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

Foundations of an effective competition agency

Note by the UNCTAD secretariat

Executive summary

Competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop.

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

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

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Introduction

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

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

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

4. The sources of information are the replies by member States to UNCTAD’s request for information, a note by Mr. Khalil Mirza,¹ work carried out by the International Competition Network (ICN), and writings by academic practitioners.

I. What is an effective competition agency?

5. An effective competition agency – tautologically – achieves its objectives by the appropriate use of resources. The design and capabilities of the agency influence the effectiveness of the agency’s decisions and its ability to obtain compliance with sanctions and remedies. Nonetheless, a competition agency is but one actor in an environment where other government ministries and agencies, the judiciary, the business community, non-governmental organizations (NGOs), the media and the general public are taking actions towards their own objectives. The effectiveness of an agency is affected by the environment in which it is placed, and part of its effectiveness can be judged by how it modifies its environment.

¹ Summary of the “Foundations of an effective competition agency” round table discussion held at the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 8–12 November 2010.

6. Effectiveness can be examined by answering two questions: (a) Did the agency's interventions produce good results, according to the objectives of the competition law? and (b) Did the agency's processes lead to an appropriate allocation of resources to promote the realization of the law's objectives?² Examining effectiveness, by unravelling exactly where deficiencies lie (and how they might be remedied), requires repeated, regular examination of both process and outcomes. The evaluation of performance is itself a part of effectiveness.

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

8. It is not appropriate for enforcement actions to be the only focus. The actions and inactions of other parts of government can aid or hinder the achievement of competition law and policy objectives, but are often beyond the reach of competition law. However, studies, hearings, and submissions to their hearings can influence the thinking and thus actions of other governmental actors. Far more enterprises refrain from engaging in anticompetitive conduct than would ever be prosecuted. And the success in persuading judges of the correctness of the competition agency's decisions under judicial review directly affects whether the agency's decisions stand. Thus, measuring effectiveness through outcomes includes an evaluation of the persuasive effect of the competition agency's studies, of its comments submitted to hearings, its speeches, and its other persuasive efforts. However, a significant risk of penalties being imposed on cartels does appear to be necessary to achieve compliance in that respect.³

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

10. Ex post assessments generally focus on a specific aspect of the activities of an agency. The *Merger Remedies Study*⁴ by the staff of the European Commission's Directorate-General for Competition is an example. Its purpose was to "review with the benefit of hindsight" the remedies it had imposed or accepted in connection with mergers, "so as to identify areas where further improvements [...] may be necessary in future." A

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

³ Parker C, Ainsworth P and Stepanenko N (2004). ACCC enforcement and compliance project: The impact of ACCC enforcement activity in cartel cases. Working paper of the Australian National University Centre for Competition and Consumer Policy.

⁴ European Commission (2005). *Merger Remedies Study*. Available at http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf.

total of 40 cases and 96 remedies were reviewed, at least three to five years after they were imposed. But a difficulty of ex post assessments is identified in another study on merger control⁵ carried out by consultants for the European Commission, namely: “What is the right counterfactual?” In this case, the consultants decided that the right counterfactual was “to rely on the expectation that some qualified market players had formed on how the market would have evolved had the proposed merger happened,” and used questionnaires and stock market returns. Their study suffered from low response rates from businesses – because they had no obligation to respond, they saw no advantage in responding, and they were concerned about granting access to confidential business data. Smaller ex post assessments can be more frequent and less costly. For example, when a case is lost, a debriefing can identify what went right and what went wrong, and the lessons learned can be incorporated into the internal manual. Indonesia and South Africa can both provide examples of evaluations of an “outcome” rather than of an enforcement activity. The competition agencies in these countries have made recommendations or submitted proposals to government on competition policy issues, which have paved the way for various reforms connected to competition legislation, thus positively impacting on the economy.⁶

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

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

13. Most respondents to UNCTAD’s questionnaire provided information on their ex post evaluations. Pakistan and Slovakia, for example, indicated that they monitored undertakings found to have infringed the competition law in the past, and the markets in which anticompetitive actions had been found in the past. As was illustrated by a submission from Turkey, though, market participants can be expected to submit another complaint if the problem in the affected sector persists after a competition enforcement action.

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

⁵ LEAR study for the Directorate-General for Competition, European Commission (2006). *Ex Post Review of Merger Control Decisions*. Available at http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf.

⁶ UNCTAD (2011). The importance of coherence between competition and government policies. TD/B/C.I/CLP/9.

institutional, analytical and procedural capabilities) can improve effectiveness as well, or more so, than cases.

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

II. Institutional design

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

A. Independence

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

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

- (a) Providing the competition agency with a distinct statutory authority, free of day-to-day ministerial control;
- (b) Prescribing well-defined professional criteria for appointments;
- (c) Involving both the executive and the legislative branches of government in the appointment process;

- (d) Appointing the director-general and the board/commission members for a fixed period and prohibiting their removal (subject to formal review), except for clearly defined due cause;
- (e) Where a collegiate (board/commission) structure has been chosen, staggering the terms of the members so that they can be replaced only gradually by successive governments;
- (f) Providing the agency with a reliable and adequate source of funding. Optimally, charges for specific services can be used to fund the competition agency to insulate it from political interference via the budget process;
- (g) Exempting the competition agency from civil service salary limits in order to attract and retain the best qualified staff and ensure adequate good governance incentives; and
- (h) Prohibiting the executive from overturning the agency's decisions, except through carefully designed channels such as new legislation or appeals to the courts based on existing law.

19. Today, increasing numbers of competition authorities around the world are institutionally independent from ministerial control; fewer than half are dependent agencies. Competition authorities have been established by 112 countries,⁷ and more than half of these authorities are separate from the ministries. There has also been a steady rise in the number of autonomous competition agencies over the last 20 years. Twenty-two of the independent agencies are in developing countries and transition economies.

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

B. Accountability

21. The independence of the competition agency must be balanced with accountability. Politicians, the media, the public and the business community must know who is responsible for a decision, and the reasoning behind it. Interested parties must be able to provide relevant input to decisions, through consultation processes. They must be able to obtain redress easily and quickly if the competition agency has acted arbitrarily or incompetently. These types of safeguards produce a balance between independence and accountability. Several formal safeguards have been employed to achieve this balance, such as:

- (a) Publishing the competition law and statutes of the competition agency, which clearly specify the duties, responsibilities, rights and obligations of the agency; in addition, differentiating between primary and secondary regulatory goals where there are multiple goals;
- (b) Ensuring that the decisions of the competition agency are subject to review by the courts or some other non-political entity, although some "threshold" should be established to deter frivolous challenges that simply delay the implementation of decisions;

⁷ See the UNCTAD Guidebook on Competition Systems, available at http://www.unctad.org/en/docs/ditccp20072_en.pdf.

- (c) Requiring the competition agency to publish annual reports on its activities, and requiring a formal review of its performance by independent auditors or oversight committees of the legislature;
- (d) Establishing rules for the removal of members of the Board if they show evidence of misconduct or incompetence;
- (e) Allowing all interested parties to make submissions to the competition agency on matters under review; and
- (f) Mandating that the competition agency publishes its reasoned decisions.

C. Transparency

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

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

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

25. On the other hand, transparency has to be limited. Much of the information on which decisions on cases are made is commercially sensitive, and must be protected from competitors, suppliers and customers. Information released to the public must be screened to protect business secrets. Premature release of information may also affect the success of some of the activities of competition agencies, such as cartel investigations.

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

D. Enforcement powers

27. The competition agency must have teeth. That requires not only a clear, formal delineation of its enforcement powers, but also the ability and willingness to exercise its authority and enforce its decisions. Competition agencies need to have the powers available to them in order to be able to investigate effectively, such as having the power to gather information in a timely manner, and the power to impose – or sue to impose – sanctions for

non-compliance. They need the power either to order certain conduct to restore competition and to impose sanctions, or to sue in court for the court to order certain conduct or impose sanctions. Many competition agencies have the power to commit not to impose sanctions, which is important for implementing leniency programmes that can provide incentives for cartel reporting.

E. Staffing and financial resources

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

29. The risk of corruption and capture in developing countries is a troublesome issue. The empirical evidence and theory as to whether low public-sector pay fosters corruption is mixed. The practice in some jurisdictions whereby competition commissions include part-time board members drawn from leading members of the private sector can raise tricky issues related to impartiality and independence, not all of which can be solved by withdrawing from cases where a conflict of interest might exist.

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

III. Internal processes

31. Setting objectives and priorities, allocating resources accordingly, and ensuring that activities are effective to meet those objectives have been identified as major processes for an effective competition agency.⁸ The overall objectives of the agency are generally set out in the legislation, but the agency usually has to identify more specific objectives in order to help guide its staff's consistent resource allocation decisions and to permit the political and business communities to understand and critique the choice. Examples might be to liberalize certain sectors or to substantially reduce the anticompetitive conduct in certain sectors, to substantially increase awareness among the business community of the merits of competition, or a "push" against cartels. These objectives then form the framework for a work programme, which broadly allocates resources among activities, and sets priorities.

⁸ ICN Competition Policy Implementation Working Group (2009). Seminar on competition agency effectiveness. This is the main source for much of the material in this section.

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

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

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

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

36. Evaluation of the effectiveness of – inter alia – decisions, advocacy, studies and guidelines, in order to identify improvements, was the third major internal process identified in the ICN’s seminar. In most jurisdictions, legislators choose to police by judicial review. It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process. Most jurisdictions appear to favour a procedural review of competition cases whereby the appeal body confines itself to a consideration of the law,⁹ including a review of the procedures adopted by competition authorities in the exercise of their investigative and decision-making functions, rather than a consideration de novo of both evidence and legal arguments. Accordingly, the intention is not for the courts to substitute their own appreciation, but to ascertain whether the competition authority has abused its discretionary powers. Grounds for review will often include lack of jurisdiction, procedural failure and error of law, defective reasons, manifest error of appreciation, and error of fact. In this context, judicial review is generally seen as an end-stage process where judgement is passed on results or actions already taken – i.e. decisions already taken by the competition authority according to whether decision-making powers are vested in the chief executive, in a board of commissioners, or in a separate quasi-judicial body in the form of a specialized

⁹ ICN (2003). Building credible competition authorities in developing countries and transition economies. Report prepared by the ICN Working Group on Capacity-Building and Competition Policy Implementation. ICN Second Annual Conference. Mérida, Mexico. 23–25 June.

competition tribunal (e.g. Brazil, Peru, South Africa and the United Kingdom). ICN (2003) asserts that structures of decision-making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than are systems in which the exercise of these functions is conflated. In this context, the successful constitutional challenge to the lack of separation of the adjudicative functions from the investigative functions under Jamaica's Fair Competition Act is viewed as corroboration.

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

IV. Special challenges for young competition agencies

38. A survey¹⁰ conducted by ICN highlighted the following difficulties for young competition authorities:

- (a) Legislation was inadequate in terms of not properly addressing the anticompetitive conduct actually engaged in in the domestic economy, and in terms of not allowing effective enforcement by the agency;
- (b) Cooperation and coordination with particular government ministries and other regulatory bodies was not sufficient;
- (c) Budget was not large enough for the agency to operate effectively;
- (d) There were too few skilled professionals; they were either not present in the country or were not attracted to the agency given the civil service salary structures;
- (e) Judiciary was unfamiliar with competition law and its economics;
- (f) A "competition culture" among the business community, government, media and general public had not developed.

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

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

¹⁰ ICN (2006). Lessons to be learnt from the experiences of young competition agencies. Competition Policy Implementation Working Group, subgroup 2. Available at <http://www.internationalcompetitionnetwork.org>.

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

41. A review of the experience of young competition agencies in reforming countries¹¹ highlights the continuing importance of individuals in determining the success or otherwise of newly created agencies. Nevertheless, the sustained effectiveness of a competition agency requires that the departure of charismatic individuals should not significantly harm the institution. Although competition regimes can prescribe the qualifications of the people appointed to such roles, as well as the safeguards they enjoy, the decision-making processes they must adopt, and the resources they may deploy for competition goals, it is impossible to eradicate the human element completely. However, in the long run, an agency's legitimacy should be institutional and should not depend solely on that leader's personal qualities, no matter how good. Otherwise, there is a risk of losing effectiveness when strong and charismatic leaders leave.

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

43. Funding can be particularly tight for young competition agencies in developing countries. For various reasons – such as inadequate accounting and control measures, risk of fraud and corruption, or a general reluctance to introduce what might constitute a differential tax on segments of society for public services – some governments are wary of allowing independent bodies to raise funding from alternative sources. For example, the Government of Jamaica has steadfastly denied requests from its Fair Trading Commission to levy fees for some of its services. The Fair Trading Commission is constrained in carrying out its competition enforcement functions and advocacy initiatives as government subventions are insufficient. Competition authorities in developing countries are often caught in a vicious cycle, whereby funding shortfalls affect not only their ability to carry

¹¹ See UNCTAD peer reviews on competition policy available at <http://www.unctad.org/Templates/Page.asp?intItemID=4163&lang=1>.

out enforcement activities, but also their ability to monitor the impact of their activities and therefore to marshal the necessary proof of their worth; if they could do so, they could raise their credibility level, facilitate accountability, and provide justification for increased funding. The onus is often entirely on the competition authority to establish credibility, not only among the general public but also within the government. In this context, initial direct political backing for competition enforcement often sets the tone for the development of future relations between the competition authority and the authorizing environment.

44. Based on significant experience in talking and working with new and old competition agencies, Kovacic has produced a summary¹² of the major tasks of a new competition agency in its first decade:

- (a) To establish credibility and a “presence” through enforcement, as well as through advocacy, publicity, and a good process;
- (b) To obtain and sustain good leaders and staff;
- (c) To control expectations and demands;
- (d) To attain autonomy in prosecution/decisions, but not isolation from the political process;
- (e) To persuade the courts, including with respect to the scope of the law;
- (f) Information-gathering and sanctioning powers;
- (g) The adequacy of the administrative process;
- (h) To build links to other institutions, such as sectoral regulators, consumer organizations, business organizations, universities and the media; and
- (i) To create business and social awareness of competition law.

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

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

47. The risk of corruption and capture in developing countries is a troublesome and clichéd issue. The empirical evidence as to whether low public-sector pay fosters corruption

¹² Kovacic WE (2010). The first decade: challenges facing new competition agencies. Presentation given in Belgrade. 26 June.

Available at <http://www.ftc.gov/speeches/kovacic/100626belgradecompetition.pdf>.

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

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

49. Developing countries and countries with economies in transition are beset by a number of barriers to competition. There is an urgent need for effective competition law and policy in these countries. However, owing to various market characteristics and legal and enforcement difficulties, it is much harder to implement competition law and policy in developing countries than in developed countries. The challenges faced in developing countries include large informal sectors, problems related to small size and large barriers to entry, difficulties in instilling a competition culture, and capacity and political economy constraints. It is important for each country to tailor its institutional design to suit its circumstances while operating within these constraints.

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

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

52. Consideration of the various criteria mentioned above may be an important factor in developing countries' objectives. The priorities of young competition agencies may be quite different from those of mature competition agencies. However, there is a risk of

asking too much from young competition agencies, when other policy instruments may be the most appropriate tools to achieve certain ends. This strengthens the case for prioritization and evaluation. It is necessary to understand the effects of a country's programme of competition law enforcement in order to determine the potential and the limitations of a competition agency.

A. Benchmarking institutional profiles

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

B. Developing a competition culture

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

C. Updating and amending laws, guidelines and procedures

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

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

D. Evaluation as a tool for the efficiency of interventions

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

58. Evaluation can assist in addressing the more severe political economy problems, thereby helping provide legitimacy for the policy system. On the other hand, capacity

constraints within developing countries and countries with economies in transition hamper the proper performance of these evaluations. Nevertheless, when conducted appropriately in these contexts, evaluation can help to provide insights into the country-specific constraints on competition in these jurisdictions arising out of the characteristics listed above, and can suggest potential remedies.

E. UNCTAD/OECD peer reviews

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

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

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

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

V. Barefoot competition offices

63. A competition law and office is sometimes part of a structural adjustment package, and not an organic product of the political and economic situation of a country or region. Not a recipient of meaningful political or economic support, it is staffed by a handful of well-meaning but underresourced officials. Can such an office influence events towards the objectives in the competition law? One expert, noting that requirements for the competition law to be useful and meaningful can be difficult to fulfil, wrote that, "If crucial elements are missing, wise policymakers might choose not to adopt antitrust at all."¹³

¹³ Fox E (2008). Antitrust, economic development and poverty: the other path. Paper presented at the Ad Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development. 15 July 2008. Geneva. Available at:

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

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

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

VI. Issues for discussion

- (a) In a jurisdiction where the idea of competition is contrary to historical or traditional values, what steps may be taken to ensure that the mission of a competition agency will be accepted by society at large?
- (b) The skills needed to implement an effective competition policy may not be readily available to governments doing so for the first time. What strategies may be employed to attract the necessary skills and talents to the agency?
- (c) In a society that has been characterized by dominant firms, an agency that does an effective job of encouraging competition is likely to attract political opposition. What strategies may be used to ensure the continued effectiveness of the agency?
- (d) How can capacity-building contribute to the effectiveness of young competition agencies? What are best practices in upgrading the skills of staff?
- (e) Formulating a set of priorities in the first years of operation and evaluating the impact of competition decisions.

http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0003_en.pdf and based on an article of the same name in the *Southwestern Journal of Law and Trade in the Americas*, vol. 13, p. 211. Her list about how to make a competition law useful and meaningful included the following requirements: that the scope of coverage of the law be sufficient; that the competition agency be independent; that it be well funded and sufficiently staffed by educated and trained, non-corrupt personnel; that the appellate channels themselves be well qualified and non-corrupt; that due process be assured in all proceedings; that all institutions operate transparently and accountably, with published decisions and judgments; and that the agency use advocacy.