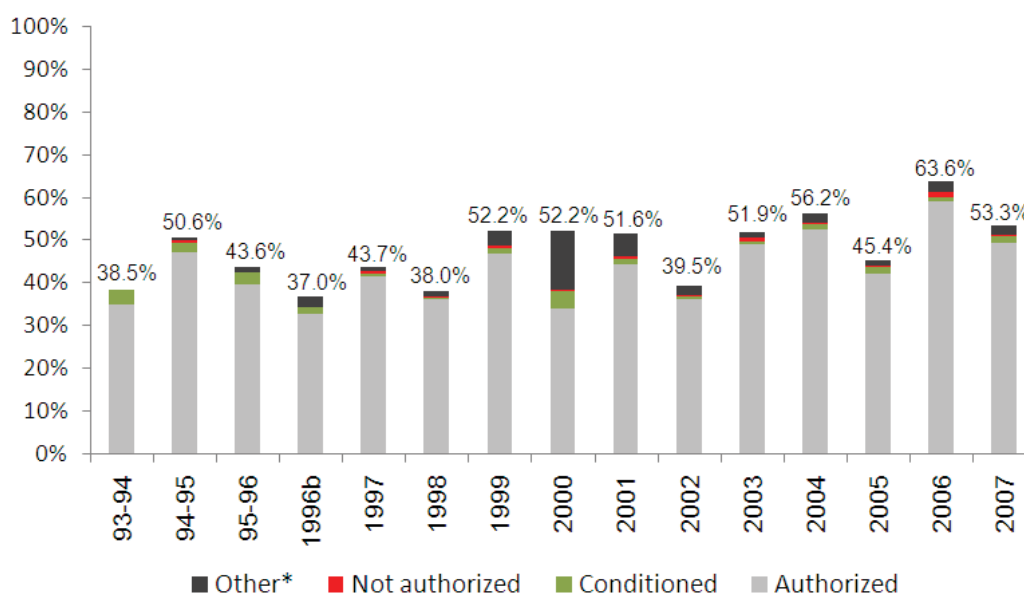
18. The Commission has the power to issue an order not to carry out a merger until it is cleared by the Commission. Art. 20 of the FLEC provides for three alternative reporting thresholds and establishes that a pre-closing filing is required if any of the following three thresholds is met:

- When the value of the transaction exceeds 946 million Mexican pesos (approximately 72 million dollars).

- When the transaction giving rise to the concentration involves the accumulation of 35 per cent or more of the assets or shares of stock of an economic agent, whose assets or annual sales in Mexico exceed 946 million Mexican pesos (approximately 72 million dollars).
- When the transaction giving rise to the concentration involves the accumulation in Mexico of assets or capital stock in excess of 441 million Mexican pesos (34 million dollar approx.) and the economic agents involved (buyer and seller) in the concentration have assets or volume of annual sales, jointly or individually (worldwide), that exceed 2,524 million Mexican pesos (approximately 194 million dollars).

19. Concession and permits for State assets (such as radio-spectrum, port infrastructure, and satellite concessions) are subject to a similar analysis as that used for mergers. Art. 22 of the FLEC establishes that those mergers reaching favourable resolution shall not be investigated, except if it is later found that said resolution was reached through false information, or if the resolution conditioned the merger and such conditions were not met. In addition, after a one-year period, a transaction not subject to notification cannot be challenged.

Figure 1. Annual merger cases as a percentage of total cases, by type of decision ¹



* Includes cases rejected, withdrawn, not admitted for processing or closed.

¹ LP gas permits are not included in total cases.

20. The ex-ante notification process for mergers requires an intensive use of human resources, but it is one of the most important aspects of competition enforcement in Mexico. Merger control has proven to be one of the most successful areas of enforcement of the FLEC. Our experience shows that the conditioning of mergers or the establishment of structural remedies is very difficult to implement and should be avoided if possible. Furthermore, the dissolution of assets once the merger has been concluded (ex-post) presents enormous legal challenges.

21. An important challenge for the CFC, and for most young authorities, is to increase the efficiency of operations and streamline the analysis of mergers so that human resources can be concentrated on the

handling of complicated cases. In order to accomplish this, a fast track procedure for the analysis of harmless mergers is of the utmost importance.

1.4. Judicial appeals

22. An economic agent can request an appeal of a decision before the Commission. The purpose of this appeal is to allow the individual to communicate to the CFC the reasons why he or she considers that the CFC erred in its decision.

23. One of the main activities between the CFC and the Judiciary is perhaps the time spent in handling appeals presented by economic agents before the tribunals. The *amparo* suit reviews the legality and constitutionality of any administrative matter and, has become the main legal recourse to challenge CFC decisions. From the creation of the CFC and until April 2004, the Judiciary resolved 375 competition-related *amparo* suits: from these, only 35% were resolved in less than a year, while 23% of the cases took from 3 to 5 years to resolve. As was mentioned previously, we have improved our record on *amparo* suits, and the latest figures show that the Commission won 79% of the *amparo* suits presented in 2007.

24. During that year, the CFC faced 199 appeals before the Judiciary: 150 *amparo* suits and 49 nullity trials³; 54 *amparo* suits were resolved (out of which the CFC won 79%). Regarding the nullity trials, only one was resolved in that year which was favourable to the CFC.

25. Until February 2008, in addition to the *amparo* suit, there was another legal instance for judicial appeal: the nullity trial. In Mexico the jurisdictional body overseeing this type of litigation is the Federal Fiscal and Administrative Justice Tribunal (TFJFA), which is part of the Executive Branch but remains fully autonomous. This legal instance reviews whether the actions of an authority are legal, and the effects of its sentences confirm or annul such actions.

26. However, a recent Supreme Court decision established that the TFJFA is no longer empowered to handle competition cases. The ruling established that the only competent jurisdictional body to litigate competition cases is the Federal Circuit Tribunals on Administrative Matters, and also concluded that the *amparo* suit is the sole vehicle of judicial defence to appeal a Commission's resolution.

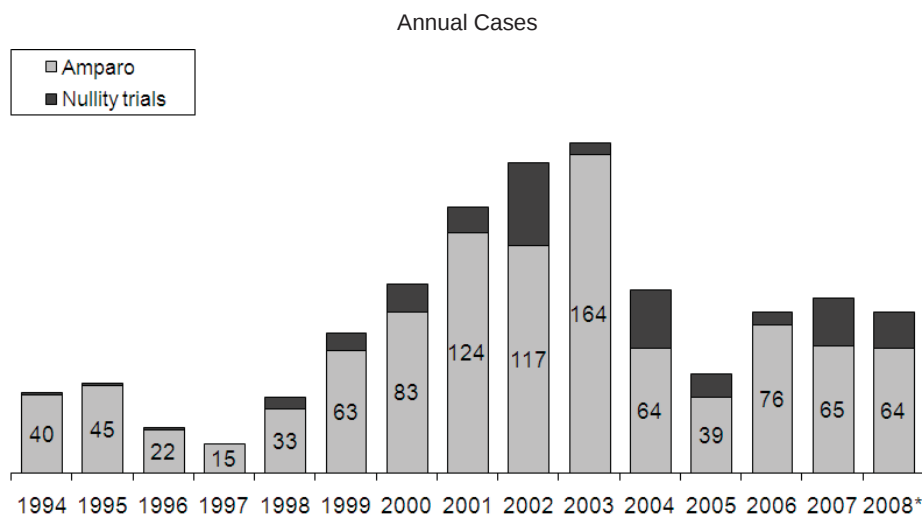
27. Some important judicial decisions have confirmed the constitutionality of seven articles of the competition law, and confirmed economic sanctions imposed by the CFC. Thus, the Judicial Branch has validated the CFC's actions in several markets with high impact on consumer welfare, in which it is essential to resolve competition problems to guarantee better prices and a wider variety of choices.

28. Another important amendment to the FLEC in 2006 was the inclusion of Article 33 bis 2, which allows economic agents to present undertakings to suspend, eliminate, and correct an anticompetitive practice or prohibited merger. After a request of this sort is filed before the Commission, it shall suspend the proceeding and issue a resolution in a period of 15 days. This modification, aimed at preventing the excessive use of resources which instead can be used for other relevant enforcement cases, has allowed the CFC to solve competition problems and restore healthy competition conditions and avoid the complex process of judicial review.

³ The nullity trial is the process followed before a jurisdictional body, to solve controversies between citizens and the public administration. These controversies arise when an individual deems that an action by an authority was carried out without adhering to the letter of the law. Hence, this process reviews the strict legality that an administrative action must follow.

29. As a result of the recent CFC actions, the number of *amparo* suits and nullity trials before the Judicial Branch have decreased considerably since 2003, as shown in the following graph:

Figure 2. *Amparo* and Nullity Trials against CFC rulings

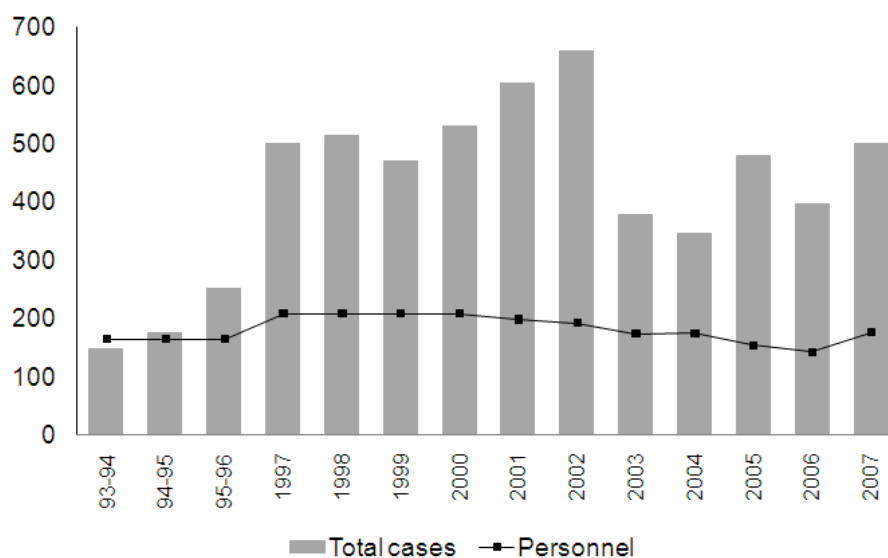


* Data as of November, 2008

1.5. Resources and structure

30. The CFC's institutional design guarantees its technical and operational autonomy. However, the CFC is dependent on the Ministry of the Economy for its budget, but this has never put in jeopardy the independence of its decisions.

Figure 3. Annual cases and personnel¹



¹ LP gas permits are not included in total cases. Second semester of 1996 was omitted to compare annual periods.

31. The number of CFC employees increased slightly during its first years. As years went by, this number became stable and even showed a small decrease. Given the permanent situation of limited resources faced by the CFC, it became necessary to apply measures to encourage a more efficient use of resources, and to seek support from bilateral and multilateral international organisations in the form of Cooperation Programs. These measures also included an internal restructuring and encouraging multidisciplinary collaboration and improving teamwork.

- In 2005, the Commission initiated a restructuring process that was completed in 2007. The process created five new departments:
 - the Unit for Planning, Institutional Relations and International Affairs;
 - the General Directorate for Institutional Relations and International Affairs;
 - the General Directorate for Contentious Affairs, which used to be embedded in the General Directorate for Legal Affairs. This new area defends the CFC in any procedure before the Judiciary. The second area serves as the CFC's Legal Counsel;
 - the General Directorate for Investigations was divided into two areas: the General Directorate for Absolute Monopolistic Practices and Restraints on Interstate Commerce, and the General Directorate for Relative Monopolistic Practices;
 - the General Directorate for Regulated Markets was separated from the General Directorate for Privatisation and Bidding Processes.

32. The CFC was restructured in order to provide more human resources to the technical areas that handle cases. This was done by shifting resources from the non-technical areas of the Commission, and the process was implemented without any additional financial resources than those assigned yearly by the Mexican Congress to the CFC.

33. Other measures adopted to improve the efficiency of our day-to-day activities had to do with using Information Technologies in order to implement a competition information system. This web-based mechanism facilitates information sharing, provides a platform for on-line work, and allows for efficient follow-up on the development and handling of casework. The implementation of this system has helped to streamline internal procedures and to keep better track of the deadlines established in the FLEC.

2. Competition culture and competition advocacy

2.1. *Fostering a competition culture*

34. In Mexico, the evolution of a competition culture has been the product of advocacy efforts carried out by the Commission over its 15 years of operation. Since 1994, the CFC has implemented countless activities to promote the understanding of competition as a key tool to promote productive and allocative efficiency.

35. During the first years of the Commission, advocacy efforts were centred on promoting an understanding of the FLEC among different constituencies, including other government institutions. Since the FLEC had substantial implications for a large number of participants in the economy, a wide-ranging media program was implemented.

36. The establishment of an active media program proved to be essential in sparking public debate on the importance of competition issues, and placing these on the national agenda.

37. A broader knowledge of the competition legislation and the institution in charge of its application is essential to underpin competition as part of the overall government policy to protect consumer rights. The main activities followed by the Commission to enhance competition culture have been based on i) the transparency of the investigations and resolutions; ii) the response to the economic agents' consultations; iii) the consideration of society's views and comments for the improvement of agency performance; iv) the issuing of studies on competition in regulated sectors; v) and the dissemination of achievements and priorities of the Commission.

38. The President of the Commission has the authority to issue and publish an annual report on the performance of the Commission, including the results of its actions on free market access and competition matters. The process of transparency is strengthened through the publication in the Official Gazette of an abstract of every investigation initiated by the authority.

2.2. *Advocacy on regulatory issues*

39. The FLEC empowers the CFC to issue opinions on legislative bills, and technical regulations, as well as any public policies or administrative acts which may affect competition. The Commission also has the authority to issue opinions on secondary regulations and legislative proposals to Congress. This mandate has been an essential tool to create and promote a competition culture among government bodies and institutions, and to advocate for the inclusion of competition criteria in public policies, including new laws and regulations.

40. The Commission regularly issues opinions and general recommendations on these key sectors of the Mexican economy, which have been instrumental in influencing the design of public policies and ensuring that these incorporate competition principles. Nevertheless, much work remains to be done, especially in Mexico's key regulated sectors such as telecommunications, energy, transportations, and financial services. Issuing opinions and making them public would not have had the same positive effects if the CFC lacked autonomy in its decision-making process. Publishing CFC opinions and making them part of the public debate has allowed us to make progress with sectoral regulators who would be less inclined to follow competition recommendations in a less transparent environment.

41. Through its opinions, the CFC has specifically looked for i) enhancing efficiency and competition in the private pension system; ii) promoting a more competitive structure of the retail banking system; iii) facilitating technological convergence and promoting a more competitive environment in telecommunications; iv) developing a pro-competitive regulatory framework to facilitate access to audiovisual content; v) minimising regulatory inefficiencies in the supply of airport services; vi) reducing barriers to entry in the gasoline retail sales and transport and distribution of liquefied petroleum gas markets; and vii) removing barriers to international trade.

42. Currently, the CFC is working with the OECD on the implementation of a Competition Assessment ("Toolkit") whose main objective is to issue recommendations on how to strengthen competition in key sectors of the economy.

2.3. *Latest progress in the advocacy strategy and challenges for the future*

43. In June 2006, after more than a year of analysis and discussion, the FLEC was amended as a result of a unanimous Congressional vote. This new law has provided the Commission with better operative tools to fight anticompetitive conducts and strengthened the agency's advocacy capabilities. The new FLEC contains provisions allowing the CFC to issue binding opinions on secondary laws and

regulations. As of today, no binding opinions have been issued, but we continue to be very active in issuing non-binding opinions.

44. Over the last two years, the Commission has acquired greater powers through legal reforms, and through its advocacy efforts (i.e. sectoral opinions, public events, and working with Congress and Media, just to mention some of them) has been able to position the importance of defending competition principles on the national agenda.

45. While the CFC has made important progress over the years in establishing an effective advocacy program, many of the challenges that we faced when the Commission was created, still remain. These include the lack of natural allies for the promotion of competition principles. The “competition community” remains very small and academic discussion is incipient. Furthermore, private sector groups and the federal or local regulators that could benefit the most from the adoption of competition principles are precisely the ones that adopt the most defensive positions when it comes to dealing with the CFC.

46. In other words, it is still hard, today, to approach the private sector and other regulators through advocacy efforts when their main concern remains whether a rapprochement with the CFC is likely to put them under the investigative microscope. We therefore need to break this negative cycle and generate confidence among key groups in society as to the benefits of engaging the CFC and embracing the principles that we defend through the FLEC.

2.4. *Relationship with the Judicial Branch*

47. One of the most important tasks for the Commission has been the interaction with the Judiciary in trying to win cases. In order to strengthen the relationship with the Judicial Branch, there are three tasks that the CFC has considered to be key:

- effective communication of CFC’s legal and economic reasoning;
- solid investigations (meaning clearer and better motivated conclusions derived from investigations); and
- mutual capacity building activities.

48. The CFC is currently working with judges and magistrates to enhance their understanding of competition law and policy through a series of seminars and workshops. The goal of these programs has been to promote a deeper understanding of economic concepts involved in competition law.

49. The activities considered in these programs have been enriched by the participation of Judicial Branch members from other countries. This involves conducting seminars with foreign judges and officials from other competition agencies, who share experiences regarding their own handling of competition cases.

2.5. *Advocacy at the state and local levels*

50. The Commission has undertaken a regional advocacy strategy with the aim of deepening competition principles at the state and local levels. As part of this effort, in 2008, the Commission renewed its cooperation agreement with the Office of the Federal Attorney for Consumer Protection (PROFECO) to work jointly in detecting monopolistic practices and strengthening the promotion of competition advocacy and consumer protection across Mexico.

51. This institutional agreement includes reciprocal training activities between both agencies and joint activities to promote competition /consumer culture throughout the country. These activities are also part of an international cooperation program signed by the Commission and the Inter American Development Bank (IADB), which is aimed at ensuring market access for small and medium-sized enterprises through competition policy.

52. In the light of this cooperation program, the Commission has conducted a series of road-shows in different states of the country with the purpose to inform local communities about the Commission's work. However, an effective regional strategy of promotion of competition principles can be very expensive, and this area used to be neglected in Mexico because of other pressing business, such as the large workload of cases, which are the bread and butter of the organisation. Nevertheless, in the last few years, existing resources have been reallocated to a "Regional Coordination Division" which is in charge of implementing such a strategy. It is in the interest of young authorities to allocate enough resources to regional advocacy activities, as most anticompetitive behaviour in developing countries takes place at the state and local level.

53. The consolidation of a competition culture requires the formation of professionals in economics with a legal background, and lawyers who understand how to apply economic analysis to competition cases. In this respect, the Commission has been working with academic institutions to help develop courses and seminars related to competition issues. This approach consists in working together with academic institutions in order to develop specific competition curricula for economics and law students. The goal is to instil competition principles in the new generations of professionals that will enter the labour market in the near future. This is an important element of the CFC's overall advocacy strategy, and it adds to the development of skills of potential Commission employees.

3. Five key elements needed to improve the effectiveness of a young agency

- Full independence.
- Enough financial and human resources.
- Proper legal framework.
- Increased efficiency in operations and quality of resolutions (internal management; knowledge management; and development of professional skills).
- Effective advocacy program in order to position competition issues at the forefront of the national agenda and engage key actors (judicial branch, private sector, sectoral regulators and state and local governments, academic community, consumer associations and other NGO's).



CONTRIBUTION BY MOROCCO

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Morocco--

1. Description of the initial organisational phase of the Moroccan National Competition Council

- Appointment of the Chair of the Competition Council on 20 August 2008 and publication of the official decree of confirmation on 15 October 2008.
- Rental of temporary office space and receipt of government approval for the construction of suitable facilities, to be completed by year-end 2010.
- Outfitting of temporary premises in late December 2008.
- Recruitment of the first team of close supervisors.

2. Objectives for 2009

- Instil a climate of trust and transparency in economic circles, with determination to portray the Council's activity as supervision that is neither unduly suspicious nor lax. The goal is to establish clear-cut rules and ensure compliance therewith.
- Insofar as the Moroccan Competition Council plays an advisory role, it will both look into matters brought to its attention and take the initiative in exploring a number of important issues and submitting proposals to the government.
- The Council will further endeavour to establish the tradition of a comprehensive yearly review of the competitiveness of the Moroccan economy, to be incorporated into its annual report.
- In addition, the Council will be expanding its communication and training initiatives in order to foster a "competition" culture amongst stakeholders and public opinion.
- During this initial phase of its operations, the Council will be giving priority to issues involving consumer protection, and consumer staples in particular, and to reviewing economic sectors that still enjoy import protection.
- Lastly, 2009 will be devoted to structuring the Council and investing it with powers, resources and procedures so it can begin to work on a higher status that will make it a decision-making authority as from 2010, like the vast majority of Competition Councils the world over.

3. Objectives for 2010

- Substantive:
 - Expand and enhance the "competition" culture.
 - Respond to matters brought before it, but strive also to prompt initiatives.
 - Develop industry studies and improve the quality of the annual report on the state of competition in Morocco.

- Heighten skills in the realms of anticompetitive practices and mergers.
- Institutional:
 - Bolster the Council's image.
 - Formulate amendments to the current statutes to give the Council the role of an independent decision-making authority.
 - Expand the Council's financial resources.

4. The five most important actions for a new competition agency

- Begin by upgrading its operational structures and the quality of its human resources.
- Avoid the pitfall of conflicts of authority with existing entities and let the role of the authority in question be shaped by objective developments and objective external forces.
- Be perceived in economic circles as a force for guidance and objective arbitration rather than as an authority whose primary role is to impose sanctions.
- Turn awareness-building into a potent weapon, and sanctions into measures that are seen as being fair and warranted.
- Communication and transparency are fundamental prerequisites for the success of a Competition Council.



CONTRIBUTION DU MAROC

QUESTIONNAIRE SUR LES DÉFIS QUE DOIVENT RELEVER LES JEUNES AUTORITÉS DE LA CONCURRENCE

--Maroc--

1. Description de la première phase d'organisation du Conseil de la Concurrence du Maroc

- La nomination du Président du Conseil de la Concurrence remonte au 20 Août 2008 et le décret d'officialisation a été publié le 15 octobre 2008.
- Location de bureaux provisoires et obtention de l'accord gouvernemental pour la construction de locaux appropriés à terminer avant fin 2010.
- Équipement des locaux provisoires à fin Décembre 2008.
- Recrutement de la première équipe d'encadrement rapproché.

2. Objectifs pour 2009

- Créer un climat de confiance et de transparence avec le monde économique avec la volonté de présenter l'activité du Conseil comme une action d'accompagnement sans méfiance excessive ni laisser aller ; le but étant de mettre en place des règles du jeu et de les faire respecter.
- Le Conseil de la Concurrence marocain ayant une fonction consultative, il s'agira aussi bien de répondre aux saisines que de prendre l'initiative d'examiner un certain nombre de dossiers importants et de faire des propositions au gouvernement.
- Le Conseil essaiera également d'initier une tradition qui consiste à réaliser annuellement une étude globale sur l'état concurrentiel de l'économie marocaine, étude qu'il intégrera dans son rapport annuel.
- Par ailleurs, le Conseil multipliera les activités de communication et de formation de façon à développer la culture « concurrence » au niveau des acteurs et de l'opinion publique.
- Le Conseil privilégiera dans cette première étape les dossiers liés à la protection du consommateur, notamment au niveau des produits de consommation de base comme il mettra l'accent sur l'étude des secteurs économiques encore protégés à l'importation.
- Enfin l'année 2009 sera consacrée à structurer le Conseil et à le doter de compétences, de moyens et de procédures, lui permettant de commencer à travailler sur un statut plus avancé qui en fera une autorité décisionnelle à partir de 2010 à l'instar de la grande majorité des Conseils de la Concurrence de par le monde.

3. Objectifs pour 2010

- Sur le plan du fonds :
 - Développer et renforcer la culture « concurrence » ;
 - Répondre aux saisines, mais essayer également d'inciter à leur intervention ;

- Développer les études sectorielles et améliorer la qualité du rapport annuel sur l'État de la concurrence au Maroc ;
- Renforcer les compétences en matière pratiques anticoncurrentielles et de fusions.
- Sur le plan institutionnel :
 - Renforcer l'image du Conseil ;
 - Préparer des amendements au texte actuel de façon à donner au Conseil un rôle d'autorité indépendante et décisionnelle ;
 - Développer les moyens financiers du Conseil.

4. Les cinq actions les plus importantes pour une agence de la concurrence débutante :

- Penser d'abord à renforcer ses structures opérationnelles et la qualité de ses ressources humaines.
- Éviter le piège d'entrer en conflit de compétence avec les structures existantes et laisser l'évolution objective des choses et les forces objectives d'appel extern, développer le rôle de l'autorité en question.
- Paraître aux yeux du monde économique comme une force d'accompagnement et d'arbitrage objectif et non comme une autorité faite d'abord pour sanctionner.
- Faire de la sensibilisation une force de frappe importante et de la sanction une mesure qui apparaît juste et méritée.
- La communication et la transparence sont une condition fondamentale pour le succès d'un Conseil de la Concurrence.



CONTRIBUTION BY THE NETHERLANDS

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--The Netherlands--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

In the mid 1990's a taskforce was created within the Ministry of Economic Affairs with responsibility for the establishment of the NMa. This taskforce was responsible for finding office space, the drafting of the organisation's structure, recruitment of staff and the new organisation's relationship towards the Ministry. The first step in staff recruitment for the NMa was to register Ministry staff interested to go work at the new organisation. The taskforce conducted job interviews with those interested, after which qualified persons were appointed. Subsequently, a labour market campaign was conducted to attract qualified personnel. At a later moment staff were encouraged to attract qualified persons in their personal network. This turned out to be a success as the new staff fitted in well in the organisation, and were motivated, and competent.

Before the Competition Act entered into force there was a period in which the Authority was already established. This time was used by the Authority to gain expertise about competition policy and to design procedures beforehand. When the Act had entered into force on 1 January 1998, and the actual work had started, procedures developed in the establishing phase were constantly evaluated, expanded and redrafted according to the experience gained.

One less fortunate choice made in the initial phase concerned the appointment of managers. The founders of the NMa believed that management should be involved more in managing processes and need not necessarily be very capable when it came to knowledge of competition policy. In subsequent years it was realised that ideally an Authority needs a mix of management with expertise in processes and procedures balanced with knowledge of competition policy and law.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

The Dutch Competition Act meant a major change in government policy for businesses. It was a considerable task for the NMa to change peoples' mindset and make competition policy a relevant part of businesses' strategic decisions. Representatives of the NMa spoke in every possible venue to explain what the NMa was established for. An advantage was that trade associations play an

important role in business society in the Netherlands and therefore it was relatively easy to reach individual businesses through their trade associations.

What also helped was the legal requirement in the first few years of the NMa's existence for companies to file a request for exemption from the Dutch equivalent of article 81(1) EC-Treaty for their cooperation agreements. The exemption system turned out to be a major challenge as far more requests (some 1100) were filed than expected. However, it also forced companies to go to the NMa and get acquainted with its policy. On the other hand it was a good instrument for the NMa to develop its policy while it gave the NMa insight about which sectors of the economy it should target. Subsequently the NMa could develop guidelines tailored for specific sectors of the economy.

Thirdly, in its first year, the NMa attained national recognition for its decisions in large merger cases, such as RAI/Jaarbeurs. These decisions were less time-consuming than dealing with the exemption requests, but they attracted more media attention, and contributed greatly to the development of a good reputation for the NMa in the Dutch business community.

Fourthly, the nation wide bid-rigging cartels in the construction sector which emerged in 2001 also gave the NMa's work much attention from politics and the media.

Nonetheless, the NMa encountered considerable resistance in the early years of its existence as cartels were wide spread across the economy.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In the early years of our existence the large amount of the work created by the exemption requests and later also the construction cartels meant that less capacity was devoted to abuse of dominance cases. We did receive a great number of complaints on alleged abuses of dominant positions. The NMa tackled some of these cases (for example, Interpay and KLM/SLM) and gained experience of the economic difficulties often faced in abuse of dominance cases.

Difficulties in prosecuting non-cartel restrictive agreements were remedied with alternative enforcement strategies and advocacy efforts. In 2007 part of the NMa's alternative enforcement programme was formalised in the instrument of commitment decisions.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The NMa's anti-cartel programme was developed relatively quickly and without many difficulties. Because of the exemption system we quickly learned how to organise our procedures and effectively assess (cartel) cases. At the same time the NMa ruled upon a number of cartels, for instance on Bicycles, Shrimps, Cell phones and Animal medicines. Also the construction cartel gave an impetus to the NMa's anti-cartel programme. The difficulties we encountered then often were specific to the

magnitude of that particular cartel but pushed us up the learning curve very rapidly. For instance it forced us to divert from our freshly developed leniency guidelines and our standard fining guidelines, to be able to finalise procedures within the legislative time limits. It also pushed us to develop a project assessment tool to check on progress. It involved chopping the entire investigation into phases at the end of which management would decide whether the case was still likely to reach a positive outcome. This gave the opportunity to work with deadlines as well, which was very useful. Overall we could say that the anti-cartel programme started to show results right from the start.

However, it was only after handling the construction cartel that we had more capacity to develop our anti-cartel programme for the various sectors of the economy.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The deadlines in the new merger control legislation meant that it was necessary quickly to learn how to carry out merger investigations. One advantage is that our merger control procedure mirrors that of the EU. It was possible for the NMa to attract new staff who had experience with merger control procedures of the European Commission, who had either worked there or had been involved in cases as a lawyer representing the merging entities. We also invited such persons to come and lecture at the NMa.

The strict deadlines in merger control means the competition agency's workforce needs to be flexible. Especially in the beginning we noticed that a flood of merger applications (combined with the exemption procedures) had a negative impact on our capacity to investigate cartels. This was remedied by an increase of budget so new staff could be hired. In the early years the NMa had an annual growth in staff of approximately 20%. At the same time we heavily invested in training and spent twice as much (on average) on training as other Dutch government agencies at that time.

In order to streamline the case load in merger control we first introduced short-form decisions for cases which obviously did not restrict competition. In 2007 a fee was introduced to cover the costs of merger control. In 2008, based on its experience, the NMa broadened the use of short form decisions.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Merger control indeed was an important and useful part of the NMa's activity in its early years. On the one hand it gave the NMa the opportunity to establish a good reputation among businesses, while on the other hand, it taught the NMa to structure its work under strict deadlines. On top of that it provided useful knowledge of many sectors of our economy.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Specialised courts rule upon competition cases in the Netherlands. Because of the relative complexity of competition cases this has contributed greatly to the judges' expertise on competition law. Nonetheless, it occasionally occurs that economic reasoning that appears clear to the NMa appears not to be very obvious to judges.

Even though procedures still may take several years, this specialisation in the judiciary probably has accelerated court procedures.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

The agency developed no formal programme, as such. Rather it ensured that judges were invited as speakers and as participants to appropriate workshops and symposiums. (Dutch judges were trained in Competition Law in special courses, for example at the University of Leiden). We also endeavoured to publish as much information as possible about the application of competition policy to Dutch situations.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

The agency received a generous budget right from the date of its establishment, which was increased on a yearly basis in order to hire the necessary extra personnel. However, due to Government cut-backs throughout the civil service, the NMa is now subject to a 20% rationalisation.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Generally speaking, yes. The NMa began in 1998 as a branch of the Dutch Ministry of Economic Affairs. The reason for embedding the NMa in the Ministry was the expectation that the NMa's decisions could prove politically sensitive.

It was decided that after a period of three years an evaluation would take place. This evaluation led to the adoption of new legislation establishing the autonomous status of the NMa Board of directors in July 2005. Legally speaking, only the Board is autonomous: the employees of the NMa remain employees of the Ministry. However, they are solely accountable to the Board of the NMa.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

1. Dare to take action and invest in permanent evaluation.
2. Ensure sufficient resourcing and training.
3. Invest in a good instrument mix, including advocacy and guidance.
4. Exert your independence.
5. Publish your results and be prepared to debate them.



CONTRIBUTION BY PAPUA NEW GUINEA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Papua New Guinea¹--

INTRODUCTION

1. Prior to 2002, Papua New Guinea (PNG) had no competition law or regulation of anti-competitive practices, nor did it have any serious regulatory framework for business conduct or for the conduct of government owned utilities, which provided a substantial part of the industrial infrastructure of the country. Business regulation was confined to corporate regulation issues, such as company registration and the like, and, to a limited extent, price control for a limited number of goods and services.

2. All of that changed in 2002 with the enactment of several pieces of legislation designed to create a business regulation framework with a number of objectives. One objective was to provide a regulatory framework for each of a number of infrastructure industries (telecommunications, electricity, water, postal services, ports and harbours, among others) which were then dominated by government owned and run monopoly utilities. That regulatory framework would provide a stable, economically sustainable capital investment strategy and long term price path stability for the utilities and their customers, together with service quality standards which the utilities were required to meet, resulting in improved efficiency and effectiveness in the utilities' service delivery. This was in the context of the plan for those utilities to be privatised (though this has not yet occurred) and to compete openly in the market, with their statutory monopoly rights removed.

3. The second objective was to create a competition law which would prohibit anti-competitive practices and conduct and which would foster open, competitive markets generally throughout Papua New Guinea. The law would follow the lines of competition laws which exist generally throughout OECD countries and in a number of developing economies, in the context of the British common law system which applies in PNG. The competition provisions, referred to as the Market Conduct Rules, are based on those in the New Zealand Commerce Act and are similar to the competition provisions applying in most developed economies. Broadly speaking, the competition law prohibits arrangements which substantially lessen competition (with a per se prohibition of price fixing); resale price maintenance; exclusionary conduct (primary boycotts); and misuse of market power (abuse of dominant position). Anti-competitive mergers or acquisitions are also prohibited. Authorisation on public benefit grounds can be applied for – a small number of authorisations on public benefit grounds have been approved since 2003 for business acquisitions or for anti-competitive arrangements. The law also contains some broad ranging consumer protection provisions.

4. The third objective was to modernise price regulation law and bring it in harmony with the competition law, bearing in mind that price control can often stifle competition rather than promote it. Thus price regulation now applies only to a very limited range of goods or services, and price monitoring is generally preferred to price control.

5. In respect of all of these areas of regulation – utilities regulation, regulation of anti-competitive behaviour and price regulation – there was a single regulatory authority created, the Independent Consumer and Competition Commission (Commission). Creating the Commission as a regulatory agency with multiple areas of responsibility – industry specific regulation in a number of industries; competition regulation; economic and price regulation; and consumer protection regulation – was intentional, since

¹ Independent Consumer and Competition Commission

these areas of regulation are overlapping and the single regulatory agency can provide a consistent and comprehensive regulatory approach for all participants in these various industry sectors.

6. The legislation which established the Commission was carefully written to ensure that this new government regulatory agency would operate professionally, honestly, transparently, independent from political pressure or influence and with such integrity that it would be respected and trusted by those whom it regulated, and by the consumers and the general public, in whose interests the Commission was acting.

7. All of this legislation was enacted by the parliament in 2002, and the Commission was created at that time. The Commission was established by statute in 2002, but the organisation did not physically exist until some time thereafter. This is not surprising – there was no regulatory agency then in existence (other than a small, ineffective and discredited price control office and a telecommunications regulatory agency which was only partly effective) and the range of new regulatory functions did not previously exist. Accordingly, the Commission had to be established “from scratch”, starting with no staff, no office, no separate funding allocated and no Commissioners appointed.

1. Organising the agency and preparing for work

8. This was the first challenge: to get an office established which could exercise its necessary regulatory functions as soon as possible, particularly since most of the legislation had come into effect in May 2002. That legislation would only be effective and useful if it were administered and enforced by the regulatory agency. The task of creating the Commission was essentially taken on by one person, Mr Thomas Abe, who is now the Commissioner, with assistance from corporate services and finance management from a government department.

9. The only way to have the necessary skilled and experienced personnel able to undertake the required regulatory functions at that early stage, was to acquire those resources from overseas, using international expert consultants (from Australia). The consultants who developed the regulatory framework and the legislation were also contracted to develop the initial regulatory contracts with the regulated utilities, which set their price paths and quality of service standards, and to undertake initial work on the other regulatory issues, including preparing and issuing licences to utilities and others, where necessary. These international consultants were also needed to train the staff of the Commission, when the staff were finally appointed.

10. The downside of using international consultants for these purposes is principally the cost, which can be considerable for a developing country, but also respecting the need for the population to feel that they have ownership of the regulation of their industries, rather than this being imposed on them by outside experts unfamiliar with local circumstances. Thus, it is important that, while external assistance is essential in the early stages of setting up the regulatory arrangements, those functions should be taken over by local staff as soon as convenient.

11. The next challenge was in selecting the right people to be Commissioners and to fill the senior (and more junior) positions as staff of the Commission. The Commissioners’ appointment process took a considerable time, and the selection of senior staff and middle managers also took time. This was largely because there was no pool of talent within PNG at that time of people who had any significant experience in an economic regulatory regime, because economic regulation was totally new to the country. High quality staff and Commissioners were appointed to the Commission, but none of them (with the exception of the non-resident Commissioner) had any significant previous hands-on experience in economic regulation. This is hardly surprising; competition law and theory was not taught in PNG universities and there was nowhere in PNG where anyone could have acquired economic regulatory experience.

12. Before the Commission could do much substantive work, the limited number of senior staff then employed at the Commission had to develop a number of policy and procedures manuals, both for good corporate governance and for organising the conduct of investigations and for issues such as how to handle complaints. At the same time, a staff training program was put in place, where the international expert consultants were devoting significant effort to staff training, bearing in mind that competition law and regulation was completely novel to PNG at that time. Staff training is, of course, continuing to the present and into the future.

13. In retrospect, it was very useful that PNG's competition law was based on the New Zealand model, which is very similar to Australia's, since the staff training was provided by Australian experts, using Australian textbooks.

14. Thus it was inevitable, but unfortunate, that the establishment of the Commission took about a year or more after the legislation commenced, before the Commission was fully staffed and operating at full capacity. The difficulties were exacerbated by the Commission staff having to do substantive work at the same time as they were developing procedures and manuals, and undergoing training. This imposed heavy burdens on Commissioners and staff in the early years (and continuing today) and at that time it also meant that some public and industry expectations of what the Commission ought to be doing, were not fully met.

15. This problem was anticipated, so the competition law provisions in the new law had a delayed start; the Commission Act commenced in May 2002, but the competition provisions in that Act did not commence until a year later, in May 2003. In hindsight, even that twelve month delay in commencement may not have been enough.

2. Competition culture and competition advocacy

16. The Commission realised very early that a significant focus of its efforts in the early stages should be education - of business, consumers, government, the legal profession and the judiciary, and the media. When the legislation was introduced into parliament there was little or no public debate about competition law and even after the ICCA Act was passed and came into effect in May 2002, there was little publicity and almost no-one seemed to know the new law existed, nor had they heard about the Commission.

17. The initial publicity and education focus for competition law was directed to the business community, through business associations such as Chambers of Commerce and the like. This was difficult in PNG where there is no significant consumer organisation and business organisations are also limited. The commission's budget did not allow for any significant advertising, so awareness campaigns were mainly through meetings. This of course meant having personnel from the Commission who could arrange and attend those meetings, and with the recruitment lag, this awareness campaign could not get underway for some time.

18. An important half day seminar/workshop for business leaders and lawyers was held shortly before the competition law came into effect in May 2003, but its effect seems to have been limited to those who attended. Overall, awareness of the competition regime in PNG spread through word of mouth, has been slow and not particularly effective. It is only now, some five years after the competition law came into effect, that awareness of the law within the business is becoming widespread.

19. With PNG having previously had no competition law of any sort, there was also a complete lack of knowledge about competition law among the legal profession and the judiciary. The Commission arranged a major all-day workshop in early 2004 for judges and lawyers with presentations from

international experts. The workshop, though fairly well attended, does not seem to have greatly increased awareness of competition law.

20. One measure of general awareness of the law is the level of litigation – the Act provides for private right of action for anti-competitive conduct - but to date there have been no proceedings brought by any private litigant for breaches of the ICCA Act. Similarly, the level of complaints to the Commission is still very low. On those measures, public awareness is still low. It is not that there is resistance to the new competition rules; there just remains an unfortunately high level of ignorance about the existence of competition law.

21. Nevertheless, general awareness is improving. The Commission is now more often consulted on government policy development where competition issues may arise and industry generally seems more aware of the existence of competition law, as does the media, than used to be the case. The Commission itself is now well known within all levels of PNG society, though that is more to do with the Commission's other responsibilities such as price regulation and telecommunications regulation. The Commission's competition functions are becoming better known through some recent applications for authorisation of mergers or anti-competitive arrangements.

3. Conduct cases and investigations – abuse of dominance and restrictive agreements

22. The Commission has had a very low level of complaints of anti-competitive conduct, and though the Commission has undertaken some investigations on its own initiative, this has meant that overall the Commission has had only limited experience in investigation of anti-competitive conduct. Most of those investigations have, to date, been able to be resolved without the need to go to court.

23. The Commission currently has a small number of investigations with external legal counsel for advice on the institution of proceedings which, if prosecution is recommended, will result in the institution of proceedings in the very near future.

24. One of those cases involves misuse of market power (abuse of dominant position) which has highlighted the problem frequently encountered with such cases, of proving purpose. The PNG misuse of market power provision prohibits a person having a substantial degree of power in a market from taking advantage of that power for the purpose of restricting market entry, deterring competitive conduct, or eliminating a competitor. While the law provides that purpose can be inferred from conduct or other relevant circumstances, this particular investigation has highlighted how hard it is to obtain and present evidence to establish the relevant purpose.

25. There are problems also in obtaining and presenting compelling evidence in cartel or price fixing cases. This arises in PNG largely because of the small size of the market in most products, which means that very often there is little or no price competition at the retail level. While there may be tacit agreement or understanding on prices, competing retailers often generally feel no need to make any arrangements or understandings with their competitors, because the market operates without aggressive price competition, with perhaps minor price variations and generally price leadership rather than price fixing. It is unfortunate that PNG does not have any culture of aggressive price discounting and consumers do not pursue price variations or other competitive behaviour. This partly stems from past practice of prices on staple items being fixed, or margins being fixed, with no expectation of being able to shop around for better prices. And in many areas, competition is limited to two or often only one supplier.

26. The Commission is convinced that resale price maintenance, market sharing and price fixing continue to occur in PNG, but in the absence of competitors seeking to discount prices, there is little complaint or evidence of these practices coming forward to the Commission.

4. Mergers

27. Since the Act commenced in 2003, there have been a number of applications for clearance or authorisation of mergers which have been dealt with by the Commission. There is no compulsory pre-notification of mergers, though those proposing mergers or business acquisitions have generally been prepared to talk to the Commission and, where appropriate, seek authorisation or clearance. (Clearance can be granted by the Commission where it is satisfied that a merger would not result, or be likely to result, in a substantial lessening of competition).

28. A number of persons have sought informal clearance from the Commission, but the Commission does not give any such indications; a formal clearance procedure is in place. The authorisation process is timely (a maximum of 72 days for authorisation on public benefit grounds, and 20 days maximum for clearances), and has proved to be an objective, reasoned, transparent process. The majority of merger applications made to the Commission since 2003 have been authorised or cleared, and the Commission feels that there is a high level of acceptance within the business community that the merger process with the Commission is working well and effectively.

29. There was one publicly contentious merger proposal a few years ago in the fuel distribution market, where the Commission, after much deliberation, finally authorised the merger after a very strong submission in support of the merger was made by the government. Another factor which the Commission took into account there was the likelihood that the target of the acquisition, Shell Oil, would likely have exited the market anyway. Now that some time has passed, concerns about whether the authorisation was the right decision, have largely been allayed.

30. From the Commission's experience, merger control can be introduced at the same time as other competition regulation, provided there is no compulsory pre-merger notification and if the competition regulator makes objective, reasoned and transparent decisions.

5. Judicial appeals

31. Administrative decisions by the Commission, such as authorisation and clearance determinations, are subject to judicial review under the general PNG law on judicial review of administrative decisions. None of the Commission's decisions on competition law matters have, to date, been taken on review to the courts.

32. The Commission has been involved in litigation in its role as telecommunications regulator, and the Commission has won each of those several cases (all of which have involved Telikom PNG Limited as the opposing party). Some Commission decisions in relation to utilities regulation are subject to review by a specially constituted Appeals Panel. In the last year, the commission has been taken to the Appeals Panel on three occasions. In two of those cases, the Commission's decision was affirmed in its entirety; in the third, part of the Commission's decision was affirmed and the Commission was required to modify its decision in other parts. All of those applications for review also involved Telikom, and another mobile phone carrier.

33. The Commission considers that its success rate with judicial and other review to date is a vindication of its decision making processes. The Commission will not win every case it takes on, but its success rate so far is high and it has no complaint about judicial review. The only concern is that some judicial proceedings in PNG can be very protracted, with long periods of time before the matter comes to hearing and also long intervals between hearing and judgment.

6. Resources

34. Another challenge at that time, and continuing today, is the limited funding available to the Commission to carry out its functions. The Commission is funded by annual government grants and by licence fees from the various industries where the Commission is the industry specific regulator and licensing authority (telecommunications, electricity, and ports and harbours). In the early phases of economic regulation, it is difficult to persuade government to focus on the regulator's needs, and there is no natural constituency which is going to push government to increase the resources made available to the regulator.

35. There is no easy answer to this. Government funding is limited, and there is much competition for available resources. The Commission is fortunate that more than half of its annual funding comes from licence fees, as noted above, which provides a stable level of income for the Commission. However, its competition regulatory activities are primarily government budget funded and thus remain continually under pressure.

36. The main resource difficulty faced by the Commission is not finance related, but is the unavailability of top quality human resources. The Commission is constrained in its salary policies by government rules, which means that it has difficulty in retaining high quality staff, who are continually being lured away to the private sector with much higher salary packages which the Commission cannot match. The Commission has been able to recruit excellent quality staff, and has given these personnel excellent training, but that has made those staff more attractive for private firms. While that may be a compliment to the Commission's staff selection and training policies, it is a continuing problem for the Commission to retain top quality personnel.

7. Independence

37. Having the competition regulator properly independent from political or other influences, making its decisions transparently and objectively, and being seen to operate independently, was considered to be crucial to the success of competition regulation in PNG. It is no accident that the regulator was named the Independent Consumer and Competition Commission.

38. This independence was achieved by requiring, in the statute, that the Commission Commissioner and Associate Commissioners be appointed by a bipartisan appointments committee (comprising the Prime Minister, the Leader of the Opposition, the Minister for Treasury and the Governor of the Central Bank); requiring one of the two Associate Commissioners to be a non-resident of PNG, who must have international experience in the operation and administration of an economic regulatory regime; giving Commissioners the tenure of, effectively, a senior judge, who can only be removed from office for proven misbehaviour or incapacity; and expressly stating that the Commission is not subject to direction or control by the Minister or any other person in the performance of its functions.

39. While these precautions may seem to some to be unduly cautious, they have borne fruit – after nearly six years of operation, the Commission is widely respected in PNG and beyond as an organisation of high integrity, operating professionally and effectively to properly and objectively regulate industry and the utilities and protect consumers' interests. It has not been easy for the organisation to earn and keep this high reputation in the years it has been operating. Everyone within the Commission has had to be constantly aware of their obligations to comply strictly with the law, and to operate in accordance with the best procedures and processes which good corporate governance requires.

40. While the Commission publicly emphasises its independence, that is echoed by industry and consumer groups, which has led politicians and others to respect that independence and not to try to

interfere with or influence the Commission. This is certainly the case with the Commission's competition regulatory functions where there has been no political interference or attempt at improper influence; the only instances where some have perceived political interference with the Commission's activities has been in its role as telecommunications industry regulator, though even there the government has recognised the limits on its powers of direction over the Commission.

8. Conclusion

41. Five most important actions for a new competition agency to ensure a successful start:

- Ensure that the agency is, and is seen to be, independent from political or government or other influence or direction.
- As early as possible, put in place procedures and manuals to ensure the agency operates to the highest standards of corporate governance even where (especially where) this sets it apart from other government agencies.
- Staff selection and training is critical. Recruit the best and brightest, and most honest, staff available, recognising that your agency is unlikely to be able to pay the same salaries as in the private sector. Intensive training will be required, probably with assistance from another country which already has similar competition laws.
- Conduct a public awareness campaign to bring knowledge of the existence of new competition regulation and what it means. Focus on the business community and their legal advisors.
- Establish a reputation for the agency for integrity, openness and professionalism in all its activities so that business and consumers alike can have confidence that their dealings with the agency will be fair and honest and the decisions taken will be objective and fully justified.

42. Five pitfalls a new competition agency should avoid:

- do not try to solve all problems at the start – recognise that it takes time to establish the agency at a proper staffing level with properly trained staff. Until that is done, the agency will not be able to properly carry out its functions within an acceptable timeframe;
- do not raise public or business expectations unreasonably. Competition regulation is not a panacea for dramatically reducing prices, and it will take time to work. Unmet expectations from the public will lead to disillusion, which is in nobody's interests;
- do not assume that your public awareness campaign means that the public generally, and business in particular, know anything about competition regulation, or even that it exists. Awareness of the law will take time;
- do not take legal action early on except where you have a high likelihood of success. Do not be tempted to take “test cases” until the agency's reputation has been established;
- do not make inconsistent decisions, or make decisions without giving reasons; that will reduce the community's confidence in the integrity and transparency of the agency's decision making processes.



CONTRIBUTION BY POLAND

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Poland--

1. Countries that have been actively enforcing a competition law for a longer period

1. After 1990 the development of competition started to be an inseparable element of the process of creation of free market economy in Poland. The promotion and protection of competition after nearly 50 years of communism and complete exclusion from economic regulations required prudent and consistent policy implemented not solely by the Antimonopoly Office but also by all government and local bodies.

1.1. Organising your agency and preparing for work

1. Before the establishment of the Antimonopoly Office (“AO”, “the Office”), it was the Department of Counteracting Monopolisation of Economy in the Ministry of Finance, which acted as an antimonopoly agency. The antitrust proceedings conducted by the Department concerned mainly individual monopolistic practices like: fixing prices, payment forms favourable for the sellers and binding transactions as well as forcing purchasers to make advance payments (e.g. making the sales transaction dependent on selling foreign currency, providing services, supplying the producer with raw materials, granting low or zero interest loans).

2. In 1990 a separate public administration body was established in form of the Antimonopoly Office. It started its operation on the basis of the Act on counteracting monopolistic practices of 1990, which constituted an element of the market reform package. The President of the Office reported to the Prime Minister. The independence allowed the Office to act effectively regardless of political circumstances.

3. The President of the Office, although not a member of the Council of Ministers, actively participated in government sessions. The Office was involved in the process of restructuring and privatisation of state-owned enterprises and whole sectors. It performed these tasks through statutory surveillance of the ownership structure of national companies and by participation in government working groups on development of sector transformation programmes.

4. First branch offices began their operation in the same year the Central Office was established. Such structure enabled to reach all the enterprises spread across the country, local and administrative bodies with the competition regulations. During the first years of operation the main task of branch offices was to provide information necessary for conducting proceedings by the Central Office in Warsaw. However, soon they became also entitled to carry antimonopoly proceedings within their region.

5. Apart from counteracting anticompetitive agreements, abuse of dominant position on the market and control of concentration of entrepreneurs, the Office had other tasks, which included: research of the level of concentration in the economy, issuing opinions, drafting government policies and creating conditions for competition development. In order to perform its tasks properly, the authority was equipped with necessary instruments, e.g. the right to perform inspections. Authorised employees were given the right to enter all premises of the undertaking subject to control, inspect all its documents and demand extracts or copies of these documents, demand explanations including written statements, collect data and information on the entity’s activity, participate in meetings of the entity’s bodies, seize documents and other evidence.

1.2. *Competition culture and competition advocacy*

6. At the beginning of its operation the antimonopoly authority had to focus not only on interventions consisting in combating violations of antimonopoly law, but also on taking steps aimed at creating conditions for the development of competition culture. The Antimonopoly Office got involved in the decision-making processes with regard to ownership changes occurring in Poland opposing the negative pressure from other ministries, which were not willing to pursue a policy supporting competition. The AO's aim was to persuade the entire government to pursue a policy supporting competition by means of getting engaged in the legislative processes (drafting and issuing opinions).

7. In order to achieve the best results a multi-year competition development programmes were drafted and adopted by the government. It set tasks for particular government institutions indicating timeframes for fulfilling their obligations. The first programme was elaborated in 1991 making the other state bodies co-responsible for the introduction of competition in Poland. The document had also an educative and opinion-building character.

8. International cooperation with OECD, USA and European Commission had great impact on competition development in Poland. Foreign assistance in form of seminars, trainings, study visits brought many profits and helped to raise the legal awareness and broaden knowledge of the Polish antitrust specialists.

9. From the very beginning negotiation process and preparation for the membership in the European Union constituted an integral part of the Office's activities.

10. At present one of the main priorities of the Polish Office of Competition on Consumer Protection (OCCP) continues to be the promotion of the benefits of competition protection. The Office participates in the process of introducing new regulations, in cross-ministerial consultations in order to examine the new acts from the competition protection perspective. Our cooperation with other ministries and government agencies is not limited to expressing opinions. We also prepare analyses indicating the course of actions for other government institutions. For example, the Office's experts prepared a report on the energy sector in connection with the planned liberalisation of energy prices. The report recommended directions for the development of the energy market and presented specific suggestions of changes that would result in the establishment of efficient competition in this sector. The report also focused on the issue of protecting weaker market participants, since, according to the Office's analysis, introducing free competition in this industry is not possible in short term without detriment to consumers.

11. Soft-law constitutes an important part of competition advocacy initiatives. On a regular basis President of the OCCP tries to furnish the entrepreneurs and legal practitioners with interpretations of the antitrust law. Elaborating guidelines is also a common practice, e.g. guidelines on criteria of setting financial sanctions for infringements of competition law or guidelines on applying for leniency.

12. The Office also provides information to consumers through educational campaigns, competition related information bulletins, publications, seminars, trainings, conferences. Our goal is to furnish the weaker participants of the market with the rules of free economy and practices restricting competition.

13. Finally, intensive contacts with the media play very important role in our effective advocacy actions.

1.3. *Conduct cases and investigations – abuse of dominance and restrictive agreements*

14. Although previous legal regulations made it possible to fight anticompetitive practices effectively, it was necessary to adapt them to the changes occurring in the Polish and world economy in

connection with the globalisation process and the development of new technologies. The Act on competition and consumer protection, introduced in 2007, adjusted Polish regulations to the requirements of the Community law. Its provisions respond to the current day needs, taking into account the OCCP's experience and present market conditions. The changes provided an instrument of increasing the efficiency of the Polish competition and consumer protection system.

15. The Act of 2007 abolished the institution of proceedings launched on request. This amendment enabled the Office to better fulfil its responsibilities and to focus on the most important violations of the competition law that have the most significant impact on the market. Before, the President of the OCCP could not extend the scope of the proceedings beyond the scope of the motion to other anticompetitive practices or practices violating collective consumer interests. According to OCCP's experience, in 80 per cent of cases initiated on business's request no breach of antitrust law was found. The new solution, to a great extent, shortened the time of conducting proceedings. It also allowed for the Office to set its priorities for actions in sectors of economy which require most intervention. This is especially important from the point of view on the economy as a whole and consumer welfare.

16. Better effectiveness was also achieved thanks to the leniency programme and creation of guidelines on criteria of setting financial sanctions by the President of the OCCP for infringements of competition law. The aim of the Guidelines is to increase the transparency in respect to the methodology of setting antitrust sanctions. In the opinion of the Office, the explanations will help enterprises understand the way of setting fines which they may face if they undertake unlawful activities. The OCCP has been applying Guidelines since 1 January 2009.

17. One of the main priorities of the OCCP is improving the effectiveness of cartel detection. To this aim a lot of the Office's budget is allocated. As the Competition policy for 2008-2010 states that one of the priorities of the Office is to increase the effectiveness of its actions and as the risk of receiving high fines is supposed to deter enterprises from infringing the competition law, the OCCP plans to impose more severe fines on enterprises which infringe the rules of fair competition on the market. So far severe sanctions have been imposed only occasionally. One of the highest fines imposed by the Office regarded the construction sector. The President of the OCCP imposed a fine of over PLN 45 million on the Castorama and ICI enterprises for fixing retail prices of paints and varnishes. At least since 2004 the companies have been fixing not only the final retail prices of ICI's paints and varnishes, but also the constituents of the prices, such as the profit margin. The enterprises were acting in a deliberate and conscious way, gaining unjustified benefits for many years, and have not changed their conduct despite the launch of the antimonopoly proceeding.

1.4. Mergers

18. Merger regulations were gradually adapted to the changing economic reality in Poland. At first, the AO had to control all mergers regardless of the size of the undertakings. Later, first notification thresholds were introduced. They were rather low as the economy was still developing and needed a greater involvement from the side of the Office in the reconstruction and privatisation process. With time, the upper threshold was increased. Presently, the Office focuses only on the biggest mergers which might have a negative impact on the state of competition on the market.

19. Moreover, in order to increase our effectiveness we changed the OCCP's organisational structure in 2007. The change involved separation of merger cases and assigning them to a new Department of Concentration Control.

1.5. *Judicial appeals*

20. In the beginning of the antimonopoly system in Poland there were no special rules of judicial appeal procedure for decisions issued in the course of administrative proceedings. The antimonopoly decision could only be appealed to the Supreme Administrative Court due to its illegality.

21. Now, the decisions of the OCCP are reviewed only by independent civil courts. In 1990 a specialised Antimonopoly Court in Warsaw was created serving as an appeal body of first instance (later transformed into Court of Competition and Consumer Protection). A few years later the undertakings were equipped with the right to appeal the rulings of the Antimonopoly Court to the Appeal Court - a lack of such possibility was earlier recognised as contradictory to the Polish Constitution.

22. The OCCP is very particular about ensuring that the Office's decisions are upheld by the courts of higher instances. We have managed to achieve the efficiency rate of over 80 per cent in this respect and we are continuously trying to further improve that result.

1.6. *Resources*

23. Ensuring stability and maintaining institutional memory in the Office is crucial. Therefore, it is of great importance to allocate sufficient financial resources for salaries of the employees and their training.

24. The Office has faced many budgetary problems and continues to thrive for more resources for these aims as insufficient finances result in highly experienced staff being lost to the private sector. The Office makes an effort to provide its employees with interesting solutions for career development (such as internships in foreign institutions, trainings, courses) which would constitute incentives for staying with the OCCP. Moreover, the Office implements a career development programme to help the employee to indicate the directions of his/her professional development.

25. The OCCP has at its disposal state budget resources and is at the same time responsible for implementing tasks envisaged in the state budget. The performance of the tasks is measured by a number of predetermined indicators, like: cases won/ cases handled ratio; merger applications examined and decided/applications examined and decided within the statutory deadline ratio; matters handled successfully/ matters received ratio. The performance of the Office influences the budget allocated.

1.7. *Independence*

26. The President of the Office reports directly to the Prime Minister and is selected from amongst the members of the State Staffing Pool, i.e. persons who have fulfilled the necessary requirements to be appointed for high-ranking public offices, without any fixed-term. Under the previous provisions, he/she used to be chosen by an independent commission from among competition/consumer law experts and appointed for a fixed 5-year term in office, which ensured an even greater transparency in the selection of the head of the Office.

2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

2.1. *Organising your agency and preparing for works*

27. Priority setting is an important part of the antitrust office's work organisation and undoubtedly contributes to improving the agency effectiveness. We recommend to prepare a "Competition policy

strategy”, a governmental document, which would comprise both long and short term goals and priorities of an antimonopoly agency as well as an assessment of the actions after they are accomplished.

2.2. *Competition Culture and Advocacy*

28. Better effectiveness can be achieved not only through a well constructed and adapted to economical reality antitrust law, but also by soft-law.

29. Participation of an antimonopoly authority in the legislation process is of utmost importance. It is inevitable to search for all government agencies’ support. A number of activities to justify the usefulness and necessity of competition existence have to be undertaken on the governmental level.

30. The competition authority should conduct activities 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 on the benefits of competition.

31. Effective competition improves consumer welfare. Therefore the antimonopoly agency could initiate educational campaigns designed to equip the weaker market participants with information on how to act on the market and what are the tools given to them by competition law (ex.: private enforcement). Furthermore, big efforts should be also placed on raising the knowledge of the entrepreneurs as regards the competition law. The Polish antimonopoly Office has conducted a sociological research to assess the knowledge of this social group and later tailored a special educational campaign for them (publications, radio programmes, press articles, TV spot).

32. Finally, cooperation with European and international organisations (such as ICN, OECD, ECN) and other antimonopoly bodies constitutes an essential tool for fostering competition law by grasping best practices and learning from others’ experience. We recommend study visits and exchange of experts, which provide a good opportunity to gain new experiences and help to establish fruitful international collaboration.

2.3. *Judicial Appeals*

33. It is necessary to introduce transparent control procedures of decisions taken by the antitrust authority. It seems that such a function is best fulfilled by another fully independent body, i.e. a special court.

2.4. *Resources*

34. Investing in the Office’s human resources is crucial. The quality of the implementation of competition protection law depends on the expertise of the employees of the competition protection agency. Trainings, seminars, internships in other antimonopoly institutions and career development programmes are a good way to achieve this goal.

2.5. *Independence*

35. As the Polish experiences show, in the process of implementation of economic transformation and competition the antimonopoly authority often comes into conflict with other economic ministries, therefore its independence is of great significance. It is the autonomy that guarantees the proper fulfilment of its role. Thus, if the decision-makers intend to pursue a policy of competition protection, they should provide the competition authority with institutional and, as far as possible, financial independence.



CONTRIBUTION BY ROMANIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Romania--

1. Background

1. Since 1989 Romania fundamentally changed its economic system, from a centrally planned economy into a decentralised market economy. This process and the pace of reform has been different from other countries in the Central and East Europe as a result of previous history, political developments and other factors, mainly of an economic nature.

2. One common factor, however, in establishing a market economy, was the central role of competition law and policy in creating an economic environment where consumers' preferences and the efforts to compete with economic operators to satisfy those demands, lead to economic efficiency and welfare.

3. Planned economies are generally characterised by a high level of economic concentration. Other typical features are state or other collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and insufficient framework setting up transparent and common rules. Competition authorities may have an important role to play in dealing with these specific problems.

4. Romania's status as candidate country for accession to the EU was certainly a factor that contributed positively to the creation and functioning of an efficient competition authority and the construction of a sound competition policy.

5. The 1993 Copenhagen European Council specified that candidate countries for EU accession must adjust their administrative structures, "so that European Community legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures."

6. Art. 64, sections 1 and 2, of the Europe Agreement between Romania and the European Union, concluded in 1995, provided that Romania should apply the fundamental principles of EC competition and state aid law in so far as the trade between Romania and the European Community was concerned.

7. Hence accession to the EU depended on setting up the rules embodied in the *acquis communautaire* and on making them work.

2. Start-up. Organisation. Independence.

8. 1996 marked the creation of the Romanian Competition Council¹, an independent administrative body in charge with the enforcement of competition and state aid policies in Romania. In addition, a Competition Office was created - a specialised institution within the Romanian Government, with 42 local inspectorates (one in each county and one in the municipality of Bucharest).

9. Romanian Competition Law no. 21/1996, designed with support from OECD, USA and EU was passed on 10 April 1996, and came into force on 1 February 1997. It prohibits anti-competitive practices, sets rules for economic concentrations and provides for authorities to enforce the legal rules. Its provisions followed to a great extent the community competition provisions, since the EU model, apart from being already validated by practice, was also the natural solution in light of Romania's future EU accession. In its

¹ For brevity purposes, the Romanian national competition authority will be referred to in this paper as RCC.

first years of existence, the competition authority adopted also a full set of secondary legislation, which subsequently was amended and completed during the process of harmonisation with the *acquis communautaire*.

10. According to the OECD Country Survey in 1999, “the most unusual feature” of the Romanian Competition Act was its division of responsibility between the independent Competition Council and the Competition Office, a government specialised body.

11. The fact that there were two investigating authorities for anticompetitive practices ran the risk of double investigation and of different standards in each. That was why the law required that “the Competition Council and the Competition Office shall inform each other about the investigations they initiate” and stated that they may “cooperate in carrying out any investigation”. While both the Council and the Office could carry out investigations and were responsible for enforcing decisions, the Council was clearly the only agency to take decisions based on investigations by either agency. If the two authorities disagreed, there was a simple hierarchy: “rules adopted by the Competition Council and its decisions are binding for the Competition Office”. The independent Competition Council thus had more power than the government-dependent Competition Office. Nevertheless, the Competition Council, due to its much smaller staff had to rely on the Office to conduct the investigations it considered necessary and to control the enforcement of its decisions.

12. In the years to come, certain needs for improvement were identified, both as a result of internal assessments or exchanges of experience as well as triggered by EC recommendations in its Regular Reports on Romania’s progress toward accession. Thus, both competition law and its enforcers underwent a series of reforms².

13. The main changes brought by the legislative reform:

- The elimination of the Competition Office and the devolution of all the competencies to enforce the competition rules to the Competition Council. Thus, the Competition Council became the only authority in Romania entrusted with the application of competition rules. The reform concentrated the enforcement of competition within a single authority independent from the Government.
- New criteria for the appointment of the Board of the Competition Council.
- The attribution to the Competition Council of the power to give “binding” opinions on draft laws which may have an anticompetitive impact. Under new article 27 (k) of the law, the Competition Council acquired the competence to address binding advisory opinions (“*aviz conform*”) on draft laws and governmental Ordinances that may have an anticompetitive impact and to propose amendments. This new provision strongly increased the profile of the Competition Council in Romania before the Romanian legislative power.
- The right of the Competition Council to bring to Court other public administrative bodies, failing to conform to its decisions.
- The entrustment of new enforcement powers to the Competition Council inspectors. Competition inspectors were no longer required to seek judicial authorisation in order to search business premises, take over documents and apply seals as a part of an investigation. However, judicial

² 2003 - GEO 121/2003 for the modification and the completion of Law 21/1996; 2004 - Law 184/2004 for the approval of GEO 121; 2005 - consolidated version of Law 21/1996

authorisation and control remains mandatory for searching private residences, lands and means of transportation. These changes eliminated a significant burden from the Council's investigative powers, which can therefore be exercised more effectively.

- The significant increase of sanctions.
- The introduction of a Statute of limitation for sanctions. This provision filled a gap that existed under the previous legislation by introducing a Statute of limitation for competition infringements. It increased legal certainty for undertakings involved in competition infringements that came to an end, since they could no longer be fined if the Statute of limitation has expired.
- Fines were to be set within the same decision declaring an infringement of the competition rules. Under the previous version of the law, decisions issuing fines were separate from decisions declaring an infringement of the competition rules. In particular, decisions declaring an infringement of the competition rules were issued by the plenum of the Competition Council. On the other hand, decisions setting fines were issued by a Sub-commission, appointed for this purpose by the President of the Competition Council and composed of one Vice-president and two Counsellors. This system presented two practical flaws. First, it increased the administrative burden of the Council by forcing it to issue separate fining decisions for each company concerned by the infringement decision (for instance, if the decision declaring an infringement of the competition rules concerned 50 companies, the Council was obliged to issue 50 separate fining decisions for each company concerned). Second, it created delays between the timing of the decision declaring an infringement and that of the decision issuing the fine. In particular, there have been instances where the decisions issuing fines were taken after the 30-day period established by the law to appeal a decision declaring an infringement. This created great uncertainty for companies concerned by infringement decisions, since, in these instances, they were forced to decide whether to appeal the infringement decision without knowing the level of fine established for their infringement.

14. Since the reform, RCC had to go across difficult tasks in a very short period of time. In 2004 it had to cope with the new competencies and tasks resulting from the new institutional framework. It had to cope with the difficult responsibility of developing a new, modern, flexible and efficient national system for competition promotion and protection and for state aid control. It had also to close the negotiation chapter on competition and state aid. Between the end of negotiations and Romania's date of accession, RCC had to fulfil a number of commitments in order to avoid the risk of activating the specific safeguard clause.

15. Even if some progresses are needed and foreseen for the next years on further strengthening the administrative capacity of the RCC and a continuous adaptation of the institutional structure and powers to the new market challenges is expected, we can consider that RCC is now, after almost 13 years of existence, a strong authority, one of the main pillars of Romania's functional market economy.

16. Once Romania has joined the EU, the national antitrust authority has entered into a new stage of development and aims to be a reliable member of the European competition family and to be able to bring a valuable contribution in solving competition issues on the ECN agenda. "Participating in these debates is the new challenge that the Council has to face. And of course the challenge is to keep up the quality of its enforcement decisions"³.

³ Alberto Heimler - "Romania and EU: challenges in the antitrust" - "Profile: competition" magazine no.1/2007

3. Competition culture and competition advocacy

17. A distinctive feature of transition economies in comparison to more mature market economies is that they not only need to protect competition but first of all to promote it during the economic transformation. A pro-competitive economic policy is thus a precondition for the effective enforcement of the legal system promoting and protecting competition.

18. This is why since the beginning of its activity RCC dedicated a large share of its resources to a various number of activities that may be classified as forms of competition advocacy. These activities included performing reviews of existing and proposed laws and regulations; providing advice on state measures that might foster anti-competitive practices and associated resource misallocation; outreach activities to educate the public and businesses directly, through seminars and newsletters, or indirectly through the media; informing judges and legislators about competition policy-related matters; and undertaking studies of actual or potential state measures that may influence market outcomes.

19. Some of these activities were codified in the law, since RCC was given or gained through various legislative amendments the legal right to be consulted at a certain point in time on proposals by state bodies to change the manner in which the economy is regulated.

4. Enforcement – abuse of dominance and restrictive agreements

20. In its 1996 form, Romanian Competition Law provided for the compulsory notification of all agreements, even those falling under a block exemption. One rationale for this double control of compulsory notification was “that the undertakings and the administrative institutions are not yet very familiar with the concepts of the market and free enterprise that are the main components of a so-called competition culture⁴”. Taking into account that under the former centrally planned economy prices were set by the state, and agreements with suppliers rather than market demand used to determine the level of output, a general belief was that this system of double control will increase the awareness of businesses on competition provisions. Institutions would regularly be confronted with, and hence learn about, the relation between free competition and consumer welfare.

21. GEO 21/2003 provided for the elimination of mandatory notifications for agreements subject to a block exemption. The Ordinance also abolished the authorisation tax for exemptions previously foreseen by Article 33 of the law and applied by the Competition Council for reviewing notifications.

22. This change decreased the administrative burden of the RCC - so far overwhelmed with notifications of agreements having clear pro-competitive effects – and allowed it to focus its enforcement activities on serious infringements of the Romanian competition rules. Following this change, companies are free to self-assess whether their commercial agreements qualify for a block exemption since they are no longer under an obligation to defer this assessment to RCC.

23. However, the notification system remains in place for companies wanting to acquire legal certainty over their commercial agreements where these include restrictions of competition which do not benefit from a block exemption. These agreements must be notified to the authority if the parties involved want to obtain an individual exemption.

⁴ G. Oprea: Modernisation of EC Competition Law: The Case of an Associated Country, 2000 EU Competition Workshop by the Robert Schumann Centre for Advanced Studies, Florence, p. 5.

24. During its 13 years' existence, the RCC completed just a few cases on abuse of dominant position. Many investigations were opened following a complaint on both abuse of dominant position and collusion grounds, but the authority sanctioned more often the anti-competitive agreements (cartels).

25. In the last two years, while the authority dismissed quite many complaints on abuse of dominance, it also applied record fines in two cases where abuse was found: the case of abusive refusal to deal and discriminatory pricing applied by the national freight railway operator to private operators and the case of unfair pricing applied by TV cable operators located in Bucharest.

5. Cartels

26. The development of an effective anti-cartel programme requires appropriate tools: effective and deterrent sanctions, adoption of a leniency programme, appropriate resources for ex-officio investigations, internal guidelines for dawn raids, in-house training for competition inspectors etc.

27. During its 13 years of existence, the legal framework on competition and the administrative capacity of the RCC underwent a series of transformations that allowed the national competition authority to acquire and make use of such tools. Presented below are a few examples that illustrate this evolution:

6. Sanctions

28. In the past, the level of sanctions under Romanian competition law was for some aspects clearly insufficient to have a deterrent function. In particular, under the previous version of Article 55, companies failing to notify a concentration or refusing to cooperate with the investigation (for example, if companies submitted incomplete, false or misleading information or refused to accept an inspection) could have been subject to a fine between ROL 2 million and ROL 100 million (i.e. approximately between EUR 50 and EUR 2,500). In addition, under the previous version of Article 56, companies committing a breach of the competition rules (for example, companies found to abuse their dominant position or to participate in an anticompetitive agreements) could be subject to a fine between ROL 5 million and ROL 250 million (i.e. approximately between EUR 125 and EUR 6,250).

29. Following the 2003 legislative reform, companies may now be fined respectively up to 1% of their aggregate turnover if they fail to notify a concentration or refuse to cooperate with the investigation and up to 10% of their aggregate turnover for breach of the competition rules.

7. Leniency

30. Although a leniency programme may have not been seen as necessary in the very first phase of competition law enforcement, when competition culture was so limited that "naïve cartels" could be uncovered by reading the newspapers, in 2004, the conditions and application criteria of a leniency policy have been put into practice. In order to promote the leniency policy, RCC initiated a large promoting campaign: "Promoting the leniency policy within the business environment". The campaign presented in an attractive way - guidelines, leaflets - details concerning the procedure to be followed by the undertakings in order to obtain leniency.

31. Until now, however, the national authority did not receive any leniency application.

8. Ex-officio investigations

32. In many reports regarding competition enforcement in Romania, the European Commission recommended "a more pro-active approach", in particular by increasing the use of "own-initiative

investigations” focused on major infringements of competition⁵. Until 2004 the investigation activities of RCC were indeed conducted almost exclusively in reaction to complaints⁶. Since 2005, ex-officio investigations account for a significant part of the total amount of investigations pursued by RCC.

9. Mergers

33. Merger control was an important part of the Romanian competition policy from the very beginning, taking into account also the particularities of the Romanian market such as the extensive and ongoing privatisation process. Between 1997 and 2001 statistics showed that economic concentrations represented almost 50% of RCC workload.

34. Before 2003 low thresholds for notification led to the notification of a large number of mergers. This meant excessive time spent on mergers having marginal effects and a misuse of RCC’s scarce resources.

35. Successive adjustments of the notification threshold reduced the administrative burden for companies involved in mergers and acquisitions with insignificant effects on the Romanian economy. In addition, it allowed the RCC to focus its administrative review on mergers and acquisitions having a significant impact over the Romanian economy.

10. Judicial appeals

36. According to the Competition Law, the decisions issued by RCC may be challenged at the Bucharest Court of Appeals, while the decisions of the Court of Appeals may be also challenged by appeal at the High Court of Cassation and Justice.

37. Programmes for interaction with the judiciary were a constant in RCC’s advocacy strategy, within Twinning projects or using RCC’s own resources. The activities included in such programmes were conferences, seminars, study visits etc. If in the early years the issues debated at these meetings were mostly related to the application of the national competition and state aid policy towards, in recent years the cooperation between the National Courts, ECJ and EC and the decentralised application of the antitrust legislation monopolised the topics of the meetings.

38. Apart from these more formalised approaches, the Legal department of the Romanian NCA initiated last year a series of more informal meetings with judges and magistrates from the national courts, in which community antitrust and state aid cases are also the topic of debate. These debates are to be continued in the future.

39. Statistics for the judicial review of the Council’s antitrust cases show that overall the percentage of the Council’s decisions upheld in the judicial review process ranges somewhere between 80-90%.

40. However the Romanian courts recently overturned some important cases in the enforcement practice of RCC in 2005 and 2006. In most of these cases, though, courts overturned the Council’s rulings on procedural grounds rather than going into complex analysis on the merits of the case.

⁵ The Roadmaps for Bulgaria and Romania - 13 November 2002, recommends for antitrust enforcement in Romania “a more pro-active approach including own-initiative investigations” (pg. 30). The same wording is contained in the Regular Report for Romania of October 9, 2002.

⁶ Note should be made that the Competition Council has a legal obligation to answer any complaint submitted to its attention within 30 days.

11. Resources

41. Limited competition culture and economic development prevent many transition economies from allocating sufficient resources to competition law enforcement, in particular to competition authorities. RCC was also faced with this problem in the beginning, trying to enforce competition law and advocate for competition culture with minimal personnel and financial resources.

42. However, over time the necessity to allocate adequate financial resources, trained staff and proper endowment to the agency became obvious and steps were taken to address those issues.

43. The 2003 reform was a step in the right direction. As a result of the institutional merger, the staff of RCC increased considerably. Furthermore, the Council acquired presence in 41 counties distributed around Romania. However, some of these employees needed specialised training and decisions needed to be taken on how to allocate the new staff within the existing structure.

44. Another feature of independence is that RCC draws up its budget, which is provided for in a distinct chapter of the state budget. The returns from fees, taxes or fines or from other sanctions enforced by RCC are collected to the state budget. In this respect, RCC's efforts of improving its capacity to implement the relevant legislation gradually received corresponding support from Government, through the allocation of adequate financial means to achieve its objectives. An example that clearly illustrates this is that the 2005 budget was 30% higher than 2004, and the same increase was noted in 2006 in comparison with 2005. Further increases were noted also in 2007 and 2008, although perhaps not with the same percentage. Other statistics show that, while in 1997, the RCC budget was approx. 0.001% of the GDP, in 2006 budgetary allocations represented approx. 0.010 % GDP.

45. Increased availability of financial resources was reflected in the working conditions of the staff: new headquarters, proper wages, modern IT equipment, professional database, library and professional training.

46. Romania's status as candidate country and RCC's strategy of international cooperation had an important contribution to the administrative capacity of the authority. The Competition Council benefited from extensive training and technical endowment from PHARE and TAIEX programmes. Experts of the FTC and DOJ provided technical assistance to their Romanian counterparts since the establishment of the authority, and even before that, beginning with the elaboration of the first draft of the Romanian competition law. International organisations such as OECD and UNCTAD included RCC in numerous capacity building activities. Also exchanges of experience with other countries proved to be an important element in improving the effectiveness of the authority.

47. Use of resources though has a quantitative and qualitative aspect. Resource problems may flow not only from lack of endowment, staffing or budgetary restraints, but also from lack of prioritising activities.

48. As shown above, certain legislative provisions, such as requirements to notify certain vertical agreements, lower thresholds for merger notification, and administrative requirements for the Council's decisions required a substantial use of resources that sometimes impeded the authority's ability to focus on serious infringements of competition.

49. Also, additional commitments requiring the use of a fair amount of resources resulted from RCC's designation by the Romanian Government to ensure the coordination of the accession negotiations on competition policy chapter until 2004 and, following that date, to manage issues related to the activation of the specific safeguard clause. Such commitments were naturally given the highest priority; however, time showed that such resources were well spent.

50. Considering the limited number of resources at its disposal, and the legal obligation to analyse all incoming complaints and intimations, the authority was faced with the necessity to define a prioritisation strategy for its ex-officio investigations.

51. In order to address this aspect, RCC - together with the Competition Component of the 2002 Twinning Project (under the responsibility of Italy) - elaborated a set of "Guidelines for a more pro-active approach in the enforcement of competition rules". The purpose of these guidelines was to provide the Competition Council with a pre-determined policy to be used when deciding which alleged anticompetitive practices should be subject to ex-officio investigations. The guidelines were put into place and are now a working document of RCC. In accordance with this policy, priority is given to investigations concerning "hardcore restrictions" of competition having an effect at national level (as opposed to local level) and relating to sectors essential for the Romanian economy.

52. In recent years, the enforcement record of the Council showed the results of such a strategy, showing an increase in cases of serious infringements of competition law being prosecuted by RCC.

12. Conclusions

53. From the experience of the RCC, the establishment of an effective competition regime relies upon four cornerstones:

- creation of an adequate legal framework,
- enforcement of legal framework in a correct and effective way,
- independent competition authority with strong administrative capacity
- recognition as an advocate of competition principles to guide regulatory reform.

54. Apart from that, co-operation and exchange of experiences amongst peers is also a vital element in the development of a national competition policy and the refinement of a competition authority's techniques. For countries that are currently in a phase of strong developments in the competition policy area, such as economies in transition and emerging market economies, exchanges of experiences with countries facing similar problems may prove to be of significant importance.

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CONTRIBUTION BY THE RUSSIAN FEDERATION

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Russian Federation--

1. The Russian Competition Authority (formerly the State Committee for Antimonopoly Policy and the Support of New Economic Structures) was initially established in July 1990 prior to the adoption of the Law on competition. At the beginning the main staff consisted of highly qualified economists and lawyers, but the majority of staff, to say nothing about business and public community at that time, was not aware not only of competition principles and culture, but of the notion “competition” *per se*.
2. Taking this into account, it should be realised that the process of competition development in Russia started from the very beginning and state authorities did not tend to immediately ruin their long-term practice and experience of acting in the planning economy and switch to competition principles. Moreover, competition was not always an immediate priority in practice at that time.
3. The first Law “On Competition and the Restriction of Monopolistic Activity on Goods Markets” was developed thanks to assistance of the global competition community and aimed to reflect the best world practices. It contained relatively mild sanctions for most violations, preferring cease and desist orders and disgorgement of improperly received income to direct fines or the punishment of individuals. This was consistent with expectations that the worst potential problems would be controlled by regulation and also reflected fairness concerns about the complete unfamiliarity of competition law concepts and a desire to allow the new rules to become known before severe sanctions were applied.
4. Historically the Russian Competition Authority used to have multi-functional powers that definitely distracted many resources from concentrating on purely competition matters. For instance, the State Committee for Antimonopoly Policy and the Support of New Economic Structures was, as it is seen from its name, responsible for support of new economic structures in general. To support creation of market infrastructure the competition authority was assigned to elaborate broad “demonopolisation plans” directed toward the elimination of structural barriers to competition, the creation of infrastructure, and the facilitation of entry in highly concentrated markets. However the tasks of the State Committee were not clearly defined. In practice it encouraged formation of new businesses and proposals concerning development of necessary market infrastructure. Moreover it controlled not only anticompetitive actions, but also all kinds of undesirable or “uncivilised” behaviour that might be engaged in by economic actors in a market setting. The Ministry of Antimonopoly Policy (1998) had a number of more broad functions (consumer protection, entrepreneurship support, control over natural monopolies and observance of advertising legislation). In addition to competition issues the latter three were delegated to the FAS Russia (2004), with gradual extension of new powers, such as control over public procurement, control over granting of state and municipal aid, control over economic concentration in the sphere of usage of natural resources, control over activity of the auction organisers under termination of state regulation of prices (tariffs) on certain goods, control over state authorities on observance of competition law, power to separate competitive (production and purchase/sale of power energy) and naturally monopolistic (transition of power energy and operative dispatch management) types of activity in energy power, control over non-discriminatory access and manipulation of prices in the sphere of natural monopolies, control over foreign investing to the economic entities having a strategic importance for the Russian national defence and state security.
5. During the next several years the competition authority undertook a major legislative drafting effort to ensure better competition development and enforcement.

6. To make the work of the competition authority more effective numerous training seminars, study-trips and consultations on competition law enforcement were held, including the ones held with the support of OECD, for the staff of the Russian Competition Authority.

7. The permanent activity of the competition authority and definitely improvement of competition legislation has resulted in achieving the evident success in the competition policy implementation in the Russian Federation when the majority of state authorities started to comprehensively understand what the competition development is aimed at, what principles are used to ensure it, and inter alia adoption of more severe sanctions and prompt advocacy efforts made business community, academicians and civil society institutions respect the competition law and realise what is expected from them to ensure observance of this competition law.

8. Coming back to the beginning of the competition authority's activity the most of its work load consisted of cases on abuse of dominance. The major difficulties the staff encountered were lack of resources to conduct investigations, weakness of official sources of information and strict time frameworks, all of which in aggregate impeded the use of economic analysis in order to define markets and market shares of numerous market participants. As a result the staff tended to prefer work on cases where market position of the defendant was obviously dominant.

9. As for the restrictive agreements, the number of disclosed ones was insufficient. Consideration of such cases was hindered by the lack of relevant complaints and necessity to prove that parties to the alleged agreement have an aggregate market share of more than 35%. Another problem was to provide convincing proves to the court.

10. At the early stages of the history of the Russian competition law enforcement there was no such notion as "cartel". There was only division on horizontal and vertical agreements and the activity in this field was rather successful. It was only a few years ago when the competition authority started to "crack cartels". And only with adoption of higher sanctions, leniency program and expansion of powers of the competition authority did the anti-cartel activity start to show results. It is important to know that criminal sanctions available in the legislation have been untested so far.

11. The merger control provisions were initially provided for in the competition law. This was particularly important within the period of demonopolisation and some time later within the period of privatisation. Mergers in unusually concentrated markets or that create firms with unusually high market shares are thought more likely to affect competition. However by the time the real market has started to operate actively the thresholds for merger notification were very low and the competition authority got a bench of notifications from various companies. The trend was that the competition authority in order to rationalise its resources and efforts decided to slowly but surely focus on transactions that could produce negative significant impact on competition, therefore the thresholds were increased over time.

12. As for the judicial practice the system of judicial examination of cases has been the same from the beginning. However judges had difficulties with questions of market definition and dominance and the competition authority had in some cases been forced through several levels of appeal on the issue of whether a regulated natural monopoly is dominant. Courts had also difficulty in defining the limits of the competition authority's powers to interfere in contractual relationships, even to protect a weaker party, and were sometimes confused about how the general rules on public contracts and contracts of adhesion that are contained in the Civil Code and the provisions of the competition law related to contractual relationships relate to one another. With this regard the competition authority made its best to conduct joint meetings with the judges to explain peculiarities of competition law in order to elaborate the unified position of the judicial community to interpretation of the Russian competition law. The result of this work was adoption at the plenary session of the Supreme Arbitration Court of the Russian Federation of two

crucial documents – Informative Letter “Review of practice of antimonopoly dispute solution” (1998) and Resolution “On certain issues of administering the antimonopoly legislation for the arbitration courts” (June 2008) which coincides with the competition authority’s understanding on the majority of fundamental issues of competition law interpretation.

13. The amount of the allocated budget will never be enough to face the challenges of the reality, and the beginning of our history can also prove this fact. However due to positive results shown by the competition authority and continued activity on further development of competition law and enforcement the budget has increased consistently year-to-year. With adoption of higher fines system the amount of fines collected by the competition authority and transferred to the federal budget fines sum exceeded several times the budget of the authority itself.

14. In order to ensure faster reaction on changing situation the Russian Competition Authority has always been subject to administrative oversight by the Russian Government and accountable directly to the Prime Minister of the Government of the Russian Federation.

15. 5 recommendations:

- i) to devote sufficient efforts to competition advocacy;
- ii) to use international experience through international cooperation to effectively train staff and develop proper competition law;
- iii) to interact with judges to elaborate transparent system of violation and punishment determination;
- iv) great prestige of the Head of the competition authority;
- v) to avoid to certain extent multi-functioning of the competition authority and try to concentrate on competition issues.



CONTRIBUTION BY SERBIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Serbia--

1. The process of political and economic reforms in Serbia was initiated in 2000, when democratic political powers laid the foundation for building of democratic state, based on rule of law and social justice with determination towards free market economy in commercial sphere. One of political goals of Serbia is its integration into European Union.
2. Within the process of association into European Union and building of legal frame for development of market economy, the Law on Protection of Competition was passed in 2005, made to the great extent in compliance with the EU competition rules. On the grounds of that Law, Commission for Protection of Competition was established as an independent and autonomous organisation, liable for its work to the National Parliament.
3. Commission began its activities in April 2006 when the first members of the Council, a decision making body within the competency of the Commission, were elected. Three years of its activities demonstrated, quite clearly, all the obstacles regarding effective implementation of competition rules:
 - a) Unstable political environment. As with majority countries in transition, political situation in Serbia is considerably unstable. Since 2000 and up to the present day, three parliamentary elections were held and each time the government was formed by the coalition of political parties. Political instability slowed down processes concerning legal and economic reforms. In such circumstances competition policy has been ignored as the government is forced to deal with more pressing political and economic issues.
 - b) Economic underdevelopment. Up to 2000, majority companies in Serbia were state or socially owned. After the crises during nineties, Serbian economy found itself on the brink of disaster. Privatisation process was initiated in 2001 and is now near completion (around one fourth out of total number of companies is still under the privatisation procedure). A number of companies were sold to foreign investors who brought fresh capital to Serbia. In many sectors of economy there are still legal monopolies held by public enterprises: transport, energy sector, management of natural resources, public utilities. These are the reasons why the market economy does not exist to the full extent, thus narrowing the space for implementation of competition rules.
 - c) Influence of domestic businessmen to opening up of market to competition. In the relatively small Serbian market, there are only a few leading domestic companies engaged in commercial activities, preventing opening of market to foreign competition by political lobbying and presenting in public arguments on "harmfulness" of implementing competition rules: necessity for domestic companies to develop and gain strength in order to be able to face competition in the world market (national champion syndrome), providing employment to domestic population etc.
 - d) Lack of political willingness for effective implementation of competition policy. Political lobbying made by large domestic companies as well as feedback of economic and political powers are the key factors why the political circles hesitate to give open support to Commission.
 - e) Lack of knowledge and understanding of the role of competition policy by domestic population. High prices of goods and services are noticeable in public and explained by non-existence of competition. That is the reason why the protection of consumers is a primary goal of Commission, whereby the role of Commission is wrongly regarded as identical to the role of state price regulator, while competition policy is often mixed with the consumer protection policy. It is

not widely known that the role of competition rules is to increase efficiency of enterprises thus contributing to growth of economic welfare of society and economic development of the country.

- f) Insufficient legal competences of the Commission. Existing Law contains certain defects preventing its effective implementation: impossibility to impose structural measures (divestiture of companies or transfer of property); lack of power of Commission to impose sanctions independently but instead it is done by the magistrate; lack of investigative powers enabling employees of the Commission easier access to and gathering of evidence, particularly in procedures concerning investigation of cartel cases.
- g) Lack of institutional capacity. Commission has a small number of employees, around twenty. It is estimated that there is a need for its staff to increase to hundred. There are no skilled employees with specialised knowledge from the field of competition on labour market, therefore it is necessary for the newly employed staff to be educated and trained through seminars and workshops. That is why, in the foreseeable future, the Commission shall not have enough skilled staff.
- h) Lack of economic analysis. Until recently, market analysis was completely neglected field of activity in the Serbian economic science. Initial procedures conducted by Commission, particularly in the field of merger control, demonstrated that without valid economic analysis there are no expertly founded and evidenced decisions.
- i) Difficulties in collecting information. Conducting research and performing economic analysis implies dealing with exact data. Statistical Agency and other competent institutions often do not dispose with data which are necessary for Commission or are legally bound and cannot provide the Commission with the requested information. Therefore, the Commission has to lean on data given by companies on whose request or against which it conducts procedure, which makes the validity of information doubtful.



CONTRIBUTION BY SINGAPORE

CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Singapore--

In February 2003, the Economic Review Committee recommended that a generic competition law be enacted to create a level playing field for businesses, big and small, to compete on an equal footing, and so make for a more conducive business environment. On 4 November 2004, the Competition Act (“Act”) was assented to by the President of Singapore. As competition law was new, the Act was implemented in phases. The Competition Commission of Singapore (“CCS”) was established on 1 January 2005 and the prohibitions against anti-competitive agreements and abuses of dominance came into effect on 1 January 2006. The prohibitions against anti-competitive mergers came into force on 1 July 2007, 18 months after the other prohibitions. On 9 January 2008, CCS issued its first infringement decision against six pest control companies for collusive practices.

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Following the Singapore Government's decision to enact a competition law, staff from the Ministry of Trade and Industry was involved in the planning of CCS and in legislating the Competition Act. Some of these staff was subsequently seconded to the newly formed competition agency. In the first 2-3 years, CCS completed a set of essential guidelines on the application of competition law to provide clarity for stakeholders, and conducted outreach and advocacy to the public. CCS did face some challenge in staff retention during the initial years.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Prior to the three main prohibitions of the Competition Act coming into force, CCS issued guidelines to help business understand how the prohibitions would be interpreted and enforced. These guidelines were finalised only after extensive public consultation and industry briefings. Numerous briefings and conferences were conducted with the business community, trade and professional associations and other stakeholder groups, such as the legal community and academic institutions, to raise the general level of awareness and understanding of competition law. Specialised advocacy sessions were also conducted, for example, briefing procurement officers on spotting the tell-tale signs of cartels. Articles and interviews about the newly enacted Competition Act, as well as timely updates on CCS' enforcement activities, were also provided to the media in our early years to reach out and

educate our stakeholders. Training courses on competition matters were conducted for Government policy-makers and CCS remains open to Government agencies seeking guidance on their policy initiatives.

In the past three years that the Competition Act has been in force, the number of new cases which CCS has undertaken has increased annually and feedback from the legal community has indicated that awareness of competition law in Singapore is gradually increasing and there are several businesses which have pro-actively put in place compliance programmes. CCS' first infringement decision arose due to an alert procurement officer who previously attended one of CCS' outreach sessions and subsequently spotted an incriminating email between several pest control companies, which was duly forwarded for our investigations. Since the issuance of this infringement decision, public interest in CCS' advocacy and outreach efforts has also increased.

Nonetheless, CCS recognises that there remains much work to be done in its advocacy and outreach efforts. This is especially so in Singapore's context given the prevalence of trade associations as well as small and medium enterprises which may not have heard of competition law or given it due consideration under their risk management and corporate governance framework.

As CCS is an agency which deals predominantly with competition matters, another form of resistance faced in the promotion of a competition culture is that consumers do not readily identify with our organisation, as the object of consumer protection is not explicitly set out in our Competition Act. Often, consumers question the reasons for a lack of market players within industries or the prevalence of high prices, which prove to be a challenge for CCS in explaining the long-term, non-readily visible benefits of competition enforcement.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?

As of end November 2008, CCS has yet to act against any abuse of dominance or non-cartel restrictive agreements cases. For the investigation of abuse of dominance cases, CCS faces challenges in defining the relevant product market or qualifying the manner of abuse for some cases. Sometimes, the alleged behaviour does not fall within commonly seen forms of abuse or case law, and there are case-specific factors complicating the assessment of the case. In this regard, CCS is articulating possible theories of harm prior to the requesting of information from parties, as well as consulting experienced case-handlers from other more established jurisdictions.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The key difficulty encountered was the low level of awareness of competition law in Singapore and as mentioned earlier, advocacy and outreach sessions were conducted to educate our stakeholders. CCS has also implemented leniency and whistle blower programmes in its enforcement against cartels. Within a year of the substantive prohibitions of the Act coming into force in 2006, CCS received a

complaint against several pest control companies for collusive practices and commenced investigations, which subsequently led to our first infringement decision being issued in January 2008.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, overinclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Not applicable as the CCS has adopted merger control.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?

The provision against anti-competitive mergers came into force on 1 July 2007, 18 months after the other provisions against cartels and abuse of dominance did, with the intention of providing the business and legal communities some time to familiarise themselves with competition law in Singapore. This allowed CCS to manage its resources more efficiently during its initial years of operation as efforts were channelled towards investigations against anti-competitive agreements and abuse of dominance, as well as competition advocacy and outreach. Staff were sent on attachment programmes with the Australian Competition and Consumer Commission, UK Competition Commission and the New Zealand Commerce Commission to learn about merger assessment and be sufficiently prepared before the merger regime took effect.

By operating on a voluntary notification regime for anticipated mergers, CCS has not been swamped with an excessive number of merger notifications, most of which were unlikely to raise any substantive competition concerns. In addition, parties which can show that their anticipated merger is likely to be carried out in good faith may apply to CCS for a Pre-Notification for Discussion session, which allows CCS to point out any incomplete information which the parties need to furnish upon their actual merger filing. This provided for a speedier merger review which benefits the merger parties, their legal advisors and CCS.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Since the merger regime came into force in July 2007, CCS has reviewed and cleared all 11 merger applications as of end November 2008. Implementation of the merger regime has been a successful one with 5 applications coming in within the first 4 months. Merger review has proven useful as it enabled the organisation to learn about various industries whilst sharpening the economic analysis skills of staff. Also, it acted as a form of competition advocacy when CCS engaged and consulted stakeholders and third parties during the review process.

1.5. *Judicial appeals*

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

If parties are not satisfied with the decisions of CCS, they can appeal to a Competition Appeal Board ("CAB"). This is an independent body comprising members appointed by the Minister of Trade and Industry from wide ranging fields, such as lawyers, economists, accountants, and representatives from the banking and business sectors. Beyond that, the parties can further appeal to the High Court and Court of Appeal on points of law and the size of financial penalty. CCS' decisions are also subject to judicial review. To date, CCS has made one infringement decision, which was not appealed. It is premature to judge the degree of success.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

Members making up the CAB, amongst others, are invited to key events organised by CCS, such as the public lecture by distinguished guest speakers, where they have the opportunity to become familiar with competition law and network with industry practitioners. However, CCS is careful about the mode and extent of communications with the CAB members so as to preserve the independence and integrity of the appeal process.

1.6. *Resources*

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Resource constraints encountered by CCS pertain largely to human resources and there was a lack of experienced staff trained in competition matters when the organisation was established. Over the past few years, CCS has been actively recruiting new staff and providing them with ample training opportunities, especially in the field of competition law and economics. Apart from participation at international competition law and policy conferences, academics and practitioners from established competition authorities have been invited to train and share their experiences with staff, and the organisation is currently developing its knowledge management framework to build up its institutional knowledge.

CCS' budget is provided by the Ministry of Trade and Industry, and is adequate.

1.8. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

CCS decides on its cases independently from the Government given that it takes on the roles of the investigator, adjudicator and enforcer. CCS is a statutory board under the Ministry of Trade and Industry, and the Minister of Trade and Industry may give CCS direction on broad strategic issues, but it is the Commission that makes decisions in respect of the cases that CCS deals with. The Minister for Trade and Industry may, under section 8 of the Competition Act, give general directions, not inconsistent with the provisions of the Competition Act, relating to the policy CCS is to observe in the exercise of its powers, the performance of its functions and the discharge of its duties. As mentioned earlier, appeals from CCS' decisions are made to the Competition Appeal Board and not to the Government. Parties may appeal to the Minister of Trade and Industry, only if the decision relates to a merger involving public interest considerations, e.g. national security or defence.

1.9. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

(a)

- Creating public awareness and support for competition culture
- Investment in human resource and knowledge management
- Provide transparency and certainty of the competition regime to stakeholders by means of guidelines, consultations and outreach sessions
- Ensure a good track record of investigation and adjudication right from the start
- Provide competition training and advisory to Government agencies

(b)

- Avoid being overly-involved in consumer issues – competition agencies should remain focused on competition issues.
- Avoid spreading resources too thinly - prioritise the first few cases
- Avoid using technical jargons and professional language in explaining competition policy matters to the public
- Avoid having a mandatory merger notification regime as this may cause a new agency to devote an excessive amount of resources during its early years to merger review

- Avoid the loss of institutional knowledge when experienced staff leave the organisation

2. Countries that have been actively enforcing a competition law for a longer period

1. For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.

2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Not applicable in CCS' context.



CONTRIBUTION BY THE SLOVAK REPUBLIC

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Slovak Republic--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Before the establishment of the Antimonopoly Office of the Slovak Republic (hereinafter referred to as “the Office”) a working group was created to ensure everything essential for establishment of a competition institution (mission of the Office, goals, competencies, legislation, staff, financial sources, the Office’s premises, etc.). Establishment of such an institution requires support of politicians and society for its creation and functioning. If there is such support, technical requirements and needs are no problem. The fact that creation of the Office took place during the transitive period, when the country went through and transformed from socialistic planned economy into market economy resulting in lack of experiences, experts and required knowledge, we considered to be the problem in the Slovak Republic. Therefore, it was necessary to make contact with countries and competition institutions, which have already had their competition history and experiences and through participation of experts of partnership institutions we tried to gain knowledge necessary for application and decision-making practice.

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Establishment of a competition culture is a long-lasting process mainly in countries where history of competition rules and market principles is not so long and rich. In this regard it is necessary to note that from the beginning a competition body tries to be the most transparent and relatively intensively communicates with the public. In first years it is important to actively inform the public on its mission, goals and tasks and also to publish permanently all relevant outputs of a competition authority. At the same time, it is required to work actively with its stakeholders (lawyers, undertakings, politicians, media, consumers, etc.). On a basis of experiences it could be proved that at first a competition topic was not very attractive for media and the public and space given to this area was not “considerable”. Interest in the given topic increases gradually not only by media but also by particular stakeholders, who activated demand for competition communication. The Office has been one of the institutions in SR trying to understand and spread principles of market and competition, though, it should be added that for the Office itself it was and still is permanent learning process. Hence, mainly in first years of its existence the Office fulfilled also the wider tasks and it also

initiated various legislation changes, for example: i) it actively entered the privatisation process with the aim to demonopolise markets; ii) it initiated the abolishment of tobacco and salt state monopolies (1994); iii) it initiated the Governmental Resolution on establishment of public procurement (1991); iv) it has been repeatedly submitting the draft of the Act on Regulation of Network Industries or on Competitive Method of Granting Licences (which have been adopted much later or have not been adopted at all).

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In early years of the Office the legislation in the area of abuse of a dominant position was set quite well, both from matter-of-fact and also procedural view – the Office had sufficient tools to ensure enforcement, to acquire evidence as well as sufficient powers to impose appropriate remedies.

Investigating and prosecuting abuse of a dominant position in its early years, the Office encountered mainly following problems:

- insufficient number of employees and insufficient training programs;
- preferentially mergers were examined;
- the Office did not have sufficient experience in application of competition rules and in the early nineties it was problematic to get information through Internet, therefore the Office used international forum, like OECD and consultations with foreign experts to acquire necessary know-how;
- unsatisfactory competition culture caused also certain problems, due to the fact that it wasn't known what practices are considered as a restrictive one under competition rules.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

During the first years, mainly due to unawareness of competition rules, we could get information on various forms of cooperation among rivals from the media. Therefore, the Office monitored the media. In the early years the Office focused not on strict sanctions, but rather on public education and explanation of competition rules and their positive impact on economy and consumer.

Later, within anti-cartel program the Office worked out materials on possibilities to apply for leniency in cartel cases and on indications of collusive conduct within public procurement (bid rigging). The Office published mentioned materials on its web site to support provision of information to the Office by external sources. So far, the Office received and noticed very little response from undertakings,

public providers or citizens to these documents. Longer time period is probably needed to get results of and draw conclusions from the mentioned activities.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Legal provisions on merger control were implemented in the Act on Protection of Competition in the year 1991.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

At the very beginning, after the creation of the Office, approximately 60% of the Office's capacities were given to mergers. This situation arose from relatively low thresholds of merger notification, but it was also connected with massive privatisation in early nineties in SR.

Regarding notification criteria of merger notification, which were valid at the beginning of the Office's activities, it is necessary to state that market share was one of the alternative notification thresholds – undertakings were obliged to notify merger, if market share of 20% was identified, then this threshold was increased at 25%.

Considering unclearness and non-transparency of market share as notification criterion, from the year 2004 notification criteria of merger notification pursuant to the Act on Protection of Competition has not been based on the market share.

Substantial decrease of number of notified mergers from 200-250 per year to approximately 70 assessed cases per year relates also to accession of the Slovak Republic to the European Union in the year 2004.

We consider provisions of merger control to be necessary, because they allow pre-affect market structure in the manner that significant barriers of effective competition in the relevant market are not created as a result of mergers.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

As in SR the privatisation of large state companies, having often the dominant position in the market took place, during this time it was very necessary to influence the markets structure through merger control.

Already from the beginning merger control was important and useful part of the Office's activities. In its decision-making practice the Office prohibited some concentration or conditioned decisions on concentration, on a basis of which significant barriers of effective competition were eliminated.

From the recent decisions it is worth mentioning few examples, e.g. concentration in pharmaceuticals industry, which was approved with conditions, next prohibition of concentration, which could result in elimination of competition between the airport in Vienna and the airport in Bratislava and prohibition of concentration of the retail chains Tesco and Carrefour.

In previous years there were changes in the Act on Protection of Competition and amendments concerning merger control. Preparatory work on legislative draft was based on experiences of the Office and also on vast experience of the European Commission and the other competition bodies.

Considering the fact that economy of the Slovak Republic is small, the Office deals with problems relating to setting the notification criteria in the manner that on the one hand the Office would be authorised to assess concentrations with possible local negative effect on competition conditions and on the other hand that it would not burden undertakings by low notification thresholds. We would welcome discussion on this matter.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Firstly, it is necessary to briefly explain the administrative two instance procedure within the Office.

The cases are investigated by one of three competent divisions (Division of Agreements Restricting Competition, Division of Abuse of a Dominant Position, Division of Concentrations) which also decide the case, issue decision and impose sanctions. The decision of the relevant division can be appealed to the Council of the Office, which has power to uphold, change or annul the decision of the division. The decision of the Council of the Office can be appealed (since the October 2004) to the Regional Court in Bratislava which in panel of three judges has power to review the decision issued by the Council of the Office together with the first instance decision (decision of the relevant division), and has power to uphold, annul both of the decisions and return them for further procedure or change the imposed fine. Before the October 2004, the decisions of the Office were reviewed by the Supreme Court of the Slovak Republic, where in majority of the cases Office was successful. Since the abovementioned date, the Office has lost majority of its cases at Regional Court in Bratislava.

Until the 15th October 2008, the appeal to the decision of Regional Court in Bratislava was only possible for the unsuccessful petitioner when the court dismisses his action and for the Office always in cases where the decision was changed (the imposed fine was decreased). However, in the proceedings which ended in annulment of the decision of the Council of the Office (and in the most of the cases also of first instance decision), the Office had power to appeal only under certain conditions stipulated in the Civil Code of Procedure which was almost never the case in reality. Therefore, the Office felt sometimes paralysed, as it was not able to intervene effectively in the market for the benefits of consumer and the competition.

Since 15 October 2008, pursuant to the legislative amendment to the Civil Code of Procedure, the Office has right to appeal against any decision of the Regional Court in Bratislava which annuls the decision of the Council of the Office (and the first instance decision as well).

In important cases court annuls the decisions of the Council of the Office, whilst most of the decisions lack the concrete identification of the failures of the Office during the proceedings and a particular legal opinion of the court. The other negative fact is unfounded and disproportionate decreases of the imposed sanctions. Lack of experience of judges in competition law and hence following outputs disable the effective enforcement of competition rules.

In average, it takes up to 2 years, till the Regional Court in Bratislava decides the case. However, since the appeal to the Supreme Court of the Slovak Republic will be possible in all cases from now on, the procedure will last longer.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

The competition cases are reviewed by the Regional Court in Bratislava being the court of general jurisdiction. There are Civil, Criminal, Commercial and Administrative Collegiums within the Regional Court in Bratislava. The Administrative Collegium is the one that reviews the competition cases, but also all other decisions of other Administrative Bodies in the Slovak Republic, that means, the judges have to be familiar with a lot of different law fields (like toll and taxes, environmental law, public procurement, social security, etc.)

The same system exists at the Supreme Court of the Slovak Republic.

The Office has been active in educational process of the judges in competition to the extent that it does not hinder the independence both of the institutions, as the court reviews the competition cases.

The Office proposed the idea of education of judges in competition law to the Ministry of Justice of SR which organised the tender for the project on education of judges in competition law. The last project, financed by the European Social Fund, has lasted (mainly in form of seminars) from February until June 2008.

The Office also forwards any information about seminars, conferences or projects for judges on competition law to the Chairwoman of the Regional Court in Bratislava, or to the Minister of Justice.

We believe that the level of education and knowledge both of employees of the Authority and the judges will enable to reach the effective competition policy enforcement.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

At first financial and personal resources were very limited and it affected also possible degree of success of our mission. Abovementioned is connected also to the fact that this area was new and unknown in our country and therefore meaning of this agenda was not appreciated fully. It came to certain progress and increase of both financial and also personal resources later. However, present situation is not optimal yet, namely relating to possibilities to motivate experts materially and also relating to existed level of university education in Slovakia and difficulty to gain experts of necessary education or specialisation, for example industrial organisation. Thus, we consider transfer of know-how by countries with long-time history of application of competition policy to be very important.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Issue of independency of a competition institution is one of the basic preconditions of its effective functioning. Autonomy of decision-making and independent court's examination are necessary criteria for effective competition enforcement. In first years it was difficult to convince politicians of existence of competition institution following more long-term goals than interests of politicians within their political cycle. After 10 years of its existence, the Office succeeded in enforcement of independency through new competition legislative amendments in the year 2001. We may see certain limitations of independence in relation to budget, when the Office has own budget chapter consisting of public resources but Office's budget is approved by the Government. So, there is certain space for possible increase of independence, for example determining Office's budget by law as fixed percentage of GDP and etc., the Office is interested in communication on given matter.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Important actions: quality communication, quality personal resources and education, transfer of know-how from foreign countries, independence of the competition authority, quality court's examination.

Pitfalls: lack of communication with the public, no guarantee of Office's independence, insufficient cooperation with partnership and international institutions within competition, problem to acquire and to stabilise quality experts.



CONTRIBUTION BY SLOVENIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Slovenia--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Competition Protection Office of the Republic of Slovenia (hereafter referred to as CPO) was established in October 1994. Since then it is organised as a body within the Ministry of Economy, however, it is independent in carrying out the tasks of competition protection.

At the beginning, the established authority was facing numerous challenges. The administrative resources were quite limited, CPO started working initially with 4 employed people and with the minimum budget. Over years, administrative resources have raised to currently 21 employees which is still far from the optimal dimension. The reasons are mostly the high rate of fluctuation, mostly among lawyers, who can easily find highly rated and paid positions outside the state administration. Administrative and financial strengthening of the CPO is one of the priorities for further activities; however, the realisation strongly depends on the Governments' staff policy guidelines and priorities.

Brief legislation history

The foundation of the legal framework of competition rules lies in the Article 74 of the Constitution of the Republic of Slovenia. The third paragraph of the above mentioned Article prohibits all practices that restrict competition in a manner contrary to the law.

The first Protection of Competition Act entered into force on April 24 1993. The Act included provisions on distortions of competition (horizontal and vertical restraints, abuse of dominant position, mergers), competition restraints due to enactment or acts of authorities, unfair competition, illicit speculations and dumped and subsidised imports. The Competition Protection Office (CPO) was established in October 2004; however, the competences for the implementation of the Act were divided between the CPO (distortions of competition) and Trade Inspectorate (unfair competition, illicit speculation and competition restraints due to enactment or acts of authorities).

Following the need for more transparency as also bringing competition legislation in line with EU legislation, the Prevention of the Restriction of Competition Act (PRCA) was adopted on 30 June 1999. This act succeeded the provisions which regulated the three areas of restriction of competition: restrictive agreements, abuse of a dominant position and concentrations. The law prohibited in principle all forms of restrictive agreements, both horizontal and vertical, with certain exemptions that could be either block exemptions (subject to a special decree) or individual exemptions, which were granted by the CPO; the law also provided for negative clearances as well as for *de minimis* rule. The law also prohibited the abuse of a dominant position. According to the law, a dominant position was held by an undertaking when it has no competition or significant competition for a specific product or service on the substantial part of the Slovenian market. A 40% market share threshold could be used

as a reference to assess market dominance, yet other criteria were also taken into account. The law prohibited concentrations, in particular through mergers, when as a result of such a merger effective competition is excluded or severely impeded. By merger review only competition criteria may be taken into account. The obligation to notify a concentration was bound to the certain aggregate yearly turnover (before tax) of the companies concerned; moreover, an alternative threshold of 40% market share on the relevant market could be used. The CPO published guidelines on how market shares were to be calculated and how relevant market has to be defined. Restrictive practices covered by the law could be subject to investigation, prohibition and fines; however, fines for breaking competition rules could only be imposed by the courts. PRCA was amended in 2004 (CPO was given the authorisation to conduct proceedings for breaches of Article 81 and 82 of the Treaty. Moreover, articles about individual exemptions and negative clearance were deleted and higher fines for the infringements were set in 2007 (amendments to articles about protection of the source and rights of the parties to review the documents of the case).

In 2008, the new Prevention of the Restriction of Competition Act (PRCA-1) was adopted, which, compared to the previous Acts, introduced several novelties. The main grounds for the reform of competition legislation in Slovenia were ineffective penalisation, unsuitable regulation of the duty of undertakings to cooperate with CPO and the need to introduce a different method of decision-making

The new Competition Act includes precise definitions of terms and measures used, brings the competition legislation closer to EU law and, above all, extends the competences of the CPO and introduces higher and more individualised fines.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

CPO, in parallel with its legal competences, performs activities aiming at raising competition culture of all market participants and therefore competition advocacy represents an important role in the policy of the Office. CPO mostly advises clients on competition rules, mostly prior to a notification of mergers. Opinions given in advisory role, however, are not binding.

Due to the competition advocacy performed by the Office through different means (i.e. press releases, seminars, formal and informal consultations) the raise of competition culture, and as a consequence, more effective competition has become evident through merger control, in particular where participants on the market tend to use the opportunities to clarify the conformity of practices before taking actions.

Advocacy activities of CPO were particularly positive in its initiatives for the more appropriate regulation of liberal professions. There were no consequences where the advocacy advice of CPO would not be taken.

Moreover, CPO is entitled to providing comments in the mandatory review process with regard to legislative proposals; from this perspective, competition advocacy is an important tool in the promotion of competition principles and market methods. Successful advocacy may contribute to a

higher quality of regulation or to accelerate deregulation processes in situations where new market conditions do not lead to increased competitiveness of the companies.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?

The provisions on abuse of dominance were included in the legislation since the 1993 Act. Prosecuting conduct investigations in abuse of dominance cases was initially quite demanding due to a lack of common understanding of the notion and purpose of competition rules. Cases were mostly related to state owned monopolies, predominantly in the field of telecommunications. However, these initial cases were mostly closed with the declaratory decision on the incompatibility of certain activities with competition rules, but no fines were imposed. The approximation and development of competition legislation over years has brought sufficient investigative powers to CPO, including the ability to impose quite substantive fines.

In the frame of current legislation, one of the fundamental rules of PRCA prohibits “the abuse of a dominant position in the market by one or more undertakings on the territory of the Republic of Slovenia or its significant portion” (Art. 9).

Article 9, paragraph 2 defines dominance as follows: “An undertaking or several undertakings shall be deemed to have a dominant position when they can act independently of competitors, clients or consumers to a significant degree.” Determining the dominant position is assessed with regard not only to the market share, CPO also takes into consideration also financing options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The provisions of distortions of competition (including horizontal and vertical restraints) were included in the legislation since the 1993 act. Investigative activities were initially quite demanding due to a lack of common understanding of the notion and purpose of competition rules and moreover with obtaining sufficient evidence about illegal agreements. However, it was interesting that CPO found the first evidence on illegal cartel activities published in the Official Gazette; this fact afterwards in a way raised the level of public awareness on competition issues. In the early years, CPO was not sufficiently empowered to successfully investigate cartel activities. The approximation and development of competition legislation over years has brought sufficient investigative powers to CPO, including the ability to impose quite substantive fines.

In currently valid legislation, one of the fundamental rules of PRCA prohibits “agreements between undertakings.... which have as their object or effect the prevention, restriction or distortion of competition in the Republic of Slovenia” (Article 6). This prohibition applies in particular to the listed examples of illegal agreements which are substantially the same as in Art. 81EC.

Article 6(3) provides for general exemption for agreements that (i) contribute to improving production or distribution of goods; (ii) promote technical and economic progress, while allowing consumers a fair share of the resulting benefit. However, such agreements shall not impose on the undertakings in question any restrictions which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating the competition in respect of a substantial part of products or services which are the subject of the agreement.

The provisions on restrictive agreements apply equally to horizontal and vertical agreements. However the provisions on restrictions of minor importance (Article 7) are more liberal for vertical agreements, the market threshold being 15% (10% for horizontal agreements).

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The provisions on merger control and obligatory notification were included in the legislation since the 1993 Act. Evidently most of the available resources and activities were spent on merger review, since at the beginning the intensive restructuring of economy was underway and mergers occurred in many sectors. Mostly the mergers were approved, a few under specific conditions.

Currently, merger control is regulated by the Prevention of the Restriction of Competition Act (PRCA), which implemented Council Regulation (EC) No. 139/2004 (EC merger Regulation). Merger control applies to concentrations, which arise when:

- two or more previously independent undertakings merge;
- one or more persons already controlling at least one undertaking, or one or more undertakings acquire whether by purchase or securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other undertakings; or
- two or more undertakings create joint venture performing on a lasting basis all the functions of an autonomous economic entity

Notification of concentration is mandatory if:

- the combined aggregate annual turnover of all the companies concerned, including the affiliated companies, exceeded €35 million before tax in the Slovenian market in the preceding financial year; and
- the annual turnover of the target, including the affiliated companies, exceeded €1 million before tax in the Slovenian market in the preceding financial year; or
- in cases of joint ventures, the annual turnover of at least two companies concerned, including affiliated companies, exceeded €1 million before tax in the Slovenian market in the preceding financial year.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Although merger control was a predominant activity of CPO in the recent years, the successful part of these activities was that through notifications CPO was able to gather a significant amount of data which could potentially be used in investigative activities related to distortions of competitions such as abuses of dominant positions or restrictive agreements.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Under the 1999 Act –PRCA, the legislation contained a special chapter on the procedure of decision-making by the CPO, providing for the subsidiary use of Administrative Procedure Act. Final decisions of the CPO could be reviewed by the Administrative Court in an administrative dispute and an appeal could be made to the Supreme Court. This differed from the arrangement under the first Act (1993), under which the affected undertakings could only bring an action in civil procedure. In most of the cases the Court supported the decisions of CPO, however.

Under the current legislation (PRCA) there is no appeal in the administration procedure against the decisions and orders issued by the CPO. However, the parties and other participants to the procedure can file a lawsuit against the CPO's decisions (and orders) with the Supreme Court of the Republic of Slovenia. In such procedure, they are not allowed to state new facts and to propose new evidence. The Supreme Court would in principle review the legality of the decision and would, after the completion

of the judicial review and in principle without hearing of parties, uphold the challenged decision or annul it and remand it to the CPO for a new procedure. In exceptional cases the court can also annul the challenged decision and decide on the merits of the case by itself. So far the case law under the new established legislation has not emerged yet.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

There were certain activities of CPO, related to develop the knowledge of judges on competitions rules such as organisation of seminars and bilateral meetings. A great amount of support in this field was provided through the support of the European Commission, organising special workshops in this field. However, our evaluation is that results of such activities could only be reached on the long term.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

The administrative resources are not sufficient although the number of staff has doubled in the last five years. The reasons are mostly the high rate of fluctuation, mostly among lawyers who can easily find highly rated and paid positions outside the state administration. Administrative (and financial) strengthening of the CPO is one of priorities for further activities; however, the realisation strongly depends on the Governments' staff policy guidelines and priorities.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The CPO is a functionally independent authority, organised within the Ministry of Economy, with appropriate statutory powers. Its legal competences include ex-post market control of restrictive agreements, the abuse of dominant market positions and control of concentrations. Formal relationship and consultation process with other ministries and departments is established through monitoring of the situation in all areas of national legislation where CPO can issue opinions on new legislative proposals or legislative amendments. CPO also submits its opinions to the national assembly and the government on general issues under its competence, either on its own initiative, or upon request.

The provisions of PRCA (Article 13(1)), clearly state that "The Office shall be independent and autonomous in exercising its tasks and powers". However, due to historical reasons of pre-set institutional arrangements, CPO is administratively still organised within the Ministry of Economy. In relation to certain regulatory bodies, organised as independent agencies, the current status of CPO certainly accommodates the need for a different institutional arrangement, which is already included in the working programme of the new Government.



CONTRIBUTION BY SOUTH AFRICA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--South Africa--

1. Introduction

1. The South African competition authority comprises three institutions with distinct functions, namely:

- the Competition Commission of South Africa (“CCSA”), the body responsible for investigation, prosecution and advocacy;
- the Competition Tribunal of South Africa (“CTSA”) which is the adjudication body in respect of all large mergers and all restrictive practices. It acts as an appeal body from decisions of the CCSA in respect of small and intermediate mergers and exemptions; and
- the Competition Appeal Court (“CAC”), a division of the High Court and on which sitting judges in the various provincial divisions of the High Court are designated to serve.

2. Although the South African government passed and adapted various competition laws from 1955 to date, the present competition regime is conducted in terms of the Competition Act 89 of 1998, as amended (“the Act” or “the Competition Act”). Under the authority of the Act, the competition bodies outlined above commenced their operations on 1 September 1999. Given the OECD’s guidance which states that younger agencies are those whose operations commenced after 1991, this submission responds to the OECD’s questionnaire for younger agencies, with a focus on the questions most relevant to our circumstances.

1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn’t?

N/A

1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

In addition to the Divisions established to carry out complaint investigations and merger assessments, the CCSA established a Compliance Division whose role it was to encourage, facilitate and monitor

voluntary compliance by the business community with the provisions of the Act. In order to achieve these objectives, the Division:

- conducted information and education programmes for the business community, as well as other stakeholders referred to in the Act, in particular, trade unions, small and medium sized business, historically disadvantaged business people and consumers;
- engaged in advocacy with government departments and other regulators in order to influence the law makers to develop pro-competitive legislation or to repeal uncompetitive legislation;
- conducted communication campaigns aimed at increasing awareness within the business and general community about the work of the competition authorities; and
- issued non-binding advisory opinions and clarifications to those wishing to avoid transgressing the Competition Act, thereby facilitating voluntary compliance with the Act.

While it is difficult to measure the success which is directly attributable to the activities mentioned above, the competition authorities have certainly benefitted from them. The South African business community is becoming increasingly aware of the competition laws and routinely requests the authorities to make presentations to workers on the subject. Ordinary South Africans, whether through consumer organisations and trade unions or individually, are also more aware of the competition laws and how they are affected by them. This can be gleaned from the complaints of anti-competitive conduct which come directly from consumers and the general queries the competition authority receives in the course of its work. The competition authorities also receive widespread media coverage generated by the authorities' own media statements as well as requests from interested parties.

In addition, the CCSA maintains good working relationships with government departments and regulators which have enabled it to influence the legislative process in industries such as telecommunications, minerals and energy, transportation and health care.

A further success came from the CTSA's statutory obligation to conduct its hearings in public and to issue written reasons for its decisions. When making this provision, the legislature believed that in the competition environment, where firms would be entitled to claim confidentiality over certain information and where the business environment had generally been secretive, transparency would be very important. As a result, company executives had to subject themselves to public scrutiny and had to account to civil society, not only for the competition concerns which arose in the public hearings but also for the general ethics they employed in directing business entities. Holding public hearings, therefore, helped to foster confidence in the competition authority from an early stage.

The competition authority mainly encountered jurisdictional hurdles in its effort to spread awareness about the new law. These concerns arose from industry regulators who believed that their functions already catered for any competition issues which might arise and also from firms that were subject to regulation. The latter generally preferred to be under the regulation of the least cumbersome provisions and also maintained that the competition authority was ill equipped to appreciate the peculiarities of their industry. The competition authority encountered these views in varying degrees of conviction from multiple industries including airlines, financial services, health care, telecommunications and regulated professions.

A further challenge which the CCSA has encountered in its attempt to make consumers aware of competition policy and law is that consumers' expectations have in some instances gone beyond what

the competition authority is mandated to do. For instance there has been an increasing call for price regulation in industries where the competition authority has uncovered cartel behaviour, a call often directed at the competition authority itself. Moreover, the public has called for much tougher penalties against cartel members than the competition authority is authorised to impose. Such expectations and other utterances remain a challenge for the CCSA in its effort to spread awareness about the law.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In conducting its investigations, the CCSA encountered challenges with interpreting certain concepts provided in the Competition Act such as “substantially preventing or lessening of competition” and “pro-competitive benefits”. While these concepts were well developed in foreign jurisdictions, either through case law or through the definitions provided in foreign legislation, the CCSA’s challenge was to develop the meaning of these terms within the South African context, for example by taking into account South Africa’s history of skewed economic development and the high concentration prevalent in identified industries, which the competition laws partly aimed to address. Two specific examples which highlight the CCSA’s challenges are to be found in the following cases:

- Hazel Tau and others v GlaxoSmithKline South Africa (Pty) Ltd and others; and
- Nationwide Poles CC v Sasol Oil (Pty) Ltd.

In the Hazel Tau matter, the complainants alleged that the respondents had contravened section 8(a) of the Competition Act in that they had charged excessive prices for their antiretroviral drugs. Moreover, the respondents had refused to grant voluntary licenses to generic manufacturers who were capable of supplying the drugs at much cheaper prices. These drugs were used in the treatment of HIV/AIDS and were under patent protection. At the time, there were no suitable alternatives to these medicines legally available in South Africa.

Section 8(a) of the Competition Act states that it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers. The CCSA assessed the allegations in terms of section 8(a) and section 8(b) which provides that it is prohibited for a dominant firm to refuse a competitor access to an essential facility when it is economically feasible to do so.

While there was limited foreign jurisprudence available to assist in determining whether the respondents’ prices were excessive and whether the license to manufacture the drugs amounted to an essential facility, much of the jurisprudence consulted appeared to indicate that the right of a firm to exercise its patent rights generally outweighed the anti-competitive effect of the firms conduct. However, at the time, the CCSA faced the unique context of South Africa’s HIV/AIDS epidemic and the effect of the lack of sufficient medicines on South African consumers. These factors had to be taken into account in the CCSA’s final analysis of the matter. Therefore, the CCSA took an approach which lent great weight to the context within which the conduct had taken place and concluded that

the respondents had contravened both sections 8(a) and 8(b) of the Act. The CCSA referred the matter to the CTSA for adjudication but the case was settled before the hearing took place. The CCSA considered this matter a success as it resulted in voluntary licenses being granted to generic manufacturers and consequently a significant decrease in the price of drugs used to treat HIV/AIDS.

Nationwide Poles CC (“Nationwide Poles”) was a small producer of treated wooden poles. The respondent, Sasol Oil (Pty) Ltd (“Sasol Oil”), supplied the complainant with creosote, a wood preservative used in the treatment of wooden poles. In conducting its business, the complainant became aware that Sasol Oil was charging it a higher price than its larger competitors for the supply of creosote. As Nationwide Poles was an ailing business, it attributed its losses to this price differentiation and alleged that Sasol Oil had contravened section 9(1) of the Competition Act. Section 9(1) prohibits unjustified price discrimination by a dominant firm if such discrimination is likely to result in a substantial lessening or prevention of competition.

The CCSA investigated the complaint and concluded that there was insufficient evidence to find that section 9(1) of the Competition Act had been contravened. The complainant then referred its complaint directly to the CTSA for adjudication. In finding that Sasol had contravened the Competition Act, the CTSA placed much emphasis on the policy context within which South Africa’s Competition Act was located. In this regard, the CTSA stated that section 9 of the Act was specifically designed to cater for the protection of small businesses and linked this to one of the stated purposes of the Competition Act, namely to ensure the equitable treatment of small and medium sized enterprises (“SME’s”), as well as other special treatment afforded to SME’s in the Act. In particular the CTSA stated that:

In our view the relevant, that is, the South African, legal and political economy context favours competition enforcement that is concerned to protect the market mechanism from conduct that has the effect of undermining it. The expressed concerns of the South African lawmakers and the policy planners support this finding. This is powerfully manifest, inter alia, in an industrial policy that places the development of SMEs at the centre of attempts to improve the workings of the market mechanism. This conclusion is grounded not only in an examination of the general industrial policy context in which concern for SME development looms large but also in an examination of the Act itself.

Although on appeal the CAC overturned the CTSA’s decision for lack of sufficient evidence, the CAC stated that its decision did not seek to minimise the particular weight which the legislature has given to price discrimination nor to the need to ensure that small and medium businesses are able to use the Act to protect their ability to compete freely and fairly.

The Nationwide Poles case, therefore, took a step further in the competition authorities’ quest to develop a body of jurisprudence which takes into account South Africa’s unique policy context for the development of its competition law. In achieving this, it has always been important for the competition authority to consistently refer back to the intention of the legislature in drafting the current legislation and to place great emphasis on the realities of the South African market when conducting any assessment.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

A few years into the CCSA’s existence it was sometimes criticised for focusing more on merger regulation than on investigating or preventing restrictive practices. At that time, the competition authority was known more for its decisions in mergers and acquisitions than for detecting and

prosecuting harmful cartel behaviour. To address this concern, in 2004, the CCSA developed a Corporate Leniency Policy ("CLP") which was designed to uncover hard core cartels. The CCSA also embarked on an information campaign regarding its CLP and, thereafter, received its first application in January 2007. Since that time the CCSA has received approximately 10 leniency applications and has also reviewed its policy to make it more user-friendly. The CCSA considers the CLP to be a highly successful tool in the detection and prosecution of cartels.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

In the first years of operation, the CCSA soon learned that the thresholds initially provided captured too large a number of transactions for the CCSA to remain efficient and accordingly increased the thresholds for notification for the first time in 2001. More recently during 2008, the Department of Trade and Industry ("the DTI") proposed a further increase in the thresholds for merger notification.

Under the DTI's recent proposal, a merger will only become notifiable once the turnover or asset value of the target firm is R80 million (currently R30 million), and the assets or turnover of the target and acquiring firms together amounts to more than R560 million (currently R200 million). A merger will be notified as a large merger if the turnover or assets of the target firm exceed R190 million (currently R100 million) and the combined figure is R6, 6 billion or more (currently R3, 5 billion).

The proposal came about after assessment of the current merger climate and the growth of the South African economy. Currently about 98% of all merger applications are approved by the competition authority. This indicates that the number of mergers being assessed is greater than necessary. Moreover, the number of mergers notified to the CCSA has risen dramatically since the Act came in to effect. In the 2007/08 financial year, the CCSA received 513 merger notifications (100 more than in the previous financial year and an increase of 143% since 2002/3). Without an increase in the thresholds, the number of notifications could almost double by 2010.

CCSA staff is also under constant pressure given the short time frames provided in the law to assess a merger. In this regard, the CCSA has a period of 20 business days to assess an intermediate merger, which is extendable by a single period of 40 days. The CCSA has 40 business days to assess a large merger and this period is extendable by unlimited periods of 15 business days each.

The DTI anticipates that its proposal to increase merger thresholds will allow the competition authority to focus on mergers which are more likely to raise competition concerns.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

South Africa's merger control provisions were a very important and useful part of the competition authority's activities in its early years. Our merger regime became a valuable source of market information since, unlike in complaint investigations, firms were always willing and able to provide data and the rationale for their business decisions, in order to expedite the approval of their merger applications. Moreover, merger applications provided the opportunity for staff to learn how to conduct sophisticated market definitions and analyses, which proved useful when the enforcement activities of the authority increased. The competition authority learnt early on that cartels and other restrictive conduct would not be as easy to detect as the law makers had anticipated. Therefore, had the authority's jurisdiction been limited to restrictive conduct in the early days, its credibility and effectiveness may well have been called into question. However, the merger regime caused the authority to be seen to stand up to large corporate interests and protect the interests of consumers and therefore enhanced its credibility.

The initial difficulties in implementing merger control related to the relatively high thresholds which had been set and jurisdictional concerns. As discussed above, the thresholds caught a large number of mergers which need not have been assessed. An early merger between Standard Bank Investment Corporation ("Stanbic") and Nedcor Limited ("Nedcor"), in the financial services sector, gave rise to concerns about the jurisdiction of the competition authority in assessing mergers in the banking industry.

Bank mergers were deemed to fall outside the jurisdiction of the Competition Act No 89 of 1998 due to the then section 3(1)(d) of the Act, according to which the provisions of the Act did not apply to "acts subject to or authorised by public regulation".

A judgment by the Pretoria High Court, confirmed by the Supreme Court on 31 March 2000, ruled that the competition authority did not have jurisdiction over bank mergers, save to the extent permitted by section 37(2) of the Banks Act, 1990. In terms of Section 37(2) of the Banks Act, "permission in terms of paragraph (a) shall only be granted on application on the prescribed form and after consultation with the Competition Board established in terms of section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No 96 of 1979)". In terms of the Competition Act, 1998, any reference in any other statute to the Competition Board was to be regarded as a reference to the CCSA. The proposed hostile takeover of Stanbic by Nedcor was therefore reviewed and evaluated by the CCSA only for the purpose of advising the Reserve Bank of South Africa about the potential competition concerns arising from the proposed take-over.

The Nedcor/Stnabic matter brought to light the problems arising from section 3(1)(d) of the Act. Consequently, the following year the Competition Act of 1998 was amended to accommodate concurrent jurisdiction between South Africa's regulatory bodies and the competition authority on competition matters.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

In terms of the Competition Act, the decisions of the CCSA can be appealed to the CTSA. Decisions of the CTSA can be appealed to the CAC. In this regard:

- a complainant may lodge a complaint of anti-competitive conduct with the CCSA for investigation. Following investigation, should the CCSA conclude that no contravention of the Act took place, the complainant may refer his/her complaint directly to the CTSA for adjudication;
- should the CCSA refuse to grant an applicant an exemption in terms of the Competition Act, such applicant may appeal this refusal with the CTSA;
- the parties to an intermediate merger may appeal the CCSA's finding against them in the CCSA; and
- all large mergers are finally assessed by the CTSA, upon a recommendation by the CCSA.

In cases flowing from the CCSA to the CTSA, the competition authority has not encountered any problems with the length of time the CTSA takes to reach their decision. This can be attributed to the fact that both the CCSA and the CTSA deal exclusively in competition matters. The CTSA members who adjudicate competition matters are required to have the necessary skills in economics or law to carry out their functions and they continue to develop their competition expertise as they perform their functions. Moreover, the Tribunal members comprise both full time and part time members. While part time members may continue business outside the CTSA and bring with them up to date commercial input, full time members dedicate all their time to hearing and deciding CTSA cases. The establishment of a specialist court for competition matters also ensures that cases are placed on the roll and heard much sooner than in ordinary courts.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

N/A

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

From inception the CCSA has experienced human resource constraints in varying ways. One of the initial constraints was the shortage of legal and economic expertise in the field of competition law. The Competition Board, which was the predecessor to the CCSA, was a relatively small agency and it did not have the kind of powers provided for in the Competition Act of 1998. Although the CCSA employed several experienced staff members from the Competition Board, it required extensive training for all the employees on competition matters. Accordingly the CCSA engaged in a 6 month training programme prior to the commencement of the CCSA. After starting its operations, the CCSA embarked on a consultancy programme which ensured that consultants from established competition authorities were available to assist CCSA staff in their complaint investigations and merger assessments. The CCSA has also undertaken a number of capacity building initiatives to ensure that current staff remain up to date with competition developments. With the development of competition law in South Africa, human resources remain in short supply for the CCSA as existing staff are often recruited by more lucrative private law firms, economic consultancies and foreign competition jurisdictions.

Since inception, the CCSA has grown in numbers and expertise. In order to cater for the developments in South Africa's competition regime, the CCSA is currently undergoing restructuring which is aimed primarily at aligning its structure with its functions in the most efficient way. This also entails the expansion of the CCSA's complaint investigations function to include a separate Cartel Division. This Division will employ specialised investigative techniques designed to boost the fight against cartels even more effectively. The CCSA's proposals are, however, subject to the approval of the DTI.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

In the discussions leading up to the promulgation of the current Act, the independence of the institutions which were to regulate competition in South Africa played a key role in shaping the framework of the institutions and the provisions of the Act.

Under the Maintenance and Promotion of Competition Act¹, the decisions of the Competition Board (who administered the Act) were subject to review and approval by the Minister of Trade and Industry. The Competition Board thus lacked independence, and was criticised for making decisions subject to political influence.

¹ Act No. 96 of 1979, as amended – the predecessor to the current legislation

Consequently, in drafting the current legislation, political independence was seen as an element crucial to ensuring the success and competence of the competition agency that was to come. The independence of the competition authorities from the influence of each other, the State and private stakeholders is now entrenched in (1) the provisions of the present Act as well as (2) in the design of the competition institutions.

A. Provisions of the Competition Act

Section 20(1) of the Competition Act states that the CCSA:

- a) is independent and subject only to the Constitution and the law; and
- b) must be impartial and must perform its functions without fear, favour or prejudice.

Section 20(2) places an obligation on each member of staff at the CCSA to not:-

- a) engage in any activity that may undermine the integrity of the Commission;
- b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;
- c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or
- d) divulge any information referred to in paragraph 2(c) to any third party, except as required as part of that person's official functions within the Commission.

Section 20(3) of the Competition Act obliges each organ of state to assist the CCSA to maintain its independence and impartiality, and to effectively carry out its powers and duties.

Further to the above, section 70 of the Competition Act states that it is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by the Act.

Finally, section 73(2) states that a person commits an offence who: -

- a) does anything calculated to improperly influence the Competition Tribunal or Competition Commission concerning any matter connected with an investigation;
- b) anticipates any findings of the Tribunal or Commission concerning an investigation in a way that is calculated to influence the proceedings or findings;

B. Institutional design

As mentioned above, the Competition Act established three independent institutions to investigate, prosecute and adjudicate all competition matters, namely the CCSA, CTSA and the CAC.

The term of office and qualification of the heads of the above institutions is also provided for in the Competition Act. In this respect, the Minister of Trade and Industry must appoint a Commissioner (of the CCSA) with suitable qualifications and experience in economics, law, commerce, industry or public affairs for a term of five years, which is renewable. The President

of South Africa must appoint the Chairperson and other members of the CTSA for a period of five years, which period is also renewable. However, the Chairperson of the CTSA may not be appointed for more than two consecutive terms. The Act also provides, in section 28(2)(b), that each member of the CTSA must be suitably qualified and experienced in economics, law, commerce, industry or public affairs.

The CCSA is a prosecutorial body which is not part of a department of state - it is an autonomous statutory body with full control over its prosecutorial decisions. The CTSA's members are experts rather than interest group representatives and may not be dismissed during their term of office, except for extremely serious offences. Their decisions - including those that balance competition and public interest - are not subject to ministerial override. The CAC is a division of the High Court and therefore also an independent body. The above mechanisms have ensured that the competition authority exercises its functions independently of political or undue influence from one another.



CONTRIBUTION DE LA TUNISIE

QUESTIONNAIRE SUR LES DÉFIS QUE DOIVENT RELEVER LES JEUNES AUTORITÉS DE LA CONCURRENCE

--Tunisie--

1. Organisation de l'autorité de concurrence

1. Décrire la phase de la mise en place de l'autorité de la concurrence dans votre pays

La politique de la concurrence en Tunisie s'est inscrite dans un processus de poursuite des objectifs: équilibres généraux, compétitivité, mondialisation... Cette politique s'est appuyée sur un cadre juridique et des institutions :

- La direction générale de la concurrence relevant du ministère chargé du commerce.
- le conseil de la concurrence: autorité indépendante

Dans les orientations stratégiques de ces autorités, au cours des premières années, les priorités ont été données à un double niveau :

- **Interne** : renforcement des capacités
- **Externe** : vulgarisation de nouveaux concepts auprès de tous les intervenants (pouvoir public, profession).

La mise en œuvre de cette politique a nécessité de nouvelles ressources matérielles et humaines vu la nature des nouvelles prérogatives accordées aux autorités de la concurrence. En effet depuis le début des années 90 (date de la promulgation de la loi sur la concurrence et les prix), une Direction Générale chargée de la concurrence a été créée au niveau du ministère à côté du Conseil de la Concurrence, autorité indépendante chargée de se prononcer sur les pratiques anticoncurrentielles. Un nombre important de fonctionnaires a été recruté provisoirement (2000-2008 recrutement de 240 agents pour atteindre un nombre de 728).

Une politique de formation a été mise en place pour former ces nouveaux agents et mettre à niveau les anciens fonctionnaires. En parallèle à cette formation, les fonctionnaires des autorités de la concurrence ont bénéficié de la formation dans le cadre de l'assistance technique avec des institutions internationales et de certains pays notamment la France. Cette assistance a aussi permis la préparation des manuels de procédure et de documentations relatives aux questions de la concurrence, de la consommation.

2. Culture de la concurrence

2. Décrire les efforts fournis par l'autorité de concurrence dans les premières années pour promouvoir la politique de la concurrence ?

Parmi les principaux défis rencontrés par une agence de concurrence jeune, on peut citer le comportement des intervenants économiques (administration, profession, consommateurs...) habitués à une longue histoire d'encadrement et d'intervention de l'État. La priorité a été donc donnée, au cours des premières années, à la promotion de la culture de la concurrence à travers l'organisation de séminaires dans le but de vulgariser les concepts de concurrence, la préparation de dépliants expliquant le contenu de la loi, l'organisation de réunions avec la profession, les communiqués de presse

Ces efforts ont donné des résultats satisfaisants qui se sont matérialisés par l'augmentation des plaintes émanant des entreprises et des consommateurs et du nombre d'affaires portées devant le conseil de la concurrence sur lesquelles il s'est prononcé,

Années	1995	2001	2003	2007
Affaires	1	4	11	22

Malgré les efforts accomplis et les résultats atteints, des difficultés persistent au niveau de la méfiance des entreprises qui préfèrent passer par l'administration pour régler leur différend au lieu de porter les affaires devant le conseil. Cette méfiance se justifie, selon ces entreprises, par la protection de leur réputation commerciale au cas où, une sanction serait infligée et même par le coût et la longueur de la procédure contentieuse.

3. Conduite de cas et investigations

Abus de domination et ententes restrictives

Étant donné que le droit de la concurrence a introduit des restrictions à la liberté contractuelle des parties en interdisant des pratiques qui étaient permises, et en introduisant de nouvelles notions qui n'étaient pas connues, les autorités de la concurrence ont trouvé des difficultés dans la conduite de leurs enquêtes (opposition), pour certaines activités qui veulent rester hors champs du droit de la concurrence (professions libérales, les banques, les assurances ...)

Pour faire face à cette résistance, les autorités tunisiennes de la concurrence, ont dans une première étape, orienté leurs interventions vers un rôle pédagogique et de sensibilisation (mise en demeure) plutôt qu'un rôle purement répressif.

Concentration

Le contrôle des opérations de concentration économique a été introduit par la modification de la loi sur la concurrence en 1995, 4 ans après la promulgation de ladite loi en soumettant les projets à un régime de notification obligatoire lorsqu'ils remplissent l'une des conditions suivantes une part de 30% où un chiffre d'affaire dépassant les 20 millions de dinars tunisiens. la majorité des projets qui ont été soumis au contrôle étaient non notifiables, vu la structure du tissu de l'économie tunisienne constituée de petites et moyennes entreprises dont la part du marché ne dépasse pas les 30%.

Le contrôle des concentrations constitue un garde-fou pour les autorités de la concurrence dans le sens qu'il permet de veiller aux mouvements de concentration et à la structure concurrentielle du marché (offre, demande...) ainsi que tout comportement pouvant nuire à la concurrence.

4. Les voies de recours

Les décisions du Conseil de la Concurrence font l'objet d'un appel devant le tribunal administratif.

Les juges du tribunal administratif sont souvent invités par les autorités de la concurrence pour assister aux différents séminaires de formation sur la concurrence. En outre le droit de la concurrence a été introduit, sur demande des autorités de la concurrence, dans le programme de formation de l'Institut Supérieur de Magistrature pour initier les juges aux concepts de concurrence.

5. Ressources

Le budget des autorités de la concurrence (la direction générale de la concurrence) est dépendant du budget du ministère chargé du commerce. Ce budget n'est affecté par direction mais ventilé selon les différentes missions allouées au ministère ce qui constitue une contrainte.

En outre, les autorités de la concurrence ont manqué durant les premières années du personnel qualifié dans le domaine de la concurrence ce qui a nécessité un effort pour le renforcement des capacités.

6. Indépendance

Le système tunisien est basé sur une structure bicéphale : une autorité de jugement indépendante qui jouit de la personnalité morale et de l'autonomie financière et une autorité administrative qui relève du ministère chargé du commerce : la direction générale de la concurrence et des enquêtes économiques. La décision de mener des enquêtes de concurrence revient au ministre chargé du commerce en tant que garant de l'ordre public économique.

7. Conclusion

Les 5 plus importantes actions qu'on peut recommander à une jeune autorité de la concurrence pour assurer la réussite:

- Mettre en place un programme de formation pour le renforcement des capacités et assurer la qualification du personnel qui est un élément important pour la réussite de la politique de la concurrence.
- Veiller à la crédibilité des institutions et à leur contribution à la réalisation des objectifs
- Mise en œuvre d'une stratégie de communication pour promouvoir la politique de concurrence avec le concours de toutes les parties concernées (universitaires, media, consommateurs ...)
- Instaurer des relations de coopération et d'échange d'expériences avec des institutions homologues et des autorités de concurrence des autres pays pour bénéficier de l'expertise et du savoir faire.

Citer les 5 éléments qu'une jeune autorité de concurrence doit éviter :

- Adoption d'un système inadéquat au régime administratif et juridictionnel du pays.
- Avantager le pouvoir répressif de l'autorité au dépend du rôle de sensibilisation et de correction.
- Confier des missions différentes à l'autorité de la concurrence qui peuvent être parfois contradictoires à sa mission principale et qui peuvent provoquer des distorsions du système



CONTRIBUTION BY TURKEY

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Turkey--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

Act no 4054 on the Protection of Competition (the Turkish Competition Law-TCL) specifying antitrust rules and establishing the Competition Authority (TCA) was published in the Official Gazette on December 12th, 1994. However, the Competition Board, the decision making body of the TCA, could be appointed on February 27th, 1997, approximately 27 months later.

It took another 8 months to establish the organization of the TCA to begin its operations. As the Competition Act envisaged an independent budget and budget resource for the TCA, establishment of organization was realized without facing serious problems. In particular finding a suitable office space as well as necessary equipment was directly dependent on financial resources.

On the basis of the experience of the TCA, it is important to state that the competition agency should be designed considering the size of their economy as well as specific circumstances of the country in question. Effectiveness of the agency should be observed.

Within the 8 months mentioned, not only the physical infrastructure and the organization were set up, but also the secondary legislation was put into force. The secondary legislation was mainly prepared considering the relevant legislation of the European Union. While the very first legislation was almost identical the EU legislation, the TCA regarded its own practice as well as specific needs of Turkey while designing new legislation/revising existing legislation stock later on. While the TCA did receive a significant contribution from in particular academic world for drafting as it lacked necessary qualified human resources during the establishment stage, with the development of its own professional staff, now the TCA can handle its own legislative works. As in the case of organization set up, no “one size fit all” approach should be held. The legislation of other jurisdictions can be observed and examined. That is quite useful, and makes it easy to design a workable legislative framework. However, such legislation should not be exported as it is. In other words, legislation of other jurisdictions should be customized considering the needs of the country in question. While designing the legislation, the competition agency should consider some other factors such as:

- possible work load which arise from the legislation,
- capacity of the agency in terms of human resources and budget,
- enforcement priorities,

In this regard, here it is important to mention “Human Resources and Training” policy during organization phase. In the success of competition authorities high-quality professional staff is quite

important. The TCA hired the first group of professional staff as a result of a very competitive examination process in 1997. Since then the TCA has 9 groups of professional staff as of December 2008.

As the Agency was a newly established one, a great deal of supporting staff and managers were transferred from other Governmental Agencies. Despite the fact that the Law envisaged hiring of professional staff without an examination by a transitory article within one year following taking into force of the Law, that never happened due to late establishment of the Agency. Actually that the Agency was established lately, was a chance for the Agency to build its own professional staff capacity based on a competition on the merit. Today TCA has a high qualified professional staff which is based on a process of fair hiring and training. Following the examination process (mainly successful graduates of well-known universities are selected), new assistant experts group is subject to 3-4 month intensive training which covers mostly law and economics of competition. Then they work accompanied by senior expert staff until they are recruited as an expert. To become an expert, they have to prepare a thesis and defend it. The TCA provides the opportunity of following master abroad in particular at the select universities in US and Europe (mainly UK). Additionally, the expert staff is always subject to training in Turkey and abroad.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Competition advocacy has two legs. The first one is raising awareness by consumers, business society etc. Second one is raising awareness by other public agencies.

With respect to mainly first leg, from the beginning, the TCA organized activities such as symposia, panels, conferences in order to create and develop competition culture. For instance, first international competition symposium of Turkey was organized in October of 1998 followed by two separate symposiums concerning competition law and judiciary, and competition policy and privatizations in 1999.

Moreover, the TCA has organized conferences on Thursdays since October of 1999 in order to reach and encourage works on competition law and economics. The conference themes are also published as books and made available to the public.

In 2000, the TCA began to issue Competition Bulletin including decisions by the Competition Board and their assessments, articles on competition law and economics, and international developments.

The TCA takes into account the limited number of resources on competition law in Turkish and therefore gives special importance to translation of relevant texts.

The TCA publishes postgraduate theses on competition law and economics.

With respect to second leg, during the very first years of the TCA, the advocacy role was not understood well. It is thought that only the enforcement of competition rules would be sufficient. However, by the time, it has been seen that the negative effects of some state measures have been worse than anticompetitive practices of private undertakings. Therefore the TCA has begun to

perceive and understand that it must have an advocacy role in eliminating the distortions arising from state measures. In parallel to the perception of the TCA, private undertakings have also understood the importance of advocacy role of the TCA in this regard. Since then, the TCA has strived for influencing the public institutions in order to prevent them from taking any measure which distorts competition in markets against either private undertakings or directly the consumers. Thus the TCA has provided opinions regarding draft legislative texts.

There is no specific method used by the TCA to measure its success rate in advocacy efforts.

However, as mentioned elsewhere, the TCA has a number of activities to raise awareness in particular by consumers, business community, academics, lawyers etc. Such activities covers training for lawyers in cooperation with Lawyer Bars, joint conferences and seminars in cooperation with universities and in cooperation with regional chambers of commerce. During these activities, the TCA has the opportunity to hear relevant stakeholders comments and opinion about its activities and practices.

Additionally, the role of the TCA in privatization cases contributed its success in its advocacy efforts. In this regard, the opinions of the TCA in Turk Telekom privatization (incumbent operator), Turkish Salt Monopoly privatization, ports privatization and in some other privatization cases contributed to introducing more competition in the aftermath of privatization period. Furthermore, the opinion of the TCA contributed to flourishing of competition in domestic airline market.

With respect to resistance, it is possible to suggest that lack of competition culture by business community and other public agencies constituted a significant source of resistance. In particular, due to low level of awareness of competition, other public agencies could easily ignore competition when designing their own legislation as well as executing their practices and actions. However, the TCA has tried to break such resistance in particular by trying to raise awareness of competition by such agencies.

On the basis of the experience of the TCA, it is important to state that the two legs of competition advocacy mentioned above are quite important for young agencies. First of all, the consumers should be made an ally of competition agency and it should be ensured that consumers have a sufficient level of competition awareness. The business community should know that the main objective of competition law is not to impose fine but to protect and improve competition in the market. The business community should learn about the importance of competition as well as their rights and obligations under competition law.

Importantly, in countries where State has an important presence in the economy as actor as well as regulator, the competition advocacy role of competition agencies are more important. Without a sufficient level of competition awareness by public agencies whose activities impact markets directly or indirectly, enforcement of competition rules lacks an important supporting element. As mentioned above, in some cases competition distortion arising from the activities of public agencies can be more grave than those of undertakings anticompetitive infringements. Here another relevant issue is the concept of neutrality. While enforcing the competition rules, there should not be any difference between private and public undertakings. Additionally, the State should not favour public undertakings against the private undertakings. In this regard the competition agencies has a special role and in countries where privatization and liberalization takes place, competition agencies should have an active competition advocacy as well as enforcement role in such processes.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

Regarding non-cartel restrictive agreements, compulsory notification of anti-competitive agreements created unnecessary workload which more or less prevented the TCA from concentrating on more severe anti-competitive practices. However, compulsory notification system was abandoned in 2005 to avoid unnecessary workload.

With respect to abuse of dominance cases, the issue of defining relevant market as well as determining the difference between what constitutes an abuse and what constitutes an action based on competition on the merit were important problems.

On the basis of the experience of the TCA, it is important to state that the competition agencies should have a priority setting while dealing with anticompetitive practices considering their limited resources. Thus a gradualist approach in enforcement should be followed by the young competition agencies. If no such approach is developed, then the agency can be struck with a huge amount of workload. Additionally, relations with media is quite important and the gradualist approach should be observed in dealing with competition problems in media sector. It should be kept in mind that competition agency should be in close cooperation with other regulatory bodies dealing with media when tackling competition problems occurring in this specific sector.

As a corollary to priority setting it is important to state that young competition agencies can develop certain tools as part of legislation as well as their daily practice to filter the cases considering its own priority. Anticompetitive practices should be dealt with by using necessary legal and economic tools. If such tools are not sufficiently developed, then the intervention by the competition agency might produce unwanted negative results. Thus, it is important to develop professional staff as well as necessary infrastructure. Additionally while dealing with cases international cooperation is quite important. For example, OECD GCF, UNCTAD and ICN provide crucially important framework via which different agencies can share experience.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

Although in majority of on-the-spot inspections, that is dawn raids, the undertakings allowed the professional staff to conduct them properly, in some instances on-the-spot inspections were obstructed by the undertakings. Therefore, the Competition Act was amended to include a provision to enable the professional staff to perform on-the-spot inspections with the decision of a criminal magistrate in case they are hindered or likely to be hindered. Moreover, the previous fixed amount of fines applicable in case of obstruction of on-the-spot inspections was changed to be calculated based on annual gross revenue. Recently, the Competition Act was amended to enable adoption of a leniency program with the possibility to ensure full immunity to cooperating undertakings and their personnel which was not possible before the amendment.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The Turkish Competition Act incorporates a merger control system in Turkey. Considering the workload and human resources capacity, it is possible to argue that the TCA has not faced such problems during first years. However, our recent practice in merger review has become a bit cumbersome due to low notification thresholds as well as so-called ancillary restraint issues. Considering these problems, the TCA revises its merger control system.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Merger control has become an important part of the practice of the TCA. It played a crucial role in particular with respect to privatization process in Turkey.

On the basis of the experience of the TCA, it is important to state that mergers should be evaluated by setting certain thresholds. And the competition agency should mainly focus on serious mergers that have wider effects. Trivial merger cases should be subject to certain fast-track methods.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Decisions of the Competition Board are subject to appeal before the Council of State, the supreme administrative court. As to rate of success, it should be mentioned that a significant amount of final decisions taken following an investigation procedure has been annulled by the Council of State on procedural grounds. The Council of State considered that existence of a member of the Competition Board both at the investigation stage as a member of the investigation team, and during the decision making meeting of the Competition Board violated the principle of neutrality. Following such decisions by the Council of State, the Competition Act was amended in 2005 to remove participation of the Competition Board members in the investigation teams. Following the amendment, the Competition Board began to reassess the files and take the decisions accordingly.

As to amount of time required for the courts to finalize the decisions, it was seen that it took time for the Council of State to conclude the cases. Therefore, the Competition Act was amended in 2003 to include a provision regulating that appealing against decisions of the Competition Board would not cease the implementation of decisions, and the follow up and collection of administrative fines. Moreover, a special chamber was created within the Council of State in 2005 responsible to handle anti-trust cases. However, it should be mentioned that the chamber does not exclusively deal with only anti-trust cases.

On the basis of the experience of the TCA, it is important to state that if possible there should be specialized courts to deal with appeals of decisions of competition agency. Additionally the training of judges is quite important. In this regard, first of all law departments of universities should introduce courses on different aspects of competition law and policy. Additionally the Ministry of Justice should envisage an inclusion of courses for the training program of judges.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

No.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

The TCA has adequate resources.

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

The Competition Act overtly says that the TCA has administrative and financial autonomy and is independent in fulfilling its duties. Moreover, according to the Competition Act, no organ, authority and person may give commands and orders to influence the final decision of the Competition Authority.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

a) 1 – adequate independence 2- No “one size fit all” approach while designing organization and drafting legislation 3 – adequate financial resources and qualified professional staff and adequate enforcement powers and tools to deal with and deter anti-competitive conduct 4 – transparency and consistency of the decisions and gradual enforcement 5 – focus on building competition culture

b) 1 – ambiguous legislation 2 – inconsistent decisions 3 – overenthusiastic application of legislation, and extreme workload if no gradual enforcement 4 – inadequate advocacy powers 5 – overlapping competence with regulatory agencies



CONTRIBUTION BY UKRAINE

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Ukraine--

1. Organisation of the department and preparation for work

1. Forming of a body in Ukraine for protection of economic competition was first provided for by the Law of Ukraine «On limitation of monopolism and protection against unfair competition in business» adopted on February 18, 1992. Practical work of the Antimonopoly Committee started in October of the same year, upon appointment of the Chairman of the Committee.

2. The organisational plan of the first year of the Committee's operation was:

- formation of the system of bodies of the Antimonopoly Committee;
- optimisation of their structure and establishment of interaction between them;
- strengthening of the staff potential and material and technical basis.

3. Operation of the Antimonopoly Committee as a collegial body started upon adoption of the Law of Ukraine «On the Antimonopoly Committee of Ukraine» on November 26, 1993 and appointment in the following month of the first membership of the Committee consisting of 9 state officials. Upon appearance of territorial bodies of the Committee in 1994-1995 in all regions, Kyiv and Sevastopol, development of the system of the Committee's bodies was mostly completed.

4. Staff selection both for the central body and for territorial units was performed only on a contest basis.

5. The specific feature of the Committee's operation at the development stage covering 1994-1996 was the fact that along with the ordinary law enforcement operation characteristic of the competition protection bodies, the Committee actively worked at performance of large-scale demonopolisation of economy, and provided creation of Ukraine's brand-new regulatory and methodic basis for competition development and protection.

6. In particular, the Committee initiated and mainly developed the State Program for Demonopolisation of economy and competition development for 1993-1995 approved by Verkhovna Rada of Ukraine on December 21, 1993. The Committee developed the new wording of the Law of Ukraine «On limitation of monopolism and non-admission of unfair competition in business », the Law of Ukraine «On protection against unfair competition» adopted on June 7, 1996, a number of regulatory documents providing control of compliance with the antimonopoly requirements in the course of privatisation, at the time of making decisions by governmental and management bodies, formed the basis for organisational and legal mechanisms for prevention of monopolisation of product markets in the course of economic concentration.

7. At the beginning of its operation, the Committee as a newly formed competition body faced problems related to:

- general crisis condition of economy, attempts of the government to stabilise the situation by way of applying administrative measures;
- psychological unreadiness of people to perceive and understand the laws of market economy. Both producers and customers were almost unaware of the requirements of the antimonopoly legislation. In some cases, on the part of branch ministries and departments, regional governmental bodies, some misunderstanding was observed in respect of demonopolisation and its tasks;
- insufficient regulatory and methodic base, duration of adoption of regulatory documents, and absence of an opportunity to perform extremely necessary scientific research because of the lack of finance.

2. Competition culture and competition advocacy

8. One of the main tasks of the Committee is promotion of competition policy in society in general. Immediately upon creation of the Committee, substantial attention was paid to informing of public about the Committee's activity, in particular during the first year of its work, more than 90 examples of different aspects of the antimonopoly law application were published in mass media. Next year, the quantity of public informing events increased almost six times. In a year more, the number of thematic publications exceeded 500, the Committee employees were involved in putting on air of about 250 radio programs, performance of almost 200 press conferences and meetings of different levels. Particular attention was paid to coverage of the cases of antimonopoly law breaches, which directly affect not only the interests of entrepreneurs, but almost every consumer.

9. Later, a number of programs for improvement of public awareness and understanding was developed. The contacts with business, administrative and science circles became one of the most important forms of competition protection. The Committee representatives took part in conferences, meetings and round-table discussions with professional groups including large professional organisations, as well as smaller industry groups of manufactures and traders.

10. At the present stage of operation, the Committee also applies such methods as holding seminars for lawyers of the private sector, for example, on matters of submitting applications for concentration permits or procedure of examination of applications on violation of economic competition. In addition, the Committee employees are engaged as lecturers of in educational establishments, take part in university seminars.

11. At the time of the Committee's implementation of events on formation of competitive culture and increasing the competitive consciousness, the problems related to psychological unreadiness of people to perceive and understand the market economy and the need of competition first of all, were considerable. Both producers and consumers were insufficiently aware of the requirements of the antimonopoly legislation. On the part of directors of enterprises, unwillingness to work in the conditions of competition was observed. On the part of branch ministries and departments, regional governmental bodies some misunderstanding of the need of demonopolisation and its tasks was observed.

3. Examination of cases and investigation – abuse of monopoly position and limiting agreements

12. In early years of the Committee's operation, the main problems in the course of investigation and punishment for violations on abuse of the monopoly position and non-punishing limiting agreements were as follows:

- lack of employees' experience;
- absence of proper information, which would allow to determine the markets, to perform due level analysis of market behaviour of business entities, economic rationale for specific acts of defendants.

13. One of the considerable problems in the course of investigating abuses of the monopoly position was the fact that considerable number of markets, in which violations occurred were the markets, in which prices and tariffs were regulated by the state.

14. In this connection, the following issues arose:

- the problem of opportunity and limits for application of competition legislation in the area of regulated prices and tariffs;
- the matter of division of powers between the Antimonopoly Committee and bodies for the state price discipline control and bodies performing regulation of the relevant branches.

15. Based on the results of practical work, specific schemes of powers distribution in this area were developed, in particular, a competitive body focused on cases, when regulation did not provide establishment of fixed price, or did not determine the structure of expenses, and bodies for the state price discipline control focused on the area of application of state fixed prices.

16. Receipt of information required for determination of markets and status of business entities in such markets contributed to establishment of cooperation with non-governmental consulting and marketing companies, whose network started developing in Ukraine in the mid-90-s.

17. In respect of sanctions, the problem was that before 1995, penalty sanctions provided for by legislation were extremely inconsiderable and could not have serious impact on behaviour of offenders.

18. Another problem at the initial stage of operation was the Committee's insufficient readiness to protect its decisions in the course of their contesting in court.

19. In order to solve these problems, since 1995, penalties were considerably increased, and their amounts were set as percentage of offenders' proceeds.

20. The Committee also introduced regular and systematic work on explaining to judges of the provisions and specific features of applying the competition legislation and, at the same time, taking into consideration judges' approaches in own law enforcement practices.

21. The main difficulty in the course of examination of cases on horizontal approved actions (cartels) has been absence of powers for receipt of direct evidence of anti-competitive collusions. At the same time, law enforcement authorities usually have had no experience of analysis of economic categories evidencing of availability of such collusions, and consequently, pay no attention to their marks.

22. In this connection, the Committee's bodies paid the main attention to improvement of the means of economic analysis of detecting horizontal anti-competitive collusions.

23. We should note that within the second year of its operation, the quantity indicator of violations suppressed by the Committee grew by almost 6 times compared to the first year of its operation and reached the level of over 1,000 violations a year.

24. The number of violations of the competitive legislation suppressed by the Committee to the first years of its operation is specified in the table below.

Violations	Years		
	1994	1995	1996
Total violations suppressed:	174	1,042	1,032
Including, by violation types:			
Abuse of monopoly position	53	150	380
Unfair competition	63	79	212
Unlawful agreements	9	31	21
Discrimination of enterprises by governmental and management bodies	49	139	86
Unfair advertisement	-	557	184
Other violations	-	86	149

4. Merger

25. The Antimonopoly Committee is given legal powers of merger control.

26. Such powers were determined first and foremost by the Law of Ukraine «On limitation of and non-admission of unfair competition in business» No. 2132-XII dd. February 18, 1992.

27. Presently, legal basis of concentration control is determined by the Law of Ukraine «On protection of economic competition» No. 2210-III dd. January 11, 2001. Upon taking effect by this Law, the aforesaid Law No. 2132-XII became null and void.

28. However, at the first stage of applying the competition legislation, the Committee's function of merger control was to considerable extent declarative. In particular, it provided for no obligation of participants of specific transactions to apply to the Committee for receipt of preliminary permit. In this connection, the Committee had almost no opportunity to actually influence the market concentration processes.

29. To solve this problem, by initiative of the Committee, the Cabinet of Ministers of Ukraine adopted Resolution No. 765 dd. November 11, 1994 «On implementation of the mechanism for prevention of product markets monopolisation». Adoption of this resolution allowed implementation of an efficient merger control mechanism.

30. Presently, the problem in concentration control is that the sphere of control often faces considerable number of cases, which actually do not and cannot influence the condition of competition in product markets.

31. To solve this problem, the Committee developed suggestions on increase of threshold values. When they are achieved, business entities shall apply for preliminary permit for concentration.

32. Initial stage of the Committee's operation to the extent of merger control was actually characterised by no specific problems on lack of resources, excluding general organisational problems in the first years of the Committee's operation, such as insufficient material and technical support.

33. However, one of the notable aspects requiring additional resources from the Committee were cases, when the Committee had to initiate revision of resolutions made by individual central executive bodies in respect of merger, without compliance with the antimonopoly requirements.

34. In general, in 1995, with support of the Committee's initiatives by Verkhovna Rada of Ukraine, President and Government of Ukraine, taking legal and institutional measures in Ukraine allowed formation of the integral mechanism of governmental control of economic concentration.

35. This resulted in the fact that any large-scale economic concentration having serious influence on competition requires consent of the Committee's bodies. In addition, the Committee received reliable powers, in case of non-performance of the set procedure of getting a concentration permit, to restore the initial status, if competition was violated.

5. Judicial contestation of resolutions

36. Resolutions of the Committee as of any other governmental body of Ukraine may be contested in a judicial proceeding. Presently, resolutions of the Committee are contested in courts of business jurisdiction.

37. The Committee is generally satisfied with the results and rapidness of cases examination by business courts. Only in individual cases, judicial proceedings were dragged on due to complicated nature of cases and large scope of evidentiary basis or abuses of procedure rights by the other side.

38. The Committee pays considerable attention to cooperation with judges of business courts. Any suitable opportunity is used by the Committee for discussing with judges the matters related to application of competition legislation. In particular, judges specialised in the matters related to competition are often invited to seminars organised by the Committee.

6. Resources

39. Funds allocated for maintenance of the Antimonopoly Committee bodies are economised and used as intended, however, their scope would be insufficient even for organisation existing for a long time and having the relevant material and technical base, let alone a department just being formed. For this reason, at the first stage of the Committee's operation, even minimal required conditions for performance of obligations by employees of the Committee and its territorial units were impossible to be created. At the present stage of the Committee's operation, expenses offered by it are not usually covered in the full scope of funds of the general fund of the state budget.

40. To comply with the required scope of expenses, the Antimonopoly Committee provides rationale for allocation of additional budget funds and cooperates in this regard with the Ministry of Finance of Ukraine, the Budget Committee of Verkhovna Rada of Ukraine.

41. Within the recent years, limit scope of expenses for improvement of material and technical basis, creation of information and analytic systems have increased.

42. In addition, within the recent 8 years, to cover deficit of funds of the general fund assigned for performance of the events planned by the Committee, the Committee shall additionally use funds of the special fund of the state budget received on treasury accounts of the Committee as own revenue.

7. Independence

43. From the legal point of view, the Committee has sufficient level of independence from other governmental organisations, large business groups etc.

44. However, lack of budget finance is an essential factor, and dependence on it may negatively influence the Committee's operation. Though such dependence characteristic of any budget organisation.

8. Conclusion

45. For successful start of operation, new competition departments shall be suggested:

- to take the following measures:
 - to prepare national competition legislation taking into consideration the best and the newest experience of leading countries in implementation of competition legislation;
 - to perform active operation on popularisation of competition culture and increasing competition consciousness in the country;
 - to establish partner relations with other governmental bodies;
 - to take care of the proper level of material and staff support of the department;
- to allow no mistakes:
 - in the course of implementing new legislation, to consider specific features of the country's economic condition, which may be omitted in the pattern competition legislation;
 - to avoid undertaking by the competition department of functions and powers not characteristic of it.



CONTRIBUTION BY THE UNITED STATES

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--United States--

1. Introduction

1. The United States Federal Trade Commission and the Antitrust Division of the Department of Justice have provided technical assistance to newer competition agencies for nearly 20 years. These efforts have been described elsewhere and will not be repeated here in great detail.¹ Among other things, FTC and DOJ have placed long-term advisors in a number of newer agencies, and have been privileged to have a detached “front row” seat from which to observe both the successes and pitfalls of other newer agencies. The following observations reflect that experience along with our own experience in the United States.²

2. Most Important Actions Recommended to a New Competition Agency

- Ensure that Agency Decisions are Informed by Sound Economics and Law

Because effective competition policy by its nature fuses law and economics, a new agency should develop an effective organisational structure that ensures that sound legal and economic principles underlie the priority-setting process, the decisions to open and commit significant resources to an investigation, and the outcome of any case.

Resources should be reserved for those cases where there is some likelihood that, absent intervention by the competition agency, consumer welfare and/or economic efficiency will be harmed by the conduct in question. Economists are trained to assess questions regarding the impact of conduct on consumer welfare or efficiency; without their input, there is a risk that enforcement will not be effective.³ Lawyers, on the other hand, are trained to consider whether sufficient evidence exists to prove the existence of a violation, how a case may be built that will withstand review by an independent tribunal or court, and whether due process and procedural rules have been observed. Without their input, there is again a risk that enforcement will prove ineffective. An organisational structure that brings both legal and economic disciplines into the decision-making process at an early stage is thus critical.

- Develop a Positive Enforcement Agenda Tied to the Economy’s Issues

While useful lessons can be learned from the experience of other jurisdictions, every economy is unique. Gathering an informed understanding of the barriers to a well-functioning competitive economy, recognising where a competition agency can make a difference in addressing them, and developing a strategy for action should be an early investment by any agency. While some problems may be obvious – an agency in an economy that has been dominated by state-owned

¹ See, “U.S. Federal Trade Commission’s And Department of Justice’s Experience With Technical Assistance For The Effective Application of Competition Laws” (2008), available at <http://www.ftc.gov/oia/wkshp/docs/exp.pdf>. That document is an updated version of a 2002 submission to the Global Forum on Competition, CCNM/GF/COMP/WD(2002)20, available at <http://www.oecd.org/dataoecd/37/61/1833990.pdf>.

² This submission draws heavily on an article by FTC Chairman William E. Kovacic, Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 Chicago-Kent L.Rev. 265 (2002), available at <http://www.ftc.gov/speeches/kovacic/2002institution.pdf>.

³ A recent article by the former chief economists of two major agencies examines possible ways of doing this. See L. Froeb, P. Pautler, and L. Roller, The Economics of Organizing Economists, [Vanderbilt Law and Economics Research Paper No. 08-18](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155237), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155237.

enterprises may not need a detailed study to understand that monopolistic practices by those entities may be a problem – a full understanding of the issues may require more study. Developing the capacity for what has been termed “competition policy research and development” can be beneficial.⁴ While a new agency may not initially have the in-house capacity for this kind of research, it can achieve the same ends through alliances with academics or other researchers.

The strategy that results from this understanding can encompass a number of tools. An effective competition advocacy program is essential. Such a program can be effective in addressing anticompetitive policies put in place by other government actors. Educating consumers as to how choice can best be exercised in a competitive market, and businesses as to compliance, may also play important roles, along with traditional law enforcement. It is important to effectively communicate the enforcement agenda to the line enforcement staff. Otherwise, the cases that work their way up through the decision chain will bear no clear relationship to the agenda. The key point is to develop an enforcement strategy that is targeted to the issues identified.

- Set Priorities Carefully Before Pursuing Cases

A new agency will be faced with many competing demands, and not all cases will present useful opportunities to advance the agency’s agenda. An agency should develop a process to screen cases at an early stage in order to ensure that the cases that move forward are economically and legally sound and consistent with the agency’s broader enforcement agenda. Experience in agencies at all levels of development has shown that it can be difficult to close down a weak case once significant resources have been put into it.

Implementation of an enforcement agenda should focus on picking the right mix of initial cases. To build credibility, the agency should focus initially on cases that will be understood by the public and that it can win. Local cartel cases can be a good place to start. Peru’s INDECOPI, for example, began with cartels in the bread and chicken industries, and more recently, El Salvador did likewise with flour. Cases that rely on application of complex economic tools or theories of competitive harm that are not widely accepted, on the other hand, are best saved until the agency has gained experience and credibility.

- Development of a Broader Culture of Competition Must Be a High Priority

Even in the most developed economies, the mission of a competition agency is not well understood, either by the public or by other public institutions whose work can also affect the competitive environment. Because a competition agency is not typically endowed with the power to impose its will on other institutions, it is important that attention be paid to the broader constituency if political support and legitimacy for the competition agency’s goals are to be realised. While there is no “best” way to do this, in the long run, the source of a competition authority’s power is the strength of ideas. Consequently, conveying those ideas in an accessible and compelling way is critical:

- Consumers may not understand why cartels are bad, but they can understand that competition benefits consumers through lower prices, better quality, and greater choices.

⁴ W. Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, Remarks before the Seoul Competition Forum 2004 (April 20, 2004), available at <http://www.ftc.gov/speeches/other/040420comppolicyinst.pdf>.

- Businesses may not wish to compete in markets where they had previously been guaranteed monopolies, but may understand that a more competitive environment will make them better able to compete in global markets.
- Regulators may be unwilling to abandon long-held ideas about regulation, but may be more sympathetic once they understand how certain regulations actually increase price and decrease incentives for quality.

The message that competition is good for consumers will likely threaten vested incumbents, so it is likely to attract controversy. However, if an agency cannot make a compelling and understandable case for its actions, its power will be eroded in the long run. This will be especially true when the agency must act in a way that is politically unpopular, such as by clearing a merger that may result in short-term job losses.

- **Recognise Your Natural Allies and Build Effective Partnerships with Them**

As noted above, sound competition policy may challenge vested interests. Opening markets to competition, by advocating for reduced tariffs or breaking up domestic cartels, for example, will threaten incumbents. While opponents to an active competition agency will not be in short supply, there are natural allies who share a common understanding or interest with the competition agency, and linkages with those groups should be sought out and developed.

Consumer advocacy groups, especially those that have developed an understanding of the economics of consumer protection, are often enthusiastic advocates of sound competition policy. Business groups that attract new and innovative entrepreneurs have interests aligned with the agency. Academics and journalists who have spoken out in favor of sound competition and regulatory policies may be sought out as well. The media is another important potential ally. A capable media relations operation is essential.

- **Be Transparent**

An agency needs to be transparent at all stages of its decision-making processes, and should explain its decisions and processes in clear and understandable language. Otherwise it will risk being perceived as arbitrary, which will ultimately cost it political support and undermine its legitimacy as a source of economic expertise and guidance.

This includes explaining the agency's procedures and areas of concern to firms that interact with it in individual cases, as well as explaining the basis for its decisions with reasoned opinions. Guidelines can be a useful way to clarify and communicate policy, although it is probably better to either develop significant enforcement experience before doing so or to revisit and revise them with the benefit of experience. While this kind of transparency is important to agencies at all levels of development, it may be especially important for a new agency where counsel and businesses have little or no understanding of competition law. Decisions and processes can easily be publicised through a transparent and accessible Internet site.

- **Hire the Right People and Find Ways to Keep Them**

The application of a competition law requires a range of different skills. Because it is an inherently predictive exercise, requiring assessment of the future economic consequences of existing facts, the skill sets of lawyers and economists are indispensable (although engineers, accountants, and public administrators can be excellent investigators and managers and can

perform specialised roles). Lawyers should have a strong grounding in economics and should understand how, in their legal system, to interpret a law in a manner consistent with its underlying economic purpose. Economists should have backgrounds in industrial organisation microeconomics, ideally at the PhD-level.

Unfortunately, individuals with this kind of training and experience tend to be in great demand, especially from the private sector. The agency's budget and/or applicable requirements to adhere to general government salary schedules can result in pay levels that are too low to attract and retain such individuals. Consequently, addressing this problem may require urgent attention. A successful strategy may include a combination of maintaining a professional work environment, obtaining approval for a budget to pay professionals at a competitive rate, and ensuring that the work assignments are sufficiently interesting and challenging so as to retain qualified staff even if they are paid somewhat less than they could attract in the private sector.

- Recognise that Capacity Building is a Long-Term Endeavour

Building capacity to enforce a competition law, typically through a carefully designed program of technical assistance, is a long-term endeavour. It takes many years for officials of developed competition agencies, who have the benefit of experienced colleagues to learn from, to develop these skills.⁵ It will take at least as long for officials of new agencies to do likewise. Consequently, a new agency should seek out technical assistance that focuses on its long-term needs, and does not rely solely on short-term interventions or those dictated without adequate consideration of the real needs of the agency. While short-term interventions are appropriate in certain circumstances, such as during an agency's early days or in response to particular identified problems, they should ideally be employed as a discrete component of a longer-term strategy. For agencies with sufficient absorptive capacity, consideration should be given to the use of long-term advisors from a more experienced competition agency.⁶

At the same time, agencies should not become over-reliant on external capacity building programs. Sustained capacity growth will require the development of an internal training program that will instil the knowledge gained from both foreign experts and domestic experience long after the foreign experts have departed.

- Ensure that the Agency has Adequate Investigatory Tools and that Sanctions Available are Sufficient to Deter Violations of the Law

An agency that does not have the power to obtain the information and evidence needed to evaluate markets and bring enforcement actions will not be able to achieve its mission of promoting competition. Investigatory tools must be backed by sanctions for failure to comply with information requests and conduct that obstructs the agency's efforts. The antitrust law must also provide penalties for violations of the law that have a sufficient deterrent effect on economic

⁵ See International Competition Network, Findings Related to Technical Assistance for Newer Competition Agencies (May 2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/9FindingsrelatedtoTechnicalAssistanceforNewerCompetitionAgencies.pdf.

⁶ See generally, Simon Evenett, The Effectiveness of Technical Assistance, Socioeconomic Development, and The Absorptive Capacity of Competition Authorities (2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/EvenettTAEffectivenessPaper041006.pdf.

agents; otherwise the penalties will be treated merely as a cost of business and the law will have little effect.

3. Pitfalls that a New Agency Should Avoid

- **Make Sure the Agency's Agenda Remains Focused on Its Overall Strategic Objectives**

Some agencies have allowed their agendas to be sidetracked by external stimuli. It is all too easy for an agency's day to be filled by processing an ever-growing pile of merger notifications, requests to authorise agreements among enterprises,⁷ or complaints lodged by competitors, at the expense of higher-priority items and its overall strategic plan.

The latter point requires some explanation. Bad cases routinely appear on a competition agency's doorstep, and often arise in the form of competitor complaints. Inefficient competitors frequently try to use competition law to curb vigorous competition by more efficient competitors. For this reason, the proverbial "squeaky wheel" is not necessarily the best place to "apply the grease." The temptation that competitor complaints present, particularly in agencies with very limited resources, has to be avoided by understanding the potential problems that such complaints present, having sufficient analytic skills within the agency, and bringing those skills to bear on such complaints at an early enough stage to enable hard, critical questions to be asked so that the good cases can be separated from the bad. Otherwise, the dangerous path of least resistance may be to spend too much time on competitor complaints to the detriment of more important cases.

In a jurisdiction with a merger control regime, resources must be expended responding to time-sensitive merger notifications, but it is important to reserve adequate resources for seeking out and addressing the real problems in the economy.

- **Do Not Try To Use Competition Law To Fix All Of Society's Ills**

In an economy in transition, it is common for competition agencies to receive complaints that are unrelated to the competition law simply because there is nobody else to take the complaint. An agency should if possible seek to avoid assuming the role of a sectoral regulator, as its resources are likely to be overwhelmed and it usually will not have the necessary expertise to address terms of access and quality of service issues. An agency should also decline to take on other non-competition responsibilities, such as resolving contract disputes or protecting inefficient domestic incumbents from takeover by foreign firms.

- **Do Not Focus on Monetary Sanctions to the Exclusion of Remedies that Will Improve Competition**

Some agencies develop an excessive focus on a single measure of success: monetary fines. If the real objective is to restore competition to a market from which it has been eliminated by anticompetitive conduct, then remedies that are likely to restore competition are more important than fines. While structural or behavioural remedies are more difficult to devise and implement, they are more likely to achieve the agency's true objectives. Indeed, when a firm is benefitting from an anticompetitive course of action, it may well view a monetary fine as a cost of doing business that it is more than willing to pay.

⁷ This commonly took place in countries whose laws were inspired by the earlier implementation of Article 81 of the Treaty of Rome and which were deluged with requests for individual exemptions.

- Do Not Ignore Other Institutions

A competition agency cannot function in a vacuum. Its decisions must typically be reviewed in the courts. It seeks political support, legislative mandates, and financing from the legislature. It may seek to persuade regulators and local officials to adopt regulations that support the functioning of a competitive market. Yet those judges, legislators, and officials may not share the same view of competition as the agency. If an effective strategy is not adopted to educate and address the views and understanding of these groups, the agency's work is not likely to be advanced effectively.



CONTRIBUTION BY ZAMBIA

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Zambia--

1. Countries that have been actively enforcing a competition law for a relatively short time

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

The Competition and Fair Trading Act in Zambia was passed in 1994 but the Zambia Competition Commission was only established three years later in 1997. The delay in the establishment was mainly due to little appreciation of the competition law. Emphasis at the time was placed on liberalising the economy and competition law and policy was not seen as major component in the liberal market.

Through advocacy and lobbying by the Ministry of Commerce, Trade and Industry and the task force set up to ensure that the Competition authority was established a Board of Commissioners was appointed in November 2006 and six months later the Executive Director was appointed. There after three other senior staff were appointed.

The management of the Commission embarked on establishing the organisational structure, finding offices for the authority and also setting up procedures for the authority. The budget allocation in the first five years was inadequate to increase the work force or train the officers of the authority. Thus the Commission suffered from under funding, under staffing, lack adequate equipment and lacked capacity to effect training programmes. Procedures for the new Act were established but regulations of the Act were not.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Establishing a competition culture in a country new to competition enforcement is key to ensuring the effectiveness of a competition law. It was difficult to inculcate a culture of competition in the economy generally in Zambia and even today a lot still remains to be done. Initially most parties to commerce did not appreciate the application of a competition law and conducted business in a manner that amounted to the infraction of this law.

In order to address this situation, the Commission embarked on activities of sensitising the business communities the operation of the law from 1999 (two years after establishment). Activities included

radio programmes, seminars, workshops and other similar activities. The Commission held annual competition and consumer workshops in collaboration with UNCTAD in order to educate and sensitise Government, private sector and consumers on the competition. The Commission further used the media to publicise its activities. The Commission participated and has continued to participate in annual trade fairs and trade shows. The Commission made advisory opinions to certain Government policies and actions. The Commission also ensured that they participated in review of existing legislation and also participated in the establishing new laws. The Commission further has continued to participate on a number of Government working groups on trade, regional integration and investment.

Furthermore, the Commission produced a number of publications, including annual reports, on competition matters and consumer issues which it freely distributes to the private sector, Government and general public. The annual report is presented to Parliament. The Commission also has embarked on a programme of visiting higher institutions of learning making presentations on the role of the Commission.

There has been measurable success in that the number of people reporting mergers and acquisitions has increased and most people have become aware of the law as evidenced from the steady but increased number of anti-competitive cases that are reported to the Commission.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

In the early years, of the existence of the law, anti-competitive practices were rampant as monopolies and firms with market power were very common in the Zambian economy. The Commission used advocacy to resolve the early cases, which method was effective. Where establishing evidence was needed, the Commission used common law provisions to establish evidence procedures as opposed to statute. This is still the case. In terms of imposing fines, the Board of Commissioners which is the decision making body of the commission has no power did not have the power to do so and the status quo has continued. Nevertheless, fines can be imposed by the Courts of Law.

The Commission identified cases of abuse of dominance in the poultry sector in 1999 but no prosecution was carried out at the time due to lack of funds and staff. A lot remains to be done as there has only been one case, which the Commission has prosecuted (in 2005) and it is still in court. Use of warn and caution statements have almost taken up primary enforcement strategy.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

The Commission has no express anti-cartel programme. The cartels are addressed within the general provisions of the Competition and Fair Trading Act. The express provisions prohibiting restrictive agreements in the Competition and Fair Trading Act contained and still contain general prohibitions of agreements that restrict competition and also prohibitions of specified types of conduct. The

specific prohibitions included agreements among competitors fixing prices or terms of sale, allocating markets or sales volumes, and bid rigging. In 1999 (two years after establishment), the Commission detected a cartel in the day old chicks sub-sector but no prosecution was carried out because of lack of funds and key prosecutorial staff.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

Our law provided for merger control from the time it was enacted in 1994.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The provision of merger control did not have a greater negative impact on our financial resources. The reason is that the Law provided and still provides for pre-merger notification and a prescribed pre-merger notification fee is payable to the Commission. Therefore, the Commission could even generate its own finances from such mergers. This notwithstanding, there was a problem in so far as human resource is concerned as the Commission was very understaffed.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

The Commission has done a lot of work in mergers and it is the area where it has achieved a lot of successes. Most mergers have been notified from many sectors of the economy. Most of these mergers have been approved with very few been disapproved.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Yes, any person aggrieved by a decision of the Commission can appeal to the High Court of Zambia, with the option of a final appeal to the Supreme Court. To date, only two Commission decisions have been a subject of appeal. These involved two multinational players in the petroleum sector. The two cases are currently in the High Court since 2007. It is in the public domain that most cases take time to be disposed off in the Zambian Courts of law and this is also true for competition law cases. The creation of a specialised court or tribunal to handle cases in competition law would expedite the disposition of competition law cases.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

The Commission has not developed any special programme for interacting with Judges. Training of judges in the field of competition law has however previously been done on two occasions under the auspices of UNCTAD.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

Chronic shortages of funds and staff have continued to be a challenge. Somehow, the Commission has evolved to operate within chronic constraints. The Commission also has continued to experience a high employee turnover.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

There is an express exemption on the application of the Act to activities to which the State is a party. In terms of decision making, the Commission does not have to seek instructions from the Government. The decision of the Commission is also not subject to review by any political office. However, the Commission is accountable to parliament through the Minister of Commerce, Trade and Industry by way of production of an annual report on its activities and usage of public funds. In terms of finance, the Commission relies wholly on government subventions which in a substantial way are controlled by the Ministry of Commerce, Trade and Industry. The process of lobbying for increased funding may lead to debatable questions of independence or autonomy.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

a

1. Creating strategic linkages through advocacy
2. Staff training
3. Staff retention scheme
4. Participation in bilateral or multilateral associations such as ICN, OECD, UNCTAD meeting
5. Publication of guidelines for business and consumers

b

1. The implementation of the law should evolve around a holistic corporate capacity and not around an individual
2. Avoid political affiliation of any sort
3. Avoid regulatory capture more so in relation to big business who may use so called innocent gifts to buy patronage
4. It should not operate like an island but should engage in a consultative approach with other institutions in the economy and also foreign competition authorities through cooperation
5. Avoid unprofessional and unethical conduct in investigations e.g. pertaining to matters of declaration of interest and confidentiality

2. Countries that have been actively enforcing a competition law for a longer period

1. For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.

2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

a

1. Creating strategic linkages through advocacy
2. Staff training
3. Staff retention scheme
4. Participation in bilateral or multilateral associations such as ICN, OECD, UNCTAD meeting
5. Publication of guidelines for business and consumers

b

1. The implementation of the law should evolve around a holistic corporate capacity and not around an individual

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PRESENTATION BY MR. THOMAS ABE



Challenges Faced by Young Competition Authorities

Country Contribution: Papua New Guinea

Thomas Abe
Commissioner & CEO
Independent, Consumer and Competition
Commission

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Outline of Presentation

- Organising the agency
- Competition culture & competition advocacy
- Conducting cases and investigations – abuse of dominant position and restrictive agreements
- Mergers
- Resources
- Independence

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Organising the Agency

- First task: establish an office to undertake regulatory functions as soon as possible
- Early Stages: No local experts in competition law:
 - Overseas expert consultants assisted
- Recruitment of Staff: critically important
 - Get the best and brightest; few or none will have prior competition law experience
- Develop policy and procedures manuals for
 - Corporate governance
 - Conduct of investigations
 - Complaints handling
- Staff training: important and ongoing
 - Overseas experts help with training

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Competition Culture & Competition Advocacy

- Initially, broad public ignorance of the existence of competition law
- Early focus on informing business, legal profession & judiciary, government and consumers
- Awareness of competition law through meetings with business groups, seminars for lawyers & judges
- After 5 years, general awareness improving, but not enough

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Conducting cases and investigations – abuse of dominant position and restrictive agreements



- Low level of complaints, most resolved without needing to go to court
- Lack of legal actions means no body of case law yet and no public awareness of competition law from court cases
- Problems with evidence gathering; small markets in PNG often with no retail price competition; abuse of dominant position is hard to prove
- No culture of aggressive discounting or strong price competition in PNG.....yet

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Mergers



- Several applications for clearance or authorisation of mergers made to the Commission since 2003
- No mandatory pre-notification of mergers
- Clearance where no substantial lessening of competition likely (maximum 20 days)
- Authorisation on public benefit grounds balancing test (maximum 72 days)
- Commission's determination of clearance and authorisation applications are objective, reasoned and transparent

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Resources

- Commission funding partly from annual government budget, partly from licence fees from industries the Commission regulates (telecomms, electricity, ports etc)
- Main resource constraint is finding quality human resources
- Salaries disparity between government agency and private sector
- Good Commission staff often attracted to private sector positions at much higher salaries

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Agency Independence

- Independence from political pressure is essential for establishing integrity, honesty and professionalism
- Independence assured by:
 - Bipartisan political appointment of Commissioners, with security of tenure
 - One Commissioner to be an international expert based outside PNG
 - Independence from Ministerial direction stated expressly in statute

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Lessons we have learned (1)

○ Things to do:

- Ensure independence, to help reputation for integrity, honesty and professionalism
- Develop policies and procedures for good governance, transparency and accountability
- Recruit the best and brightest and train them well, then continue training
- Develop public awareness of competition regulation and how it can benefit industry and consumers
- Above all, ensure the agency acts honestly, professionally and, especially, openly

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Lessons we have learned (2)

Pitfalls to avoid:

- You cannot solve all problems in the first few months – it takes time
- Do not raise expectations for industry or consumers that your agency can fix all complaints – you cannot
- Do not allow the agency to have inconsistent actions or decisions, or if they must be inconsistent, admit the earlier decisions were wrong – and make public your reasons for all major decisions

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SPEECH BY MR. ZOLTÁN NAGY

**KEY ELEMENTS OF STRATEGY TO OVERCOME CHALLENGES IN TRANSITION:
THE HUNGARIAN EXPERIENCE**

**-- By Mr. Zoltán NAGY --
President, Hungarian Competition Authority**

It is a pleasure and an honour to be here, and to share the Hungarian experience on challenges faced by young competition authorities. Let me express my appreciation for choosing this issue to discuss in the Global Forum. Young competition authorities receive much support and valuable technical assistance from more experienced ones, but such programs are usually not designed to address unique problems young authorities often have to overcome.

Competition law enforcement in Hungary was launched in 1991, right after the fall of the iron curtain, and so the beginning of my agency's operation was part of the historically unprecedented economic and social transformation, called transition. The Hungarian contribution to this session elaborates on the most important developments from the outset to present. It divides this period of almost two decades into two stages, the first is characterised mainly by the transition, while the second is characterised mainly by closer international integration. It also describes a number of important steps we took and factors that had an impact on us. However, probably no two identical set of conditions exist, therefore many elements of the story of the Hungarian Competition Authority are not necessarily relevant for others.

For this reason, I want to use in my ten minutes time to concentrate on two considerations that, I think, may have more universal relevance for young competition authorities. The first is the importance of persistent efforts to make sure that your agency is seen by stakeholders as being present and active. The second is the need of promoting competition culture continuously. Both of these considerations have been central in my service as a competition authority president.

My starting point is that oddly enough, the first years of transition were easier for competition policy in Hungary, in a certain respect. At the beginning, the value of competition and competition policy were not questioned. This was probably because of the euphoria about the chance to move from communism to liberal democracy and market economy. Later however, emotional trust faded and my agency operated, and still operates, in a by and large relatively less hospitable environment. Hungarian mentality, for many reasons, is inherently more sceptical about the benefits of competition, and understands competition policy less than in most developed countries.

Given such an environment, I have recognised that maintaining the trust of various stakeholders, which plays a crucial role, requires a persistent effort. I have found it to be critical to make my agency and its activity visible. The achievements, and our steps taken to reach them, that are mentioned in our contribution, would have not been possible without a certain level of support and trust in the competition authority. This support and trust was generated by the image of a professional, effective and active agency. Even those who did not like the competition authority, were not in the position to attack it in the most destructive ways, largely because of the shield of its reputation.

It is not enough to be credible, you have to make your credibility visible to stakeholders. Moreover, your reputation is fragile in a hostile environment. So you need to work constantly in order to maintain it. Indeed, many of the developments that are included in the Hungarian contribution, served as visibility boosting, sometimes directly, sometimes indirectly as a side effect.

The other factor I have found to be critical in such an environment is the promotion of competition culture. Competition culture has significance everywhere, and in most places a competition authority is simply not sufficiently influential to make a real difference alone. But dealing with competition culture is probably more important in countries like Hungary. Ultimately it is about improving our environment. Therefore I take seriously our declaration that our activity is based on three equally important pillars: enforcement, advocacy and promoting competition culture.

Turning back to visibility, this time in a wider sense, I have maintained a certain aggressiveness in competition advocacy. In a less responsive environment, my agency had to repeat certain messages several times in order to deliver them. In other cases, repetition was needed to keep an advocacy issue alive in public debate, or to put it back on the government's policy agenda. Naturally, these efforts often do not bear fruit for their original purposes, and this can be very frustrating for the staff of the agency, including me. But I am confident that even so, they are essential. At the same time, you never know which initiative will succeed.

Increased activity may overstretch resources. But it can also generate them. It may, but not necessarily, entail lesser quality in competition advocacy. But in the environment I am speaking about, perfection in itself is not always the most relevant factor, and certainly it is not the "silver bullet".

It is possible, that this increased level of activity, and quality/volume ratio would not be optimal for a more mature agency and a correspondingly developed environment. While it might be more appropriate for a less mature, less developed one. Obviously, in practice I have not always found the right mix, which itself is a moving target in the longer run as we mature gradually.

By no means should you conclude that I am against quality. On the contrary. You can see in our contribution that the Hungarian Competition Authority have always genuinely tried to deliver quality work, to develop in many respects and to be one step ahead of our environment. Moreover, we have always pursued the mainstream competition policy approach instead of inventing special regimes, such as a competition policy for transition economies or anything like that. The same is true for the importance of enforcement. It is absolutely essential. However, my point is to highlight specifics, and in my experience, if there is something special for competition policy in a transition economy – or perhaps in a other less developed economies –, it is not the substantive analytical framework, but the sort of things I hope I have pointed out.

Thank you.