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Global Forum on Competition

CHALLENGES FACED BY YOUNG COMPETITION AUTHORITIES

Note by the Secretariat

-- Session III --

This paper by the Secretariat is submitted FOR DISCUSSION under session III of the Global Forum on Competition to be held on 19 and 20 February 2009.

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NOTE BY THE SECRETARIAT[1]

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:
  - 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
  - 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.

OECD[11]

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

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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 regulators[20], while a few excelled in this area[21]. 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 the 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.orhttp://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:

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[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 vigourous 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.