STRATEGIC PRIORITIES OF COMPETITION AND REGULATORY AGENCIES IN DEVELOPING COUNTRIES

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I. Introduction

The main objective of competition policy and law is to preserve and promote competition as a means to ensure the efficient allocation of resources in an economy. Competition law, along with the creation of an independent competition enforcement agency constitutes the most critical infrastructure required to achieve a fair market environment. However, the enactment of a competition law does not necessarily translate into an effective competition regime. Competition law is only one element of competition policy. Therefore, it is important for the law to be realistic and capable of being implemented. In particular, developing and transition countries often fall short in implementing such laws for several reasons such as the lack of competition culture, limited resources, lack of qualified staff, excessive bureaucracy, political resistance to reform, overlapping jurisdiction between the competition agencies and sectoral regulators, inadequate jurisprudence, among many others.

The design and implementation of competition law and the mix of policy instruments and enforcement priorities must, however, reflect the institutional endowments and technical capacity of countries at different stages of economic development. When properly designed and enforced, competition law promotes economic growth and benefits consumers both directly, through lower prices, better quality and an improved choice of products, and indirectly, through its impact on economic growth. However, it is not the design alone of policies and laws that benefits consumers through lower prices, better quality and improved choice. The application of resources, review and analysis and most importantly time for institutions to develop and mature are critical factors as well. Likewise, a healthy competition culture is the hallmark of a good competition regime and competition advocacy is a basis pre-requisite for that.

Most developing countries have a relatively short history of competition law. They may

well have an interest in enacting a competition law, but nonetheless require assistance tailored to their specific needs in the adoption of such laws. Another major source of legislation in developing countries responds to external pressures from donor countries and from institutions such as the International Monetary Fund, the World Bank, the World Trade Organisation, etc. Developing countries are confronted with many daunting obstacles in their quest to implement competition legislation. It has become clearly evident that there is a need for capacity building and technical assistance to these countries in order for them to achieve the required degree of enforcement.

Every country has different competition concerns that will determine the nature of competition policy and law to be adopted. Particularly in countries where former state-owned companies retain substantial power in the market, the development of a fair market environment is crucial to economic development. The combination of socio-economic ideologies of the government and the obstacles created by political pressures are important determinants of the adoption and the enforcement of a competition law. Also, it has to be recognised that the adoption of a competition law may encounter resistance from many groups in society. For instance, competition law would limit the ability of an incumbent monopolist to create artificial barriers to the entry or expansion of its rivals.

Often the passing of a competition law has been treated as one of the cornerstones of the liberalisation and pro-market reforms that have swept through many developing countries.1 In the last twenty-five years, the implementation of competition law and policy has become an important tool in the development sector and has to a considerable extent marginalised industry policy, tariff management and other forms of central control.

Competition agencies with limited economic resources and trained people must choose carefully how to use them to their advantage. They need to prioritise their work carefully and at least initially concentrate on cases where entry barriers seem high, where prices seem high and where consumers will benefit most. “Competition authorities must act proactively to bring about government policies that lower barriers to

1 Michael Gal, *Prerequisites for development-oriented competition policy implementation*, (2004) available at http://www.unctad.org/en/docs//ditcclp20041ch1_en.pdf

entry, promote deregulation and trade liberalization and minimize unnecessary government intervention in all markets."2

There is a presumption in some of the existing reports on competition advocacy3 that this activity should be prioritised over the enforcement of competition law in developing countries. Priority should be given to competition advocacy that would challenge government-generated entry barriers and would enhance coherence among public policies. Further, most developing countries lack suitable competition cultures, and it is important for the agencies to begin the process of building one. Competition advocacy initiatives can be taken as to: on the one hand, indicate which concrete cases harm the economy, consumers and government; and on the other hand, assist on the prevention of anticompetitive conducts.

The purpose of this paper is to identify and analyse the strategic priorities of competition and regulatory agencies in developing countries. Ultimately the goal is to provide best practice guidance to competition agencies in developing countries in prioritising the cases to deal with amongst a large number of anticompetitive practices.

The paper is structured as follows: Section II indicates the methods of analysis used for the paper. Section III describes some of the most important factors to be considered by competition agencies in prioritising work and identifying the most damaging practices. This session also identifies the main challenges faced by competition and regulatory agencies and describes the main enforcement priorities from a developing country's perspective. Section IV examines the influence of political-economic and legal considerations in prioritising the work of competition agencies in developing countries. Section V discusses best practices in prioritising; including current literature and analysis of how countries with more developed antitrust laws prioritise cases and what the competition prioritisation framework for competition agencies in developing countries should be. Section VI offers some concluding remarks derived from the survey data analysis.

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2 The World Bank, OECD: A Framework for the Design and Implementation of Competition Law and Policy, Chapter 6, at 93, 1998.

3 *See* International Competition Network (ICN), *Advocacy and Competition Policy*. Report of the Advocacy Working Group (2002). *See also* ICN "*Competition Advocacy In Regulated Sectors: Examples of Success"* in the report of the Capacity Building and Competition Policy Implementation Working Group (2004).

II. Methods of Analysis:

The methods of analysis for the foregoing paper are the following:

1. Competition agencies were surveyed4 regarding the main factors to be considered in prioritising work, allocating resources and identifying the most damaging practices. In the selection process, an attempt was made to get a cross-section of country types that reflect differing political and judicial systems, size of economies and level of rule of law in the society, since all of these factors would impact on the responses encountered.5

2. Legal research and analysis of current literature of how countries with more developed antitrust laws prioritise cases.

III. Factors to be considered by competition agencies in prioritising work and identifying the most damaging practices

Often competition agencies in developing countries find a huge number of anti-competitive practices all around. It is physically impossible to handle all of them simultaneously due to their limited resources and capabilities. Obviously, competition agencies need to ensure that their resources are effectively allocated and casework prioritised. This, however, is not an easy task. They may tend to take up cases, which are more important and harmful to the economy and society. However, these cases may be more difficult to solve and by taking up such cases, the competition authorities may fall short in overall achievements which is so important for moving forward with their agenda.

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4 A questionnaire was sent to competition agencies in thirty (30) countries seeking information about the main factors to be considered in prioritising cases and identifying the most damaging practices. Twenty one (21) agencies responded to the questionnaire and the information supplied in those responses forms the core basis for this paper, along with existing published material, including recent reports published by the Organisation of Economic Cooperation and Development (OECD), the International Competition Network (ICN), and competition agencies' annual reports. Competition agencies in the following countries participated in the survey: Armenia, Argentina, Azerbaijan, Bulgaria, Brazil, Chile, Croatia, Ecuador, El Salvador, Estonia, Georgia, Indonesia, Jamaica, Lithuania, Peru, Poland, Serbia, South Africa, Venezuela, Zambia, and Zimbabwe.

5 The survey questionnaire is annexed as Annex A. A summary chart of the survey responses can be found as Annex B. A response rate to summary and graph is included as Annex C.

"In economies with limited enforcement resources, it may well be advisable to keep the new competition law focused on the behaviour that is, clearly the most harmful to consumers. The amount of resources needed will depend on the size of the economy and the amount of anticompetitive activity. For example, if the economy has a number of long-established cartels, a strong initial enforcement effort may be required to unseat them. Even with a fairly generous budget, a new enforcement agency will need to set priorities for its enforcement goals. A good way to start this process is to focus first on horizontal restraints of trade, especially cases of price fixing and bid rigging. In these cases, large benefits can often be obtained for consumers by breaking up the cartels and introducing competition."6 It is also important to focus on the regulation of combinations such as mergers, acquisitions and takeovers.7 However, mergers and acquisitions are very complex and time consuming.

"In countries with new competition policies, there is often a tendency to focus on complex vertical relationships, perhaps because of complaints about these matters filed by competitors. These cases need to be assessed early to determine the likelihood of competitive harm, and how many resources would be used in the investigations. In this way long, expensive, and complicated investigations with minimal benefits can be avoided."8

Competition agencies cannot investigate every potential meritorious case – there are not adequate resources to do so. Authorities should focus on those cases of anti-competitive behaviour which have caused or which have the greatest potential to cause harm to the local economy. A case screening criteria is needed to ensure those cases that merit the devotion of scarce resources receive careful investigation.

Based on the questionnaire responses received from competition agencies in the surveyed countries9, the main factors to be considered by competition agencies in

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6 David SMITH and Su SUN, *Introducing Competition Policy into Developing Economies: A Summary of Lessons Learned***,** Perspectives, Vol. 2, No. 4, *available at* http://www.oycf.org/Perspectives/10_022801/introducing_competition_policy_i.htm

7 Merger activity in developing countries has been on the increase in recent years. Data on merger activity is available but there has been little systematic attempt to examine cross country differences in the pattern of mergers taking place in developing countries.

8 David SMITH and Su SUN, *Introducing Competition Policy into Developing Economies: A Summary of Lessons Learned***,** Perspectives, Vol. 2, No. 4, *available at* http://www.oycf.org/Perspectives/10_022801/introducing_competition_policy_i.htm

9 For an exhaustive list of the factors to be considered by competition agencies in prioritising cases refer to Annex B

prioritising work are as follows:

1. Likelihood of competitive harm

The economic evaluation of competitive harm generally focuses on the concept of exclusionary market power.10 The exercise of exclusionary market power can significantly harm consumers by disadvantaging competitors, even if it falls short of forcing the excluded firms to exit from the market. It also may involve preventing prices from falling, rather than raising prices above the initial level.

2. Resources needed for the investigation

The amount of resources needed for the investigation is considered a very important factor in prioritising cases. The proper handling of competition cases requires experience and expertise. Many competition agencies in developing countries lack the data, the expertise, the special skills, and the time required to take specific cases. The competition agency needs to assess what resources would be required to achieve the desired outcome. For example, is it likely to be an infringement decision but might be an alternative outcome? This will depend on the type of evidence needed and the complexity of issues still to be resolved.

3. Relevant market

The size and importance of the relevant market constitute important factors in prioritising cases. The relevant market comprises all companies (and their products) within a specific geographical area, which are connected to each other in such a way that they constrain the competitive behaviour of each other.

4. Deterrent value of pursuing

This factor indicates the likely consumer detriment prevented as a result of deterrence. Relevant considerations can be: whether parties are likely to be party to other similar arrangements, whether it is a wider issue affecting other sectors, whether other recent

10 Exclusionary market power is the ability to raise prices above the competitive level or maintain supracompetitive prices by raising the costs of rival firms and thereby causing those competitors to reduce their output.

cases have covered the same issues. This factor also includes the harm that would be reduced/removed as a result of taking action.

5. Other aggravating factors

Aggravating factors can strengthen or weaken the need to take action in a particular case. The blatancy of the infringement, and the duration of the infringement are examples of aggravating factors that should be taken into account.

6. Policy considerations

Another factor which might point in favour of or against taking action in a particular case is policy considerations. This could include the following: new sector, priority sector, need for policy clarity, novel infringement, criminal cartels, whether the sector concern is particularly important for the specific country.

In general, the survey findings, supported by research and analysis indicate that the principal screening factors for competition agencies in developing countries are the following: the resources available for the investigation, the likelihood of consumer harm, the deterrent value of pursuing, and other aggravating factors. In addition, the size of the market was considered an important factor in developing countries with a large market, because the economic impact of even a small price increase or reduction in innovation or service would be very considerable. Moreover, the vast majority of the surveyed countries identified the importance of the case to the economy as an important factor. For instance, in the case of Chile's competition institutions, they are all increasingly basing their policies and decisions on economic principles. Likewise, in Croatia11, greater attention is directed to economic analysis, which makes the economic approach to particular competition issues as important as the legal one.

Likewise, it is important to note that the vast majority of competition agencies in

11In the Republic of Croatia (which is currently an EU candidate country) , the considered decisions often involve very complex and detailed economic surveys which require an adequate number of skilled expert staff and organisational efficiency. In fact, some cases in the area of tobacco industry and distribution of videograms have not been closed due to exceptionally complex investigations, including economic expertise analysis.

developing countries fail to design a clear enforcement strategy in the competition agency annual plan. In Peru, however, the competition authority has identified two main factors for the prioritisation of competition related cases, the first being the study of a market structure which will help analyse cases and foresee the agent's conduct and second, the shaping of legal strategies in order to avoid delays during the investigation of cases. This statement highlights that the ideal setting for the implementation of these factors is through the creation of a prioritisation framework (including guidelines) that would establish the procedures that the competition agency should follow to solve cases.

Precisely, the issuance of nonbinding enforcement guidelines to clarify the overall framework for interpretation of the law and to provide guidance regarding its approach to key issues in competition analysis and procedure was one of the recommendations addressed by the OECD to Chile in its peer review of the country published in two thousand and four (2004).12 Accordingly, in many developed countries these guidelines are currently in existence. For example in the case of the United Kingdom, which will be further analysed in section V of this paper, at the end of 2006, the Office of Fair Trading (OFT) published criteria denominated as "Competition Prioritisation Framework", which clearly indicates the competition agency's continued commitment to a more targeted and transparent approach to competition casework, with the objective of becoming a more efficient entity by being able to concentrate efforts on clear strategic goals13.

While there is consensus on the factors to be considered by competition agencies in prioritising cases, the specific priorities of competition agencies in each developing country vary depending on its underlying regulatory infrastructure, the perception of the role of competition in its political and economic culture, and its resource availability.

1. Challenges faced by competition and regulatory agencies in developing countries

The main challenge for the competition authorities in developing countries is to appropriately allocate their resources in enforcing competition law, in order to focus on

12 OECD, Competition Law and Policy in Chile, A Peer Review, January 2004.
13 Office of Fair Trading, Press release 2006, Newsroom., *available at* www.oft.gov.uk/news/press/2006

the kinds of conduct or transactions by firms, which most seriously obstruct the proper working of the markets.

"It is widely accepted that competition authorities in developed and developing countries alike encounter challenges and obstacles in their effort to promote competition and enforce their various competition laws. While the challenges faced are similar in nature their degrees vary across countries. Some challenges however are unique to small developing countries which have limited resources and pressing social problems which require immediate attention."14 Developing countries pose unique issues for competitiveness and competition law enforcement. For example, their low level of economic development, which is often accompanied by institutional design problems and complex government regulation and bureaucracy, creates real-world challenges that have to be recognised.

An increasing number of developing countries have adopted competition policies at national level as part of a coherent set of policies to create comparative advantage and internationally competitive industries. However, there may be some cases where a country, perhaps reluctantly, introduces competition law under external pressure. "With the changing global landscape, trade barriers being removed and markets becoming more integrated, developing countries find themselves in the situation in which they have no choice but to institute the relevant legislation… The developing world is just not equipped to deal effectively with all the issues of a global market place and all the relevant institutions, which come with them."15

Institutional challenges include various factors that prevent a competition authority from performing its duties in the most effective way like insufficient institutional and budgetary independence; overlapping jurisdiction with other regulators, or unclear division of responsibilities with other regulators; relations between the courts and competition authorities; insufficient investigatory or enforcement powers; and other factors that hamper the effective operations of the authority like insufficient resources or

14 Challenges and Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition. Contribution from the Fair Trading Commission, Jamaica's competition agency, SESSION II – OECD Global Forum on Competition, 2003 available at http://www.jftc.com/news&publications/Speeches/Reports/OECD%20SESSION%20II-8-12-03.pdf

15 Challenges and Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition. Contribution from the Fair Trading Commission, Jamaica's competition agency. SESSION II – OECD Global Forum on Competition, 2003 available at http://www.jftc.com/news&publications/Speeches/Reports/OECD%20SESSION%20II-8-12-03.pdf

difficulties attracting and retaining qualified staff. Competition authorities also face challenges beyond institutional issues, such as in advocacy and communications or, more broadly, from the lack of competition culture.

Likewise, utility regulators face a number of challenges which have been outlined by Smith16. These include: 1) developing and applying the expertise required to address challenging issues in highly complex and increasing dynamic industries. While understanding the technical features of the regulatory industry is clearly essential, the regulator will need to draw expertise in economics, finance, law and engineering to understand the art and science of regulatory decisions; 2) resisting undue pressure or influences from political authorities (political capture), who are often interested in short term gains; 3) resisting undue pressure from regulated firms (regulatory capture) to ensure that the balance between consumer and producers interest is struck in their favour; 4) obtaining information from regulated firms. Well informed decisions also require inputs from a diffuse range of consumers, who individually have limited incentives to provide full or accurate information; and 5) exercising their responsibilities in a way that builds public support for their role and decisions, and thus help to sustain reform.

Furthermore, newly created agencies in developing countries typically face more severe constraints particularly when they are established as part of broader reforms including privatisation. In the face of weak personnel, non existent data on the regulated firm, they may be required to introduce unpopular tariff increases at a time when privatisation remains contentious and consumers have unrealistic expectations about the timing of service improvement.

The regulator's role is likely to be especially important in developing countries that do not have strong antitrust enforcement authorities. Some of the competition problems may be classic market power problems arising from few competitors and slow entry, while others may result from imperfect price and nonprice conditions of access to the network or cross-subsidy problems that the regulator is in the best position to control. However, it is important for the regulatory agency to focus on identifying serious, long-term performance problems, rather than to adopt unrealistic goals for perfect

16 *See* Smith, Warrick. 2000. "Regulating Utilities: Thinking about Location Questions." Discussion Draft. World Bank Summer Workshop on Market Institutions, July, Washington D.C.

competition in the competitive segments, or become a micromanager of the competitive segments.17

In general, the main challenges faced by competition agencies in developing countries are as follows:

1.1. Lack of resources

Free and open competition benefits consumers by ensuring lower prices and new and better products. In many countries, however, the benefits of competition laws and policy have yet to emerge visibly, because enforcement has been hampered by inadequate staffing, lack of resources, and reliable data or sufficient information about production costs, market shares and consumer behaviour.

The resource problem for the vast majority of competition agencies entails a combination of a relatively small staff, lack of requisite technical skills and limited finances. In many countries, the limited number of staff available is a challenge, because it places severe strain on the agency's ability to respond readily to queries and complaints, requests for data, and other appointments. Also, as some agencies concentrate on both consumer protection and competition matters, the volume and nature of the complaints require much more human resources.

Competition agencies need to identify the genuine priorities and plan activities in the context of the available budget and the current number of expert staff employed. The implementation of particular activities may require joint cooperation and interaction with other competent public authorities, including utility regulators which is to be carried out on the basis of coordinated mutual participation in the planning and completion schedules for certain activities.

The majority of competition agencies in developing countries allocate scarce financial and human resources to set up competition law regimes. For example, in Argentina, the National Commission for the Defence of Competition ('CNDC') draws upon resources from the budget of the Ministry of Economy and Production allocated on an annual

17 *See generally* Paul Joskow *Regulatory Priorities for Reforming Infrastructure Sectors in Developing Countries* (1998) *available at* http://www.worldbank.org/html/rad/abcde/joskow.pdf

basis, which excludes budgetary autonomy. The CNDC has a regulatory annual budget of approximately USD 738.525. Likewise, the competition authority of Panama is largely financed by transfer of funds from the central government budget, supplemented by donations and loans from international organisations.

Jamaica's competition authority has a regulatory annual budget of approximately USD 572.000. According to the Fair Trading Commission of Jamaica, an effective competition policy would require a higher budget to support industrial policy, trained staff, and an effective competition law. In other countries such as Zambia, the competition authority only counts on a regulatory budget of USD 100.000 per year. Considering this limited budget, Zambia has to be very careful about following a specific procedure for allocating its resources. According to Zambia's competition authority, "priority is therefore given to activities where there is blatant disregard of the law followed by awareness activities."18

"In general, competition authorities receive the major part of their budgetary resources from the state budget. However, the mechanisms for allocating these resources to the authority may vary from country to country. For instance, a process where the legislator allocates an annual budget to the authority, giving it discretionary power to use it for various purposes, is perceived to grant a high degree of autonomy. On the contrary, mechanisms where the authority depends on detailed decisions by the responsible Ministry for current expenditures would imply a lesser degree of independence."19

Alternatively, additional sources of funding can be considered such as allowing the competition authority to keep fines imposed, to charge fees for notifications or complaints, or to charge fees for other services provided, for instance reports that are published. However, such alternative sources of funding may provide incentives that influence the priorities of the authority in a non-optimal way, like focussing on the number of notified cases rather than on their anti-competitive effects.20

18 Zambia Competition Commission's response to the International Survey on Priorities of Competition Agencies in Developing Countries, August 2006.
19 OECD and the Inter-American Development Bank, *Institutional Challenges in Promoting Competition*, (2004) available at http://www.oecd.org/dataoecd/52/41/32033728.pdf
20 *Id*

The amount of resources available include not only the budget in pecuniary terms and the number of staff but also the skills, training and experience of staff have a major impact on what the authority is able to produce and the quality of its work. Sometimes access to external expertise can – at least partially – compensate for those competencies that are not available among permanent staff.

1.2. Limited Expertise in Competition Analysis

Antitrust experts are critical for a competition authority to properly enforce antitrust law. Therefore, both lawyers and economists should be employed by the enforcement agency. Likewise, the agency needs adequate staff to assist them with their responsibilities, as investigations of competition issues tend to be fact intensive.

A study conducted by the ICN Competition Policy Implementation Working Group21 showed that the lack of skilled personnel means an inability of competition agencies to readily identify offending practices, and to handle complex matters. It also causes delays and sometimes incorrect decisions. For instance, in Bulgaria**,** the analyses of new and emerging markets are a substantive challenge for staff of the Commission for Protection of Competition. Tunisia also faces the problem of a lack of qualified officials in competition law and policy in the early stages of the law enforcement. The Israeli authority (IAA) finds it difficult for professional staff, such as lawyers and economists to stay more than 3-4 years due to the fact that the maximum possible grading can be reached in such a time period.

Developing countries need to improve the system of data collection and reporting on the competition matters e.g. concentration, determination of market power, investment behaviour of the producing firms, and facilitate training in disciplines necessary for the competition policy implementation such as competition law and economics. However, conditions prevailing in most developing countries and uncertainties regarding existing rules make this objective extremely problematic.

21 ICN Competition Policy Implementation Working Group, *Lessons To Be Learnt From The Experiences Of Young Competition Agencies*, Cape Town (3-5 May 2006) available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNSG2ProjectReportFinal.pdf

Recruitment of professional and technical staff is a particular challenge. The competition agency in a small economy will therefore have to grapple with the problems of obtaining affordable and relevant training for its personnel. The vast majority of developing countries do not offer courses and or continuing legal education programmes specific to competition law and its enforcement. The result is that neither the staff nor the majority of commissioners have any formal academic training in these areas.

Technical assistance programmes and partnerships with universities and academics may solve the challenge of training of local professionals. Most agencies such as, Barbados, South Africa, Jamaica, Netherlands, and Tunisia reported on the above mentioned ICN study22 that they have at some time utilised the expertise of foreign competition authorities such as the Australian Consumer and Competition Commission (ACCC), the US Department of Justice, the US Federal Trade Commission, and Norwegian Competition Authority. It is very important for competition agencies in developing countries to learn from the experiences and acquire the know-how of advanced countries as necessary in each stage of law enforcement. For example, the Korea Fair Trade Commission (KFTC) has seconded its staffs to competition authorities and research centres in advanced countries having similar experience. It has also invited foreign experts to draw lessons from their countries' experiences.

Technical assistance can be provided on a bilateral, multilateral or regional basis. There is already a lot of initiative in this area being spearheaded by international organisations such as UNCTAD, OECD, WTO and the World Bank. These international bodies have over the years enhanced technical assistance support and are experienced in organizing and running effective competition seminars and events. For example, the Zambian Competition Authority received technical assistance from UNCTAD, including the provision of material on competition enforcement and competition advocacy, particularly a manual on the formulation and application of competition law, as well as seminars for investigators, judges and practitioners of competition law.

The sharing of experiences and practice in undertaking cooperation is very much needed to improve effective implementation of the competition law in developing countries.

22 *Id*

Technical assistance programmes can take the form of training, short-term consultancies, staff exchange programmes, etc. Also, they can include advice on setting priorities that can emphasise the matters of greatest significance, application of rigorous legal and economic analysis in real life situations, managing the influence of non-antitrust considerations in conducting investigations, etc. In addition, it is essential for the programmes to be carefully developed and tailored to meet the needs of the recipient country. The providers of technical assistance should possess the required experience and sufficient knowledge of the economy, cultural, and legal system of the recipient country.

1.3. Deficient Legislation

The likeness of provisions in competition legislations across the developing world reveal a similarity of source from which the laws have been 'borrowed' from. However, this approach of 'one size fits all' has a tendency of ignoring the nuances peculiar to each jurisdiction. For example, the level of economic development of the recipient country, investment levels in human capital and availability of the infrastructure, and political will of the countries' politicians to implement the competition law and policy. Moreover, where the laws have been changed or modified to presumably cater to these individual quirks – the legislators have done more harm than if they would have let the provisions be as they are. The problems are hence two fold – legislations have been designed which do not adequately deal with all the challenges which a competition authority in a particular country. Moreover, there are numerous instances of confusing terminology and ambiguity of provisions. The rich but confusing terminology and perhaps ambiguity of some clauses in the law makes the job of a competition authority exhausting and time consuming.

Deficient legislation is probably one of the biggest obstacles being faced by competition agencies in developing countries. For instance, the Israel Antitrust Authority (IAA) has found problematic the application of Section 29A of its Competition law which relates to dealing with "Group Concentrations" (similar to "joint dominance" in the EU). Recently, this issue has been of much interest, and the IAA is in the process of studying it and determining the framework for analysis.

Also, Peru faces a number of challenges in implementing its competition legislation which was enacted in the early 1990s. This legislation does not recognise and allow for control over newer anti-competitive practices such as some predatory conducts and potentially anti-competitive mergers.

Likewise, the Bulgarian Commission for Protection of Competition (CPC) had no competency prior to 2003, to use "dawn raids" in its investigations. Further, the CPC did not have legal authority to impose pecuniary sanctions during the period 1991-1997, which was a serious problem. However, recent amendments have now rectified these deficiencies.

The Jamaican Fair Competition Act (FCA) allows its commissioners to investigate and hear matters in a quasi-judicial capacity. However, the Courts have ruled that such a structure of the Commission lends itself to a breach of the principles of natural justice. This ruling has limited the agency's ability to bring cases before the courts and hence its ability to affectively enforce competition law. Further, the only statue that recognises the Competition Authority is the Telecommunications Act of 2000. This ensures that there remains an inconsistent and jurisdictional doubts as to the application of competition law vis-à-vis other enactments.

In India, the operation of the Competition Act, 2002 was stayed by the Supreme Court because of the method of appointment of the members of the proposed Competition Commission of India (CCI). For nearly four years, the Indian government has been unable to bring into force the substantive provisions of the Competition Act passed by Parliament in December 2002. The implementation of the Act, and the appointment of the chairman and all but one of the ten members of the proposed Competition Commission of India (CCI), was stalled by a writ petition in the Indian Supreme Court which contended that the constitutional doctrine of separation of powers required that the CCI be headed by a judge chosen by the judiciary and not a bureaucrat chosen by the executive. "Moreover, the envisaged Competition Fund could not be set up due to non-availability of appropriate rules for the same. As a result, the financial procedures/activities of the Commission are routed through normal ministerial channels in contravention of the financial autonomy envisaged under the Competition Act."23

23 See generally, http://www.indlaw.com/publicdata/articles/article206.pdf

Nevertheless, with an amendment bill tabled in the Parliament, it is expected that the new law and the CCI would soon become fully operational.24

Apart from these specific examples, developing countries often overlook important practical issues while drafting legislation. These include the following:25

− Competition laws typically provide that the competition agency may compel production of necessary documents by businesses. They do not always provide clear guidance as to what the agency may do when its request for documents is rebuffed.

− While many laws provide for fines of a determinate amount as a sanction in such cases, as a practical matter companies may choose to simply pay the fine as a cost of doing business.

− Some competition laws provide that the terms of all members of a multi-member body expire at the same time. This can lead to a loss of institutional continuity if all members are replaced simultaneously.

− Agencies' relationship with the judiciary is sometimes poorly considered. In some cases, the judiciary is given a role in all cases but lacks adequate training and experience or lacks the capacity to decide cases based on likely future market effects as opposed to past conduct. In other cases, the agency is empowered to decide cases but lacks effective power to impose remedies and sanctions. It can be difficult to strike an appropriate balance between bringing agency expertise to bear, imposing effective remedies, and ensuring fairness through independent review.

− Some laws can be interpreted to mean that the agency is required to address every complaint, no matter how ill-founded. This can lead agencies to waste time on cases that should never have been opened or, worse, to be used by weak competitors who wish to use the competition agency as a club against more efficient competitors.

− Some laws contain deadlines for action that may not be realistic in actual experience. If a competition agency is forced to reach a decision before it can conduct an adequate investigation, the result may be ill-informed; conversely, overgenerous deadlines may result in unneeded delay to business.

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24 The Companies Bill and the Competition Bill will be introduced in Parliament in the second half of the Budget Session according to the Company Affairs Minister Prem Chand Gupta.

25 See generally, *The United States experience in competition law technical assistance: A ten year perspective* (2002) *available at* http://www.oecd.org/dataoecd/37/61/1833990.pdf

− Institutional demands created by legislative command may not be adequately appreciated. A merger notification program with unreasonably low reporting thresholds may result in a new competition agency being overwhelmed with notifications and having no time to analyse them, let alone address the potentially more serious cartels or abuses of dominance.

1.4. Absence of a Competition Culture

Competition culture refers to the awareness of the general public, including the business community, politicians and civil servants about competition law and the benefits of competition. In some countries, however, understanding of competition policy among the governments and people seems to be insufficient. The creation of competition culture involves a process of public education to facilitate the acceptance of competition policy principles as a central element of national economic policy, both politically and within the national business community26.

A competition authority in a developing country therefore faces a major challenge of justifying its relevance to the business community and general public in their every day economic lives. In Argentina, for example, a competition culture has been slowly developing with a small but growing competition legal community27. Additionally to the legal community mentioned, the Argentinean academic community recognises the discipline of competition policy, however, the majority of the public does not participate in this competition culture.

Competition authorities set up under the relevant legislation in Kenya,28 have not been very busy, because the system is "seen as slow and uncertain". When complaints are made, they are often settled through some sort of agreement among the parties. Such settlements can be efficient ways to end illegal conduct, but they may sometimes resolve matters in ways that serve the interests of the parties rather than those of the

26 WTO Annual Report for 1997, Special Study on Trade and Competition Policy.
27 More than 400 members maintain a website blog group called "Foro Competencia", a forum where opinions concerning various issues related to competition can be exchanged. *See www.groups.yahoo.com/group/ForoCompetencia.*
28 See OECD, *Challenges faced by competition authorities in achieving greater economic development through the promotion of competition*, (2004) *available at* http://www.oecd.org/dataoecd/35/5/26001096.pdf

public. It may not come as a surprise to those familiar with the intelligence of the average parliamentarian in a developing country that some members of Kenya's Parliament thought that the law should be applied to curtail the economic predominance of a certain group of Kenyans in relation to another group that was deemed to be indigenous. 29

These examples clearly highlight how the competition culture has not yet taken root in the country, with both the law makers and the public remaining unaware of the benefits of a competitive economy, and misunderstanding the role of the competition authority.

Similarly, in Indonesia, some proponents of competition law apparently thought that it should be to reduce the power of a minority, not merely to end market abuses.30 Likewise, in China, the lack of competition culture can be seen in the over-intervention of the government in the working of the markets, despite in paper adhering to principles of free competition.

Not surprisingly, competition agencies in developing countries sometimes have special training needs that grow out of their countries' historical lack of competition culture. And since most developing countries lack suitable competition cultures, it is important for competition agencies to begin the process of building one.31 Building a competition culture is of the essence. Sufficient awareness of competition principles has to be created and maintained among other government agencies, academia, business, and the general public.

1.5. Lack of co-operation with other local regulators and the issue of jurisdiction

The relationship of the competition authority with other regulatory agencies and the issue of jurisdiction must be addressed. Competition agencies in developing countries should meet other regulators in order to ensure clarity with respect to jurisdiction and to develop opportunities to share information on responsibilities, procedures, and policy.

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29 *Id*
30 *Id.*
31 *See* John W Clark, *Competition Advocacy: Challenges for Developing Countries*, OECD Second Annual Meeting of the Latin American Forum, June 14-15 2004, available at http://www.iadb.org/res/publications/pubfiles/pubS-208.pdf

Further cooperation and interaction with other relevant competition authorities and sector- specific regulators, particularly by putting formal arrangements (joint working groups) in place for liaising with the regulators concerned, with the purpose to promote competition in such markets should be encouraged.

On the one hand, competition agencies promote and protect competition and economic efficiency, preventing abuses of market power, dominance, exclusionary practices and non-competitive agreements among competitors. On the other hand, regulatory agencies are in charge of supervising natural monopolies in public services and sectors characterized by distortions and externalities in production or consumption, and they rely mainly on price, quantity and access to the market regulations.

One of the most serious problems in the relationship between the competition agency and other regulators is a reticence to apply the instruments of competition policy for the benefit of the market. For instance, the case when the regulator ensures that it is the only authority competent to oversee the issues related to the regulated sector, including competition, even when this may not be a priority of the sectoral regulator.

There are also problems associated with confusing jurisdiction between competition authorities and industry specific regulator. "The boundaries between the roles of the sectoral regulators and the competition authority are difficult to define and in many countries the issue remains unresolved."32 For instance, in Argentina there is no jurisdictional overlap, but practical experience shows that it is sometimes unclear whether a problem, such as a complaint on a possible anti-competitive practice, falls under the jurisdiction of the competition law or the regulatory framework of a specific sector. Likewise, in South Africa, there is no jurisdictional overlap but rather insufficient jurisdiction because industry specific regulators have their jurisdiction carved out of the national competition. This clearly illustrates the case where the Government is unwilling to leave regulation to the competent regulatory bodies. In Panama, for example, the competence of the competition authority to investigate restrictive practices in any economic sector is clearly defined by law. However, also sectoral legislation may include rules on competition, although in a more vague and

32 Pradeep S. Mehta, *Competition Policy in Developing Countries,* Bulletin on Asia Pacific Perspectives, 2002-03, *available at* http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf

superficial manner. When sectoral regulators apply competition rules contained in special legislation, the competition authority may supplement such decisions by enforcing competition law.

Also, in many developing countries, Governments still have a large share in utility sectors and state enterprises are sometimes exempted from the competition law. In such cases, there is a high likelihood of abuse of dominant position by state enterprises. Another important issue is the capture of utility sectors by politicians and the capture of sector regulators by industries.

The above mentioned examples show that in some countries there are overlapping powers, and in others the regulated sectors are exempted from the competition authority's power to apply competition rules. In order to avoid conflict between competition law enforcement and the application of sectoral regulation, more developed countries have adopted detailed rules on competences, procedures and priorities, and others have arranged for close consultation and co-operation between the respective institutions. In other countries there is a situation of more or less open conflict between authorities and regulatory frameworks. For example, in Tunisia, there is inconsistency between competition policy and the other sectoral regulations. Laws and regulations that apply to some sectors (i.e. insurance, health) allow some practices that are incompatible with competition principles.

Competition authorities and regulatory agencies need to be aware of the strategic dimensions of their oversight role. They must protect the competition laws and regulations from being abused by setting the right priorities in enforcement.

Competition authorities and regulatory agencies can co-exist under various conditions, depending on their jurisdiction and mandate. Competition issues in a regulated sector may pose certain dilemmas, the outcome of which depends on how the allocation of jurisdiction in these matters is understood and the effectiveness of the agencies involved. Jurisdictional conflict over which authority should regulate which area often, leads to tedious and expensive litigation over purely procedural matters, thus preventing regulators from engaging in substantive issues. Moreover, friction may exist regarding

the prioritisation of objectives and the methods used by regulatory authorities and competition authorities.

Establishing the proper relationship between the competition agency and regulators is a significant and ongoing challenged in most countries. The issue has been discussed and debated in international fora but no single solution has emerged. Different jurisdictions have different approaches and even within a single jurisdiction the approach to the relationship can vary.

In sum, there should be a clear definition of the jurisdiction boundary between competition and regulatory agencies. Additionally, competition and regulation agencies should interact in order to reduce institutional conflicts between them. In light of this, both competition and regulatory agencies need to work hard for establishing an institutional framework that guarantees the adequate scope of regulation, sound institutional credibility, independence, policy consistency and coordination among competition and regulatory bodies. Lastly, developing countries should examine more closely the international experiences of regulation and competition in developing its own specific strategies. As in many developed countries, there should be a national consensus to keep the issues of regulation and competition out of the political agenda, which is still not happening in the vast majority of developing countries.

1.6. Lack of independence

An important issue regarding the implementation of competition law is the position of the body entrusted with this implementation task. The independence of competition authorities must be understood as the probability of implementing policies without the interference of political agents or of agents of the private sector. Independence can be interpreted at least in legal, political and economic as well as in factual terms. A sufficient degree of independence is sometimes put forward as a key ingredient to allow authorities to enforce competition policy in a satisfactory manner.
An important advantage of an independent competition authority is that the application and enforcement of competition rules are not influenced by political and volatile considerations.

Competition agencies should have sufficient independence to ensure objective application and enforcement of competition laws and also to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents. Agencies should also seek to avoid any perception that their enforcement activities are motivated by considerations other than those in the relevant legislation. The idea is that the application and enforcement of competition law should not be influenced by political and volatile considerations.

"A limited amount of evidence suggests that certain competition authorities may lack the influence or independence necessary to be effective advocates for reform. The reasons for this are to be found in the policy environment within which these competition authorities exist. Access to media may be restricted, or the media itself may not have the independent outreach expected of it. Civil society groups may be restrained and the judiciary may be cowed by the legislature. These variables have a negative effect upon the ability of competition authorities to properly conduct their competition advocacy role."33

In the case of Jamaica, the country's Fair Trading Commission believes that independence is critical to the effectiveness of the competition agency and is therefore a factor that should be addressed when creating the competition authority in the country.34 While many developing countries such as Venezuela, Mexico, Poland and South Africa share a general consensus with some developed countries35 that competition agencies should be organizationally independent in some way, others simply depend on the larger government ministries which they are a part of, as an executive branch of government36.

Independence of competition authorities is considered to be beneficial for the regulatory agencies as a necessary attribute to ensure that the regulatory role will be carried out effectively37. A study carried out by the International Competition Network ('ICN')38,

33 Simon Evenett, *Designing and Implementing Economic Reforms in Developing Countries : What role for competition advocacy*, (2005) available at http://www.evenett.com/working/Deliverable5.pdf
34 Fair Trading Commission of Jamaica's response to the International Survey on Priorities of Competition Agencies in Developing Countries, August 2006.
35 Competition agencies in the United States, Australia, Canada, Germany and Japan.
36 OECD, Global Forum on Competition, "Challenges and Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition", 5 February 2004.
37 GTZ: Infrastructure Regulation – An introduction to fundamental concepts and key issues. GTZ

noted that 70% of the competition authorities reported that both the competition authority and the regulatory agency interact in order to implement competition law in regulated sectors and that 43% of these interact with a precise definition of responsibilities and without function overlapping. The report concludes that the existence of independent regulators is important for the advocacy work.

Accordingly, one of the benefits of having independent competition agencies is that there is less risk for those regulators of being linked to a specific group or political party, and therefore they can act independently and not be subject to political and economic pressures. In this way, independence of competition authorities stimulates efficiency in a country's economy by ensuring better openings in international economic markets39.

Creating an independent agency is not an easy task in any setting and it is even more challenging in countries with a limited tradition of independent public institutions and limited regulatory experience and capacity.

2. Priorities for developing countries in implementing competition laws

Competition agencies in developing countries should give priority to advocacy over enforcement activities. One of the arguments is that in those countries many state assets are privatized which gives rise to an intensive rule making process in which competition advocacy has an important role to play. A second reason is that most of these countries have recently undergone a substantial trade and investment liberalization which has triggered the emergence of interest groups lobbying with public authorities for the reinstallation of lost privileges. Lastly, it is argued that competition law enforcement requires a sophisticated adjudication of cases for which recently installed competition agencies and a judicial system with little experience in that field are poorly equipped.40

working paper, 2003.
38 ICN – Competition Policy Implementation Working Group, "Competition Advocacy in Regulated Sectors", May 2005.
39 OECD. Regulatory Policies in OECD Countries: From intervention to regulatory governance. 2002.
40 *See generally* International Competition Network (ICN), *Advocacy and Competition Policy*. Report of the Advocacy Working Group (2002).

Advocacy and enforcement support each other in a remarkable way. Enforcement becomes more effective as knowledge of competition law and policy disseminates as a result of the advocacy programs; meanwhile advocacy is facilitated as successful enforcement activities generate solid and consistent results that give prestige and prominence to competition agencies. Enforcement is strengthened by an active advocacy, and advocacy is less effective in the absence of enforcement powers or when enforcement lacks credibility.

Likewise, competition agencies should be careful to ensure that the conduct in question is clearly anti-competitive, especially in high technology industries which are undergoing rapid transition. Similarly, competition authorities must be certain that enforcement action is necessary to protect consumers. This is crucial because the cost of interfering too quickly and perhaps too aggressively can inhibit innovation and future competitive growth. Competition law enforcement must try to find the right balance on a case by case basis, as the facts of each case will necessarily differ.

The following arguments have been identified regarding what the appropriate priorities for developing countries should be in implementing competition laws41.

2.1 The establishment of legal institutions before enacting competition law.

For those developing countries that are currently in the process of enacting a competition law, it would be advisable to establish the national institutions whose characteristic will have an implication for the effectiveness of competition law enforcement. However, this solution can be too late for those countries that have already enacted a competition law.

In order for competition policy to be effective, a country needs strong and predictable legal institutions, well-established property rights, flexible capital markets, and many other government and private institutions necessary to sustaining a robust market economy.

41 Simon J. Evenett, "Links Between Development and Competition Law in Developing Countries" commissioned by the United Kingdom's Department for International Development, 28 October 2003.

It is important for those developing countries that are currently in the process of enacting a competition law to establish an independent competition agency, with real autonomy from political authorities, before enacting its competition law. Also, it is important to consider the organisation of the authority, investigation, decision making, effective remedies and sanctions, education and advocacy, staffing and funding issues. For instance, internal operating procedures, agency structure, and internal guidelines can have a significant impact on the quality of an agency's work. Additionally, institutional issues include matters such as who holds the power to initiate investigations and to make decisions, who within the agency will have the power to compel testimony and require documents, etc.

Competition agencies come in a wide variety of forms and functions. For example, they vary in terms of their administrative, political and financial independence: some are stand-alone agencies, others are integrated into a department of government, and yet again others may feature quasi-judicial characteristics. For those developing countries that already have established the competition agency, collegiate decision-making is the predominant structure.42

A country implementing a competition policy needs an enforcement agency with properly trained employees and adequate resources to enforce its new statute. It is also essential for the agency to be politically independent, and operate transparently to avoid charges of corruption. If the competition authority is seen as being incapable of discharging its role then people may lose faith in the effectiveness of competition law as a whole. The competition authority should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously.

When establishing a new competition policy it is generally best not to rely on existing courts for enforcement. The current judges will typically not have the experience or expertise needed to deal with the legal and economic issues raised in these proceedings. Ideally, the new adjudicating body would consist of a panel of experts who specialize in competitive matters. Both lawyers and economists should sit on this panel. They should

42 The collegiate structure is generally empowered to investigate and adjudicate anticompetitive practices (e.g. quasijudicial).

be adequately compensated, operate in open sessions to the extent practical, and write opinions that can be publicly evaluated to ensure transparency.

Also, in developing countries, as infrastructure sectors are privatised and restructured to promote competition in potentially competitive segments, the creation of supporting regulatory institutions is a necessary component of the reform program. These regulatory institutions should be created as an integral component of the entire reform program, not as an afterthought. These institutions must be part of an economic environment for each infrastructure sector that can protect consumers from exploitation resulting from the exercise of market power, promote efficient supply behaviour by firms providing residual monopoly services subject to public regulation, and facilitate competition in the competitive segments.43

Regulatory agencies may do best by starting to work with simple regulatory rules and procedures and refining them as they gain more information and experience. In the end, there is a delicate balance that must be struck between elaborating a complete regulatory framework at the outset, and allowing regulatory rules and procedures to evolve in response to the development and performance of the sectors subject to regulation and growth in the experience and capabilities of the regulators.44

2.2 Advocacy in Promotion of Awareness of Competition Policy in Developing Countries

In countries where competition policies have not been in force, another especially important task of new enforcement agencies is educating the public. To educate the general public, the enforcement agency should have a broad policy of spreading information on its activities and goals. The agency can be more helpful to consumers if they understand what the agency can do for them, and how they can file complaints with the agency. Therefore, it is instrumental for competition authorities in developing countries to engage in competition advocacy.

According to a report prepared by the ICN's Advocacy Working Group45, competition advocacy "refers to those activities conducted by a competition authority related to the

43 *See generally* Paul Joskow *Regulatory Priorities for Reforming Infrastructure Sectors in Developing Countries* (1998) *available at* http://www.worldbank.org/html/rad/abcde/joskow.pdf
44 *Id*
45 International Competition Network , "*Advocacy and Competition Policy*": Report Prepared by the

promotion of a competitive economic environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."

However, competition advocacy can be a difficult task in developing countries. For example, market institutions in developing countries are much weaker than in the developed economies. Also the transparency of procedures and the accountability of public authorities is usually lower in developing countries. This has important consequences for both enforcement and advocacy but complicates advocacy work in a particular way. Additionally, in developing countries there is a lot of privatisation of state-owned enterprises going on which gives rise to an intense rulemaking process.46

"As the ICN 2002 Advocacy Study explained, the rationale for prioritising competition advocacy over competition law enforcement is threefold. First, in developing and transition countries, the spread of market reform has given rise to an intensive rule making process. Dialogue between the competition authority and other rule makers at an early stage may ensure that competition provides the foundation for legislation. Second, liberalisation has also heightened the activity of interest groups as they lobby for lost privileges. Competition authorities are considered to be less prone to regulatory capture by interest groups than, for example, sector-specific regulators and through advocacy competition authorities can in still competitive values in sector-specific regulation, reducing the possibility of regulatory capture. Third, law enforcement requires sophisticated adjudication of competition cases which young competition authorities and judicial systems often find challenging." 47

Fifty-three competition authorities from fifty jurisdictions responded to a survey instrument prepared by the ICN of the competition advocacy activities of its member competition authorities that contained forty-four questions48. The main findings of this

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Advocacy Working Group" (2002) *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf

46 *Id*

47 ICN 2002 Advocacy Study at iii-iv. See also William Kovacic (1997), "Getting Started: Creating New Competition Policy Institutions in Transition Economies", 23 Brooklyn J. of Int. Law 403: 441-442.

48 Of those countries (both developed and developing) that could identify the proportion of their resources spent on advocacy, most (62%) spent less than 20% on that activity. The remainder spent between 20% and 30%. There are good reasons for this apparent disparity, however. Agencies, especially in developing countries, lack the technical expertise necessary for meaningful participation in many

survey were (1) a clear majority of survey respondents felt that competition advocacy had an important role in addressing state-imposed or state-condoned constraints on competition, (2) "autonomy" of the competition authority was "generally considered" to be a determinant of effective competition advocacy, especially as that autonomy relates to the appointment, renewal, and dismissal of senior officials of the competition authority and to the process by which the authority's budget is set, (3) participation, especially at an early stage, by the competition authority in legislative and regulatory decision-making is "the most important component of competition advocacy," (4) transparency enhances the effectiveness of competition advocacy by building public support, as does the perception of the credibility and public neutrality of the competition authority, (5) developing and industrialized countries differ in their public-facing communication strategies with the latter using more targeted approaches and publicizing and undertaking special studies and the former employing the mass media, (6) additional resources would allow competition authorities to undertake more effective competition advocacy and authorities in developing countries said they needed more expertise about regulated sectors, and (7) clear objectives should be set for international cooperation and technical assistance on competition advocacy.

In order to establish a foundation for competition advocacy, developing countries must focus on three prerequisites: independence, resources, and credibility. Competition advocacy generally includes the following activities: performing reviews of existing and proposed laws; outreach activities to educate the public; informing judges and legislators about competition policy-related matters; and undertaking studies of actual or potential state measures that may influence market outcomes.

In Poland, the Office of Competition and Consumer Protection conducted a nationwide billboard campaign under the slogan “Nie daj sie oskubac” (“Don’t let them rip you off”), which was aimed to inform the public about the possibility of seeking free of charge legal advice from local (municipal or district) consumer ombudsmen. Also, in 2005 Polish public television broadcast the second edition of the “Konsument ("Consumer") programme, accompanied by radio broadcasts and articles in Polish press.

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proceedings.

Competition agencies in more developed countries have identified several ways for the agency to reach out to business. For example, in Australia, the Australian Competition and Consumer Commission (ACCC) has a great wealth of experience with business outreach. Newsletters, publications, guidelines, compliance toolkits and humour are other ways the ACCC educates small business. Likewise, the Korea Fair Trade Commission has devoted resources to stakeholder outreach by encouraging compliance though the publication of a manual and reports.

For relatively new competition regimes, it is particularly important for the agency to publicise enforcement work. It will certainly take a number of fines and cases before the business community starts to understand the effect of the law.

2.3 Focus on cartel enforcement first

Cartel conduct is the most harmful of all types of anticompetitive conduct, and many competition experts, including the OECD's Competition Committee, consider anti-cartel enforcement to be the most important function of a competition agency. Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct. The strengthening of anti-cartel enforcement should be a priority for competition agencies in developing countries because hard core cartels raise prices, restrict supply, reduce innovation, and can lead to artificially concentrated markets, waste, and inefficiency.

Although not all anti-competitive behaviour which is subject to antitrust laws involve illegal cartels, the following types of business anti-competitive practices activities are generally prohibited but are most commonly found in developing countries: 1) price fixing49, 2) output restrictions which can involve agreements on production volumes, sales volumes, or percentages of market growth, 3) market allocation50, and 4) bid-rigging conspiracy where competitors agree to restrict or eliminate competition for some piece of defined business, whether it is a sale, a contract, or a project.

49 Any agreement among competitors to raise, fix, or otherwise maintain the price for a product or service.
50 Agreements in which competitors divide markets among themselves – competing firms allocate specific customers or types of customers, products or territories.

Hard core cartels are a global phenomenon which affects a range of important products used and consumed globally, in developed and developing countries alike. However, the fight against cartels is a demanding task as cartel cases are notoriously difficult to prove. In fact, competition agencies generally need to undertake great efforts to detect concealed cartels, have extraordinary powers and skills to collect sufficient evidence to mount a viable case against sometimes uncooperative defendants, and work to a particularly high standard of procedure and proof.

A report published by the ICN51 offers three 'building blocks' which are the bedrock of any solid anti-cartel regime, namely: a clear understanding – and prohibition – of conduct that constitutes a cartel; an institution well-equipped to detect, investigate and sometimes prosecute cartels; an effective sanctioning regime. Strong sanctions both provide a deterrent to future unlawful conduct and create an incentive for cartel operators to co-operate with the prosecutor in order to reduce or eliminate the sanctions.

Another way of enhancing cartel enforcement is to improve detection with use of tools such as leniency or amnesty programme.52 In most cases, investigations only start after competition authorities are given a hint by "whistleblowers". In this connection, leniency programmes, can help gather information on hardcore cartels in return for leniency relating to fines or personal sanctions for the provider of information.

The introduction of clear and predictable leniency programmes to encourage whistle-blowing among cartel participants, thus facilitating the detection of such cartels and leading to successful investigations could usefully be considered in developing countries. "The programmes uncover conspiracies that would otherwise go undetected, can destabilise existing cartels and can act as a deterrent effect to entering into cartel arrangements…The evidence can be obtained more quickly, and at lower direct cost,

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51 *See* International Competition Network (ICN) Cartels Working Group "Building Blocks for Effective Anti-Cartel Regimes" 2005 available at http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf

52 In the increasingly sophisticated world of global competition law enforcement, having an effective leniency policy is becoming the norm. The European Commission has an established policy and procedure for cartel "whistleblowers", guaranteeing reduced or even no fines, in return for providing information on a cartel. Similar policies have either been established or are being developed in the member states. At present, 19 member states operate leniency programmes. Outside the EU, Australia, Brazil, Canada, Japan, New Zealand, Norway, Switzerland, South Korea, and the Unites States have leniency programmes in place.

compared to other methods of investigation, leading to prompt and efficient resolution of cases."53

For example, one of the most relevant changes in competition and cartel enforcement in Brazil was the introduction of a leniency programme under which individuals and corporations, if they co-operate in a case, are excused from some or all of the civil penalties for unlawful conduct under the competition law and protected from criminal prosecution under Brazil's economic crimes law.54 A leniency programme has been introduced in the Brazilian Law since 2000, but it was only until 2003 that the Secretariat of Economic Law (SDE) effectively started to enforce anti-cartel activities and, as a consequence, companies and individuals started to take notice to the possibility of benefiting from leniency agreements. Accordingly, the number of cartel investigations and of leniency applications has been increasing55 and, more important, the improvement in the quality of investigation techniques is providing the authorities with better and more accurate evidences.

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53 *See generally*, ICN *Good Practices related to leniency policy, available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf

54 Article 35-B authorizes the Secretariat of Economic Law of the Ministry of Justice (SDE), the body responsible for the investigation of antitrust cases in Brazil, to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or all of the penalties for unlawful conduct under Law 8884 (The Brazilian Competition Law). The leniency provision is supplemented by Article 35-C, which provides that successful fulfillment of a leniency agreement will also protect cooperating parties from criminal prosecution under Brazil's economic crimes law (Law 8137/90). The leniency agreement may be executed if all of the following conditions are met: (1) the company or individual is the first to report with respect to the anti-competitive practice under investigation; (2) the company or individual ceases all involvement in the anti-competitive practice as of the date on which the agreement is proposed; (3) SDE does not already possess sufficient evidence to convict the company or the individual at the time the agreement is proposed; and (4) the company or individual confesses to having participated in the unlawful practice and effectively cooperates with the government's investigations (Art. 35-B, §2). Leniency is not available to the companies or individuals that instigated the illegal conduct (Art. 35-B, §1). The degree of leniency accorded to a cooperating party depends on whether SDE was previously aware of the illegal conduct at issue. If SDE was unaware, the party is entitled to freedom from any penalty in the ensuing the Council for Economic Defense (CADE, the "administrative tribunal" responsible for judging all competition matters) proceeding. If SDE was previously aware, CADE is authorized to reduce the applicable penalty by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement (Art. 35-B, §4). In the latter instance, the penalty imposed cannot in any event be more severe than the mildest penalty imposed on any of the other participants in the illegal conduct (Art. 35-B, §5). A leniency agreement shelters the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requisite obligations (Art. 35-B, §6). A separate implementation issue has arisen in cases where a party approaches SDE for a leniency agreement but is found to be ineligible (e.g. when it is not the first party in the matter to offer cooperation). In such circumstances, the statute expressly provides that the party's proffer shall be kept confidential by SDE and will not be treated as an admission that the party engaged in the conduct at issue or that the conduct is unlawful (Art. 35-B, §10).

55 The SDE has received 10 leniency applications to date.

However, in Brazil one can argue the efficiency of the leniency programmes as prosecutors, where the alleged cartel takes effect, can currently challenge the SDE's ability to grant criminal immunity in a matter that can only be dealt with by the public prosecutor. This is a Constitutional matter which has never been taken to Court and will certainly take some time until a decision reaches the highest Courts. The current practice in Brazil is that the SDE obtains the signatures of public prosecutors in his leniency agreements, but this does not solve the problem.

In South Africa, the Competition Commission has implemented a Corporate Leniency Policy (CLP), first notified in Media Release No. 3 of 2004 on 29 January 2004.56 The policy provides incentive for firms participating in a cartel to come forward and disclose information on cartel conduct in return for immunity from prosecution.57 According to the policy, only the first cartel member to apply to the Commission and who provides full, frank and useful information regarding the cartel's activities, would qualify for immunity. If the firm is already under investigation by the Commission, it is unlikely that immunity will be granted. But, if late-coming members of the cartel still wish to come clean on their involvement in the cartel to which the first whistleblower had already confessed, the Commission may be persuaded to explore other leniency options outside the policy, such as a consent order with a reduced fine. Cooperation with the authorities is a mitigating factor in the imposition of a penalty.58

Reports reveal that the use of the CLP has been successful. One of the biggest breakthroughs made by the Commission in the South African Airways (SAA) case; where the Commission uncovered evidence of a cartel being operated by five domestic passenger airlines, including SAA; involved the first successful use of its corporate leniency policy.59

In January 2006, the Japanese Fair Trade Commission (JFTC) amended the Japanese Anti-monopoly Act to introduce a leniency programme for companies that admit to

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56http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202004/Jan/Med%20Rel%2003%20of%2029%20Jan%202004.asp
57 http://www.compcom.co.za/resources/Government%20Gazette_111.doc
58 http://www.globalcompetitionreview.com/ear/south_africa.cfm. *See also* - http://www.practicallaw.com/4-205-5183
59http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202005/MR07_2005.doc

anticompetitive behaviour. On May 31, 2006, the JFTC reported that it received twenty-six leniency applications between January 4, 2006 and March 31, 2006, evidencing the early success of Japan's new leniency program. On May 23, 2006, the JFTC again demonstrated its determination to use criminal process in cartel enforcement when it filed criminal accusations with the Prosecutor General against eleven companies for bid-rigging in connection with municipal disposal facility construction projects.

In general, the most efficient tools to gather evidence are the use of leniency programmes, on-site searches and raids, and taking of witness statements. In addition, some jurisdictions, such as the United Kingdom, Canada, and Japan prosecute cartel infringements as a criminal offence which means that specific procedures are required, which generally differ from the procedures applicable to other infringements of the competition law.
In the absence of leniency programmes, the introduction of criminal penalties for cartel matters, and the disqualification of corporate directors for competition law infringements60 are also important steps in eliminating this anti-competitive activity.

It is also important for competition agencies to raise public and business awareness on the harm of cartels and send a clear message that cartel is a serious offence and will result in severe penalties. An additional way of achieving deterrence can be to publish the sanctioning decision, since the harm done to the good name of a company might act as a very strong deterrent.

Putting a sound leniency program in place should be a high priority. Experience elsewhere has shown that leniency tools are invaluable to penetrate clandestine cartels. Substantial sanctions against cartels are closely related to leniency, which does not work unless the benefit of avoiding punishment is great enough.

IV. Political, economic and judicial considerations in prioritising the work of competition agencies in developing countries

60 Article 204 of the Enterprise Act 2002 in the United Kingdom provides for disqualification of company directors for competition law infringements.

It is important for the competition agency to be neutral or non-political so that the value of competition would be maintained and promoted. If the competition authority were influenced by politics too much, the goal of competition would be possible to be sacrificed to other values like employment or short-term economic booming. Therefore, the effects of politics on the implementation of competition law cannot be simply ignored.

Quite commonly competition agencies come under political and even media attack as they impinge on the market power of monopolists and oligopolists as well as price fixes. Due to constant interference by government, the decisions by competition agencies are sometimes influenced by political expediencies and not sound competition principles.

Also, a comprehensive competition regime requires an appropriate judicial system which can efficiently and effectively deal with the cases relating to the application of competition rules. The judiciary plays an important role in the institutional apparatus of antitrust enforcement. In most countries decisions by the competition agency are subject to judicial review and in some cases the judiciary has the initial decision making power.

A serious problem with the judiciary in most of developing countries is the low level of expertise of judges in antitrust issues. Competition adjudication requires a well-equipped judiciary. According to an article published by the Inter-American Developing Bank and the OECD61, a problem that many competition agencies in the Latin American region seem to face is that the court system is often slow, sometimes resistant to competition law enforcement, and corrupt. Also, regulation, bureaucracy and transparency factors impinge on the competition agency's ability to operate62.

The effectiveness of a competition agency requires the assurance that its procedures and actions are transparent, that due process is provided in its law enforcement activities, and that its officials protect the confidentiality of business information and are governed by ethical standards.

Currently developing countries tend not to have the capacity to use competition policy

61 Inter-American Developing Bank and the OECD, *Fighting Hard Core Cartels in Latin America and the Caribbean* (2005) *available at* http://www.iadb.org/europe/LACF2005/pdf/IssuesPaper-session1.pdf
62 Fair Trading Commission of Jamaica and the Commission on Protection of Competition of Bulgaria responses to the International Survey on Priorities of Competition Agencies in Developing Countries, August 2006.

in an effective manner. One of the reasons could reside in the fact showed by research where developing countries tend to have a higher degree of state-owned monopolies, which provide basic services to the country's population, especially in regards to public utilities such as in telecommunications, energy power, electricity and also in the transportation sector, for example in railways.63

In light of transparency, competition agencies in developing countries should explain to the public in general what its main priorities are, how it investigates and makes decisions, and the reasoning behind its enforcement and policy decisions.64

Additionally, more joint networking between the competition authority and the central government is heavily needed by many developing countries' competition agencies in order for the general public and political sector to have a better understanding and acceptance of the agencies' activities regarding competition policy. Nonetheless, this joint networking should be limited in the sense that it should never affect the independence of the competition agency.

1. What practices are the most damaging from developing countries perspective?

Based on the survey responses received, the majority of countries shared the same perspective on the list of the most damaging practices from a developing country perspective.65 The general consensus was that cartel agreements (price fixing, market sharing, bid rigging) and abuse of dominant position were considered as the most damaging practices in developing countries. Also, it was a fairly general consensus that the most damaging practices identified above are the most harmful to consumers. Additionally, amongst the most harmful practices to competitors, the following practices were identified: exclusive agreements, unjustified refusals to buy or sale products or services, and price abusive practices.

For example, in the case of the Government of Ecuador's experience, the most harmful

63 *See* OECD, *Competition Advocacy in Developing Countries*, *available at* http://www.oecd.org/dataoecd/52/42/32033710.pdf
64 W. Kovacic, Getting Started Creating New Competition Policy Institutions in Transition Economies, 1997.
65 A comprehensive survey chart containing the responses on this issue is available in Annex B.

anticompetitive behaviours are price fixing and market sharing66. For Jamaica's Fair Trading Commission67, the most damaging practices in order of importance are collusion, predatory behaviour, discrimination, misleading advertisement, and vertical restraint.

According to the Zambia's Competition Commission, horizontal mergers and acquisitions, cartels, abuse of dominant position of market power, unfair trade practices and discrimination in terms and conditions of supply and price are the most damaging anti-competitive practices. In Zimbabwe, the most damaging practices include the following: misleading advertising of consumer products, price fixing, bid rigging, predatory fixing and, conditional trading.

Similarly to the above, Venezuela's Competition Commission "Procompetencia" identifies as the most damaging the following practices: cartels, abuse of dominant position, collective recommendations, boycotts and unfair competition.

In the Republic of Serbia, the country's competition authority identified as the most damaging anti competitive practices the following, in order of importance: i) establishment of sales or purchase prices; ii) market sharing; iii) application of unequal conditions; iv) restriction of production, market and technical developments and, v) imposing of additional commitments (e.g. tying). The agency also identifies the following types of behaviour as the most harmful to competitors: 1. market sharing; 2. restriction of production; 3. application of unequal business conditions; 4. imposing of additional commitments and, 5. imposing of unfair purchase and sales prices.

In Bulgaria, for example, Bulgaria's Commission on Protection of Competition considers the following as the most damaging anti-competitive practices: i) cartel agreements such as price fixing, market sharing, sales quotas and bid-rigging; ii) unilateral abusive practices such as price abusive conducts, refusals to deal, tying and establishing discriminatory conditions; iii) public restraints to competition; iv) unfair competition practices and, v) vertical restraints to competition. Additionally the agency

66 Government of Ecuador's response to the International Survey on Priorities of Competition Agencies in Developing Countries, August 2006.
67 According to the international survey on priorities of competition answered in August 2006 by the Fair Trading Commission of Jamaica.

has also identified68 the following as the most harmful types of behaviour to consumers: 1. imposing of unfair process; 2. restriction of production or market; 3. imposing of additional commitments; 4. restriction to accessing particular markets, goods and services and 5. application of unequal business conditions.

In relation to the types of behaviour, which are most harmful to both consumers, and competitors Zimbabwe's competition authority agrees that predatory pricing, market sharing and bid-rigging are common to both. Whereas, the presence of exclusive agreements and refusal to deal are harmful types of behaviour which affect only competitors. For Azerbaijan, cartels and market sharing are considered the most harmful behaviours to consumers.

With regard to the specific types of behaviour that harm consumers, Bulgaria's competition authority indicates as anti-competitive practices: price fixing, market sharing, and excessive pricing, limiting production and trade and the limitation found on consumer's choice of products. The above-mentioned anti-competitive practices differ to the types of behaviour most harmful to competitors in Bulgaria which are: market foreclosure, price abusive practices (e.g. predatory pricing and price squeezing), refusals to deal, tying and bid-rigging).

Cartels in developing countries may be more damaging, given the absence of a competitive fringe to affect its decisions at the margin. Market foreclosure may be more pronounced in transition economies, given the small number of firms on the market. The lack of vigorous competition and fragile macro-economic conditions in some developing countries may be further affected by unfettered monopoly power in the private sector, lack of control of state aid, and discriminatory treatment by state monopolies of a commercial character.

Which ever the form of anticompetitive practice found, the conclusion seems to be the same for the prevention of these practices in all developing countries, and that is the need for strong and efficient competition laws working side by side with a proactive competition agency to help enforce these laws. In sum, for developing countries the

68 According to the international survey on priorities of competition answered in August 2006 by the Commission for the Protection of Competition of the Republic of Serbia.

existence of guidelines or a framework identifying the factors or criteria for a competition agency to use for prioritising work would prove to be very beneficial as it would allow the competition authority to focus primarily on the most important issues that affect the country's market as a whole.

2. Which cases are easier to solve?

The vast majority of competition agencies in the surveyed countries agreed that the easiest cases to solve are those where the relevant evidence is easy obtainable by the country's competition agency.

According to Jamaica's Fair Trading Commission, the easiest cases to solve are those related to unfair trade, specifically regarding "misleading advertising" (due to the fact that relevant evidence is easily obtainable), cases of discrimination, non-hardcore horizontal restraint, predatory pricing, and finally hardcore cartel activity follow subsequently. Other Latin American countries agree with the above mentioned Caribbean island by stating that the easiest cases to solve are directly linked to the easiness of the gathering of evidence, which in turn is what helps the competition authority to investigate the facts involved in each case. For Peru, for example, the easiest types of cases to solve are the cartels, which are illegal per se, being their main objective is to restrict production and as a consequence, the restriction of competition. Next, Indecopi, Peru's competition authority considers unjustified refusal to buy or sell products with direct evidence of such practice are the second easiest competition cases to solve in the country. Likewise, Venezuela admits unfair competition cases are the easiest to solve because again, fact finding can be obtained directly and efficiently. Therefore, for the latter South American country, the reason why cartel cases prove to be the most difficult to solve seems obvious, due to the difficulty in obtaining fact finding elements in cartel related cases.

In Africa, according to Zambia's competition authority, the easiest cases to solve are: exclusive dealings, horizontal mergers and acquisitions, vertical mergers and acquisitions, deceptive conducts and misrepresentation, and abuse of dominant position of market power. In contrast, predatory behaviour cases and transfer prices are considered to be the most difficult cases to solve considering the difficulty in having to

authenticate costs and prices, as well as time and resource management. In the case of Zimbabwe, for this country's competition authority the difficulty of solving a case depends on the amount of information provided much more than on the depth of the analysis. In order of importance mergers, prohibited practices such as price fixing, conditional trading, bid-rigging and exploitative practices such as excessive pricing are considered to be the easiest cases to solve, as opposed to exploitative practices, such as price fixing, predatory pricing, conditional trading and unfair business practices (the latter, which are per se prohibited), are considered the most difficult cases to solve.

Due to broad practice and less influence on the markets, Bulgaria's Commission on Protection of Competition establishes unfair competition cases as the easiest to solve, in contrast to cartel agreements and price abusive practices which are the most difficult to solve due to the secrecy involved and the difficulties in obtaining proof. 69

As in the case of some African70, Caribbean and Latin American developing countries, Serbia considers that the level of difficulty in solving a competition case depends largely on the evidence submitted. In this sense, the Serbian competition authority has stated that: "the easiest cases to solve are those where, along with the request for initiation of procedure, the party involves submits to the competition authority sufficient evidence and facts on the grounds of which it is possible, relatively quickly, to assess and establish the level of potential distortion of competition71". And on the other hand, Serbia's competition authority considers that the most difficult cases to solve are those where the commission does not have at its disposal all the relevant facts for decision making and when fact findings requests for longer periods, or additional communication with competitors, consumers or institutions.

In conclusion, for the majority of developing countries, the easiest competition cases to solve are those where the facts and law are usually self evident and easily obtainable by the country's competition authority.

V. Best practices in prioritising; including current literature and analysis of

69 According to the international survey on priorities of competition answered in August 2006 by the Commission on Protection of Competition of Bulgaria.
70 As is the case of Zimbabwe.
71 According to the international survey on priorities of competition answered in August 2006 by the Commission for the Protection of Competition of the Republic of Serbia.

how countries with more developed antitrust laws prioritise cases and what the competition prioritisation framework for competition agencies in developing countries should be

There is substantial experimentation around the world in competition law and implementation, priorities, independence, and competition advocacy. There is plenty of scope for cross-country learning.

Currently over one hundred nations have enacted antitrust laws in the last twenty years, mostly based on the United States and European Union models. Models of competition policy developed in wealthy nations have deeply influenced the adoption of competition policy reforms in developing countries.

Many nations implement competition laws, through their competition authorities, which is a government agency, typically a statutory authority, that regulates competition laws, and may sometimes also regulate consumer protection laws. Normally there is a general agreement on acceptable standards of behaviour. The degree to which countries enforce their competition policy does vary substantially, with the United States generally regarded as having the most strict competition laws and enforcement.

The main goal of competition authorities in developed countries is consumer's welfare and making sure that business communities survive and thrive in an internationally competitive environment, thus ensuring economic growth.

"Cartels are anathema to competition principles and therefore detecting and prosecuting firms involved in cartels are the priority of competition agencies around the world."72 Cartel enforcement is widely recognised among jurisdictions that have competition laws as the most egregious form of anti-competitive behaviour 73. It is a top priority of

72 "Cartels are a particularly damaging form of anti-competitive behaviour – taking action against them is one of the OFT's priorities." Office of Fair Trading website. "Cartels are generally recognized as the most serious form of anti-competitive behaviour. For this reason the Authority has identified the pursuit of cartels as its top priority." Irish Competition Authority, Cartel Watch, Guidelines on Cartels: Detection and Remedies. "Fighting cartels is one of the ACCC's highest priorities." Australian Competition and Consumer Commission website. "Because of the harm that cartel violations cause, the Justice Department's number one antitrust priority is criminal prosecution of those activities." United States Department of Justice, Antitrust Division, Antitrust Enforcement and the Consumer.
73 *See* International Competition Network, Cartel Working Group, 2006 available at http://www.internationalcompetitionnetwork.org/cartels/ManualIntro-2006.pdf stating "In 2004, in clear

competition authorities throughout the world to eradicate these illegal agreements, which reduce consumer welfare and weaken economies and businesses insulated from the disciplines of a competitive market.

Cartels can be found in any industry. Some industries, however, are more prone to cartelization than others because of their structure. In particular, industries which possess the following characteristics are generally more susceptible to cartels:74 high degree of concentration – few competitors, homogenous products – products having similar characteristics, similar cost structures, significant barriers to entry, and effective communication channels among competitors – e.g. Trade Associations.

Eliminating cartels is part of global economic governance and benefits consumers. Breaking up a cartel is the most easily understood achievement of a competition agency. Therefore, no competition agency can do its job unless it has the tools and the ability to successfully investigate and sanction cartels.

The fight against cartels is the key priority for the European Commission for Competition Policy75 before unlawful public funding, abuse of dominance and mergers. In antitrust enforcement, the EC gave the highest priority to detecting dismantling and sanctioning cartels and as proof, in 2005; the Commission adopted five decisions against cartels totalling 683.029 million Euros. For the EC cartels can significantly increase the input cost for business considering they artificially raise the price of goods and services, reduce supply and hamper innovation76.

In Spain, for example, cartel arrangements involving price fixing, bid rigging or market allocation are per se illegal and rarely benefit from an exemption. The Competition Defence Act in Spain establishes a de minimums rule, applicable to certain anti-competitive conducts. Under this rule, Spanish antitrust authorities may decide not to

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recognition of the priority that competition agencies around the world have placed on enforcement against hard - core cartels, the ICN established the Cartel Working Group".

74 *See* Fair Trading Commission, *Why Should We be Concerned With Cartels?* 14 July 2006, available at http://www.jftc.com/news&publications/Publications/ftc_pdf/Concerns_With_Cartels__July_2006____A_Grant.pdf

75 Neelie Kroes, EC Antitrust rules: An overview of recent developments, October 5, 2006.

76 European Commission, Report on Competition Policy 2006, June 2006.

prosecute prohibited practices that, given their minor importance, are not capable of having an appreciable effect on competition77.

Spanish competition courts have imposed significant fines on offenders of cartels, especially price-fixing and market-sharing cartels. For the level fixation of the fine, the courts take into account the following factors:

- The nature and scope of the restriction of competition;
- The dimension of the market affected;
- The market share of the relevant companies;
- The effect of the restriction on competitors or potential competitors, consumers and users;
- The duration of the restriction of competition, and
- The repetition of the performance of the prohibited conduct.

The main and most effective tools in an agency's arsenal to fight cartels are dawn raid capability, leniency programs and significant fines, usually a percentage of revenue. Competition agencies in developing countries should propose adequate solutions to this problem taking into account the practice and judicial mechanisms applicable in the comparable jurisdictions.

Leniency programmes represent a key development in competition law and enforcement. Over the past year, leniency programmes have enabled competition authorities to detect more cartel activity and thus to step up their relentless fight against cartels. This instance has proved to be vital in the investigation and combat of cartels even by the European Commission, which acknowledges that no cartel case would have been successfully solved without the cooperation of the undertakings concerned with the antitrust authorities. The European Commission has recently adopted the new Commission Leniency Notice which sets out precise evidentiary threshold requirements for immunity and facilitates coordinated immunity applications to the Commission and competition enforcement agencies in other jurisdictions.

77 Edurne Navarro and Segio Baches, Uria Mendez, from Mondaq, "Cartel Regulation 2006, Spain", 10 October 2006. See www.mondaq.com .

Additionally, convergence efforts with regard to leniency programmes and safeguarding information exchanged in connection with leniency programmes are well under way, and are already producing positive results in the form of new and revised leniency programmes, but still much needs to be accomplished.78

When countries lack the sanctions and other powers needed for leniency programmes and/or the power to conduct dawn raids, one approach some OECD countries have used is to focus on visible conduct that may facilitate or manifest cartels rather than to devote substantial resources to trying to uncover and prosecute secret, truly hard core cartels. For example, an authority can monitor trade associations' information exchange programs to see whether they are anticompetitive in and of themselves or even a means of preventing cartel members from cheating on the cartel. In addition, a competition authority without powerful anti-cartel investigation tools can focus on agreements among competitors to observe uniform hours of business, refrain from advertising, or otherwise eliminate a potentially significant form of competition.

Examples of competition prioritisation frameworks for competition agencies in developed countries:

- **United Kingdom**

With regard to enforcement priorities, in the case of the United Kingdom, the competition authority recently published criteria for the handling of competition casework.79 The OFT framework for the prioritisation of competition decisions, includes a list of non-exhaustive factors which aim to make the OFT a more efficient agency by concentrating their efforts on clear strategic goals. Consequently, the OFT is seeking to focus its resources on matters that have the greatest public interest. The competition prioritisation framework is based on the following criteria: 1. Considering if the OFT is the best place where the problem can be handled. This is the initial step taken by the recently created "Preliminary Investigations Unit", where if it is

78 The European Competition Network (ECN) has recently introduced a Model Leniency Programme to further enhance the detection and punishment of cross-border cartels. The heads of the competition authorities of the 25 EU Member States and the European Commission have given a commitment to align their respective leniency policies to minimum standards set out in the Model Leniency Programme. This will make it easier for companies to report cross-border cartel conduct by bringing about a greater harmonisation of leniency policies across the EU.
79 Office of Fair Trading, Competition prioritisation framework, October 2006.

determined that the OFT is not the best to handle the problem, there won't be a need to apply further prioritisation criteria; 2. Estimate of direct consumer benefit that would arise from intervention; 3. The likely consumer detriment effect arising from the anticompetitive behaviour; 4. Resources required to achieve the desired outcome; 5. Nature and seriousness of the alleged infringement; 6. Aggravating or mitigating factors; 7.The precedent or policy value of the case and; 8.Likelihood of success.

- **The Netherlands**

Likewise, with regard to enforcement priorities, the Netherlands Competition Authority ('NMa') identifies the following issues:

1. Enforcement against anticompetitive practices: It is important to begin a pro-active enforcement strategy right from the beginning in order to ensure that investigating cases and issuing fines when necessary are the best ways of guaranteeing the build-up of the required expertise and becoming a respected competition authority.
2. Communication issues: Communicate to and with the business community.
3. Allocate an authority's limited resources wisely: Which include setting priorities and choosing efficient instruments.
4. Provide constant and high standard training for its staff
5. Fight abuse of dominance and monopolisation
6. Review of mergers

The NMa have established a "Priority Policy¨ in order to explain their decision to reject certain cases, motivating the rejection of such decisions to the criteria used to choose certain priorities. This policy consists of published criteria, which concerns: 1) the economic importance of a case; 2) the interests of consumers; 3) the severity of the infringement and, 4) the expediency and efficiency of the competition authority's action.

Another reason the NMa has for not dealing with every single question and complaint is that they argue that companies are ultimately responsible for their own behaviour. In this sense, the answers to many competition questions can be found in case-law or in decision practice of the authority and in the jurisprudence of the Courts.

Through the Kingma case80, the Court approved the "Priority Policy" for the Netherlands. Kingma is the first judgement concerning the NMa´s policy of prioritising cases where the Court acknowledged the power of the NMa to prioritise cases, which means that the NMa is not obliged to investigate every complaint that is filed based on the above-mentioned four criteria.

In later judgements, the District Court of Rotterdam recognised the possibility of prioritising a case when there's a more appropriate authority that can handle the complaint or when the complaint has already started a civil procedure regarding the same infringement. A guiding principle followed by the Netherlands Competition Authority is that these priority policies must clearly contribute to an economic effect.

- **United States**

In the United States, the priorities include educating the public about the value of competition, competition advocacy and law enforcement actions.81 For the United States Department of Justice, the main priorities are the following82:

1. Cartel violations: Criminal cartel prosecution is the United States top priority and is considered the worst antitrust offence. For the Antitrust Division effective criminal penalties are a vital part of antitrust enforcement and also amnesty plus in the leniency programmes has proven to be very successful in uncovering cartels in the US.
2. Merger review or enforcement
3. Monopolisation issues

- **Japan**

According to the Fair Trade Commission of Japan83 the top enforcement priorities are:

80 OECD, Annual Report, 2004.
81 American Antitrust Institute, Report, 2003.
82 Department of Justice, Antitrust Enforcement Priorities: A year in review.
83 Fair Trade Commission of Japan, Grand Design for Competition Policy. Available at: www.jftc.go.jp

1. Hard-core cartels / International cartels: Bid-rigging in particular constitutes a violation of both the Anti-Monopoly Law as well as Public Law, but is rampant nationwide in construction and engineering works.
2. Actions against anti-competitive and abusive exercise of intellectual property rights: This includes elimination of anti-competitive activities in the IT sector.
3. Mergers: Improvement of merger review is required in view of increasing M&As.

While steps have been taken to strengthen the competition authority in Japan, the 2004 study made by the OECD84 showed that the Fair Trade Commission of Japan devoted less attention to mergers than enforcers in other jurisdictions. "In practice, if the Japanese Fair Trade Commission advises that it has concerns, the parties either correct the problem or abandon their plans" for a merger.85

- **Germany**

The priorities of the German competition authority are the following:

1. Cartels: The Special Unit for Combating Cartels within the Bundeskartellamt prepares, carries out and analyses the results of search operations as part of cartel proceedings. The most significant cartel proceeding took place in 2003, where administrative fines amounting to a total of 702 million Euro were imposed on the 12 accused cement manufacturers as well as the persons responsible who had been involved in quota and territorial agreements over several decades.
2. Abuse of dominant position
3. Mergers: Approximately 1400 decisions in merger control proceeding per year are taking place.86

In addition to the above, in 2004 and 2005 the Bundeskartellamt initiated proceedings against several gas providers on suspicion of their charging abusively excessive prices to end customers.

84 OECD, A review of Japan, 2004.
85 Deirdre Shanahan, Counsel for the Asia Pacific Bureau of Competition, Fair Trade Commission, "The Development of Antitrust in China, Korea and Japan", June 2005.
86 The Bundeskartellamt in Bonn, "Organization, Activities and History", May 2005,

- **Korea**

The introduction of competition laws to Korea was made when it was still a developing country, and for the past 25 years, after a lot of trials and errors, it has firmly established competition laws with a great success. For this achievement, Korea has been a good example to developing & transition countries that try to find ways to effectively adopt competition laws and strengthen their capacity to enforce such laws and policies. The priorities of the Korea Fair Trade Commission are as follows:

1- Cartel enforcement
2- Mergers
3- Abuse of dominant position

What the competition prioritisation framework for competition agencies in developing countries should be:

Competition agencies should focus on those cases of anti-competitive behaviour which have caused or which have the greatest potential to cause harm to the local economy. The main focus should be on cases that could bring the greatest economic effect and public awareness to the country. In most developing countries, the interests of consumers are poorly represented and are much weaker than those of producers. In light of this, organising and promoting consumers' rights creates a potent force for ensuring the promotion of competition.

Additionally, it is essential for the agencies to educate the public about the value of competition, competition advocacy and enforcement actions. The agency should communicate to and with the business community though the media. Likewise technical assistance programmes may solve the challenge of the lack of expertise and limited enforcement experience.

Case screening criteria are needed to ensure those cases that merit the devotion of scarce resources receive careful investigation. The framework below provides guidance to competition agencies in developing countries for prioritisation decisions. The list of factors is illustrative and not exhaustive.

1- Design a clear enforcement strategy from the beginning in the competition agency annual plan. This would include the selection of priority sectors as well as policy objectives and priorities.
2- Consider whether the agency is the best place where the problem can be handled.
3- Estimate the direct consumer benefit that would arise from intervention in any particular case.
4- Assess the deterrent effect to indicate the likely consumer detriment prevented as a result of deterrence and the economic importance of the specific case.
5- Assess what resources would be required to achieve desired outcome. This includes the type of evidence required and the complexity of the issues to be resolved.
6- Consider the dimension of the market affected including the market share of the relevant companies. The size of the market is obviously a key factor where the market is large, because the economic impact of even a small price increase or reduction in innovation or service would be very considerable.
7- Seriousness of the conduct: This refers to the nature and seriousness of the alleged infringement (for example, allegations of price fixing or market sharing will generally be given priority). A corporate leniency policy can contribute to the successful investigation and prosecution of cartels. It would also be important to consider whether national, international, or major regional participants are involved in the matter.
8- Consider the aggravating factors which may strengthen or weaken the need to take action in any particular case (blatancy and severity of the infringement)
9- The precedent or policy value of the case.
10- Consider the likelihood of success (will the case lead to the desired outcome?)

VI. Conclusions:

It is critical that developing countries identify priorities with which competition law will deal. Competition policy in a specific developing country should reflect the level of economic development of the country concerned, the structure of its economy and its constitution and culture. The ultimate consideration must be that a competition law, however structured, must not only contribute, but be seen to be contributing to the lives of the people in the country applying it. It should be tailored-made for each specific country and not copied from a developed to a developing country as a whole. Also,

competition law should be part of complete package of measures and not stand alone on its own, in order to allow competitive markets.

"Competition is not an end itself but a means to safe guard and defend freedom and promote prosperity"87. Competition policy and law can benefit all countries, regardless of their size and level of development, but the law must be appropriate to their needs. This is why competition authorities in developing countries need to prioritise their work carefully.

It has been widely recognised that there is no 'one fits all' approach to competition law design and application. It is therefore, not possible to advise on the best design. What is important though is that the competition law must meet the needs of the country concerned. That is, it must accommodate its industrial policy, developmental policies and other policies designed to improve the economic and social welfare of broader society. For developing countries, the ability of competition law to accommodate these various interests will give the competition authority legitimacy with both the executive and society.

The general feeling among competition agencies in developing countries is that these countries should prioritise their work to cases that could bring the greatest economic effect and public awareness to the country. Therefore, there is still currently a sense that the role of the competition authorities is still not well understood and hence acceptance is required by the general public and in the political arena.

Even though most developing countries have a relatively short history of competition law, in benefit of its economy it is essential for the competition agencies to engage in competition advocacy. Competition agencies in developing countries should be relatively more active in competition advocacy than their counterparts in developed countries.88 Effective competition law enforcement, including bringing cases of

87 Dr.Ulf Boge, President of the Bundeskartellamt, Organization, Activities and History, May 2005.
88 John W Clark, *Competition Advocacy: Challenges for Developing Countries*, OECD Second Annual Meeting of the Latin American Forum, June 14-15 2004, has stated "…competition agencies in developing countries may lack the foundation for doing so – they may not yet have acquired the independence, the resources and the credibility necessary for effective advocacy. The agency must simply exercise good judgment in selecting and pursuing its advocacy projects. It must seek out matters that are economically important, politically visible, that will not occupy too many resources and in which the agency has a reasonable chance of success. It must give ongoing attention to building a competition

demonstrable benefit to consumers, is the most effective means of developing a national competition culture.

The design and implementation of competition law and the mix of policy instruments and enforcement priorities must reflect the institutional endowments and technical capacity of countries at different stages of economic development. In economies with limited enforcement resources, it may well be advisable to keep the new competition law focused on the behaviour that is, clearly the most harmful to consumers. The consumers are at the heart of competition law enforcement. For example, if the economy has a number of long-established cartels, a strong initial enforcement effort may be required to unseat them. It may also be advisable to focus first on horizontal restraints of trade, especially cases of price fixing and bid rigging.

The main challenge for the competition authorities in developing countries is to appropriately allocate their resources in enforcing competition law, in order to focus on the kinds of conduct or transactions by firms, which most seriously obstruct the proper working of the markets. Developing countries pose unique issues for competitiveness and competition law enforcement. For example, their low level of economic development, complex government regulation and bureaucracy, creates real challenges that have to be recognised. These challenges may vary depending on the level of development of the given country or the country's drive to establish market oriented reforms.

Additionally, institutional challenges include various factors that prevent a competition authority from performing its duties in the most effective way such as insufficient institutional and budgetary independence; overlapping jurisdiction with other regulators, or unclear division of responsibilities with other regulators; relations between the courts and competition authorities; insufficient investigatory or enforcement powers; etc.

Developing countries can learn and benefit from the experience of the developed nations. For instance, when countries with successful experiences in operating competition law share their experiences and know-how, the efforts will become much

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culture through aggressive public relations and dissemination of information. And importantly, it must not neglect its law enforcement responsibilities. It must exercise the same care and expend at least the same amount of energy in finding and prosecuting violations of the law as it does in its advocacy efforts."

easier. The same holds true for designing the framework of competition policy that is suitable for each country's specific economic situation. In this context, technical assistance is important not only for capacity building of countries that have competition laws in place, but also for developing countries that are yet to introduce competition laws.

The vast majority of developing countries have a long way to go before competition policy can function properly and the competition culture can take hold in each economy. In this regard, cooperation between competition agencies in different countries is becoming increasingly important in the globalisation process, and can be an important source of knowledge exchange and skills development.

ANNEX A: SURVEY FORM

OBJECTIVE:

To undertake an enquiry into the enforcement priorities of competition agencies through a qualitative survey of the factors to be considered in prioritising work, allocating resources and identifying the most damaging practices. The findings of this qualitative survey will be published in a paper that could be made available to interested agencies and countries.

GENERAL INSTRUCTIONS:

Please provide as thoroughly as possible, answers to the questions below. The information can be submitted by e-mail, fax or post, or any other arrangements that may be more convenient to you.

QUESTIONS:

I. Prioritisation of Work Factors:

1) What are the 5 key factors the competition authority considers when prioritising work? Please list in order of importance, 1 being the most important and 5 the least.

1. _____
2. _____
3. _____
4. _____
5. _____

2) What sectors in your country give rise to conditions of 'natural monopoly'? (e.g. gas, electricity, telecoms, banking, etc)

1. _____
2. _____
3. _____
4. _____
5. _____

3) What are the basic requirements for effective competition policy to exist?

1. _____
2. _____
3. _____
4. _____
5. _____

II. Influence of Political-Economy Considerations and Resource Availability:

4) What is the competition authority's regulatory budget?

_____
_____
_____

5) Is there a specific procedure used by the competition authority for allocating resources?

☐ Yes

Which one:_____

☐ No

6) Approximately how long does it take for the competition authority to investigate and bring a case to trial?

_____

7) Does regulation/bureaucracy/transparency impinge on the competition authority's ability to operate?

☐ Yes

☐ No

III. Damaging practices:

8) What are the most damaging practices? List 5 in order of importance, 1 being the most important and 5 the least.

1. _____
2. _____
3. _____
4. _____
5. _____

9) What types of behaviour are more harmful to consumers? (e.g. price fixing, bid-rigging, market sharing and primary boycotts) Please list 5 in order of importance, 1 being the most important and 5 the least.

1. _____
2. _____
3. _____
4. _____
5. _____

10) What types of behaviour are more harmful to competitors? Please list 5 in order of importance, 1 being the most important and 5 the least.

1. _____
2. _____
3. _____
4. _____
5. _____

11) Which are the easiest cases to solve?

1. _____
2. _____
3. _____
4. _____
5. _____

Why:

_____

12) Which are the most difficult cases to solve?

1. _____
2. _____
3. _____
4. _____
5. _____

Why:_____

13) Does the competition authority have the ability to enforce competition policy?

- ☐ Yes
- ☐ No

14) How many Government-owned entities are there? (please select one)

- ☐ More than 20
- ☐ 10-20
- ☐ Less than 10

15) Is the underlying regulatory infrastructure for competition policy in the country sufficient?

☐ Yes

☐ No, please explain:_____

_____

16) Do you have any other comments that you feel could be helpful in our efforts to determine the factors that play a key role in establishing the strategic priorities of competition authorities in developing countries?

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ANNEX B: SUMMARY CHART OF SURVEY

Summary chart of survey addressed to Competition and Regulatory Agencies in developing countries

I. Prioritisation of Work Factors:

*** COUNTRY (Competition and Regulatory Agency)**	1) What are the 5 key factors the competition authority considers when prioritising work? Please list in order of importance, 1 being the most important and 5 the least.	2) What sectors in the country give rise to conditions of ´natural monopoly¨? (e.g. gas, electricity, telecoms, banking, etc.)	3) What are the basic requirements for effective competition policy/legislation to exist?
AFRICA:			
1) South Africa	1. Promote economic efficiency and development 2. Provide consumers with competitive prices and product choices 3. Promote employment 4. Expand opportunities for participation in world markets 5. Increase ownership of previously disadvantaged persons.	1. Liquid fuels pipelines 2. Electricity 3. Telecoms	1. Political commitment 2. Strong institutions adequately resourced 3. Independence 4. Good understanding of competition law regime

2) Zambia	1. Whether there is a blatant disregard of the law. 2. Potential for deterrent or educative effect. 3. Significance of detriment to consumer welfare or general public. 4. Availability of human and financial resources. 5. Public policy.	1. Petroleum 2. Electricity 3. Railways 4. In land harbour 5. Telecommunications – landline and international gateway	1. Enabling legislation/ Existence of a competitive culture 2. Independence/Autonomy of competition authority 3. Competent technical staff 4. Adequate financial resources 5. Political support
3) Zimbabwe	1. Extend of damage of the practice (e.g. deceptive products) 2. Statutory requirements (e.g. merger examination period) 3. Cost to the affected parties (e.g. merging entities) 4. Benefits to economy at large 5. Resources required 6.	1. Electricity 2. Telecoms 3. Railways 4. Air transport 5. Coal exploitation	No answer

ASIA:			
4) Azerbaijan	1. Relevant market 2. De-concentration of market 3. Healthy competition	No answer	No answer

5) Indonesia	1. Maintain public order 2. Improve efficiency 3. Improve people's welfare 4. create an atmosphere of fair competition 5. Inhibit monopolistic practices 6. Inhibit unfair business competition Effectiveness and efficiency in all business segments. Business conduct is defined as that which harms competition through prohibited agreements, prohibited conduct, unfair business practices and abuse of dominant position.	1. Sugar cane – The government appointed agency monitors imported sugar distribution. 2. Telecommunications 3. Crude carriers	The Indonesian Competition Law regulates fair business practices and prohibits monopolistic practices and unfair business competition.
EUROPE:			
6) Armenia	1. Political stability 2. Price fixing 3. Market 4. Competitive environment	No answer	No answer
	1. The general impact of the	1. Gas	1. Competition legislation

7) Bulgaria	restrictive/unfair/practice 2. The effect for consumers 3. The nature of infringement 4. The market concerned/ size, importance, etc 5. Promoting competition in the newly liberalised markets	2. Electricity 3. Water supply 4. Harbour services 5. Telecommunications and postal services	2. Institutional capacity/ independence, competences, powers, budget resources 3. Human capacity/ trained, experienced and well-paid staff 4. Pro active enforcement / ex officio cases, advocacy 5. Awareness of the competition rules by the government authorities, business community, consumers
8) Croatia	Prioritising work and planning are two very important factors for the Croatian Competition Agency, taking into account the limited budgetary resources and the lack of staff that is engaged in a rather wide scope of responsibilities of the Agency as laid down by the relevant legislative framework. The Agency prioritises its actions towards cases which were initiated back in 2004 or earlier, and that still have not been closed.	1. Telecommunications 2. Energy 3. Transport	A comprehensive competition regime in Croatia requires highly educated and trained staff and adequate resources for the Agency. At the same time, it is also necessary to have an appropriate judicial system which can efficiently, within its scope, deal with the cases relating to the application of competition rules.

9) Estonia	1. Complaints 2. Changes of market structure 3. Public information about infringements 4. Regulator's conclusions 5. Cases of other competition authorities	No answer	No answer
10) Georgia	1. Analyses of legal documents 2. Market 3. Exposure and suppression of facts of discrimination 4. Suppression of administrative barriers 5.Impediments for competition development	No answer	No answer
11) Lithuania	1. Market position 2. Cartel agreement 3. Government support 4. Stability of relevant market 5. Anti competitive clause	No answer	No answer
12) Poland	The Protection of weaker market participants which includes actions aimed at elimination of illegal abusive clauses from legal use	Energy sector	No answer
	1. Market position of	1. Energy	1. Effective and operational

13) Serbia	undertakings 2. Assessment of effects on competition 3. Effects of conduct and acts on consumers-buyers 4. Stability of relevant market 5. Assessment of potential changes in the market	2. Gas 3. Electricity 4. Telecommunications fixed – although formally demonopolised 5. Railways	authority for competition protection 2. Its independency and autonomy 3. Maximum trained expert staff 4. Continual engagement in the field of development of competition awareness and advocacy 5. Observance of competition rules in the Law by market participants
LATIN AMERICA AND THE CARIBBEAN:			
14) Argentina	In order to be illegal, anticompetitive practices have to be able to: 1. Generate damage to the general economic interest 2. Implies a lessening of competition or an abuse of dominance 3. Inefficient in the sense that it generates a reduction in the general economic interest 4. Affect the market as a whole	1. Media 2. Telecommunications	There is no per se rule in Argentina. It must be shown that all violations have the requisite harm to the "general economic interest".

	and not only the distribution of given surplus between buyers and sellers		
***15) Brazil**			
16) Chile	1. Economic efficiency: Chile's competition institutions, like most of their foreign counterparts, are increasing basing their policies and decisions on economic principles. 2. Consumer welfare	1. Water and sewer services 2. Mining 3. Ports	Chile has been a pioneer in the field of competition law and policy in South America and among developing countries. The principal goal of Chile's competition law is to promote economic efficiency with the expectation that in the long run this maximizes consumer welfare.
17) Colombia	1. The nature of the product in question: necessary or luxury product. 2. The existence of substitutes of the product in question. 3. The level of barriers to entry into the relevant market. 4. The potential impact of the practice in question on consumers and competitors. 5. The availability of relevant	1.Electricity transport and distribution 2. Gas transport and distribution 3. Telecommunications capacity carriage 4. Water distribution and supply 5. Air transport airports slots	1. A widespread competition culture. 2. Business community acceptance of competition law enforcement. 3. A reliable and independent competition authority and modern competition law instruments. 4. Predictable decisions when the antitrust authority enforces the law. 5. Predictable judiciary decisions when it reviews the enforcement authority decisions.

	evidence.		
18) Ecuador	Unfortunately, in Ecuador there is no approved Competition Law yet in force. However, nowadays there is a Competition Law Project (draft) being discussed in the Parliament. Thus, only those applicable questions will be answered in accordance to Ecuador's reality.	1.Water 2. Electricity 3. Gas	In order to implement an effective competition policy it's necessary for the Competition Law to be approved, as well as to have an autonomous authority with enough faculties to investigate and punish anticompetitive practices.
19) Jamaica	1.Extent of detriment and seriousness of conduct 2.Deterrent value of pursuing 3.Public interest 4.Jurisprudential value 5.Capacity to investigate (resources; availability of evidence)	1. Electricity 2. Water	1. A supportive industrial policy 2. Supportive laws 3. Political support 4. Trained staff 5. Effective Competition Law 6. Proper budget
20) Peru	1. Relevant market 2. Kinds of anticompetitive conducts 3. Kinds of anticompetitive clauses of contracts and agreements	1. Electricity 2. Telecommunication 3. Water supply and sewerage 4. Gas	No answer
21) Venezuela	1. Preliminary investigations	1. Electricity	1. Autonomous regulatory organ

	over the competition dynamic in the markets. 2. Claims brought upon by third parties over possible anticompetitive practices 3. Officio investigations for possible anticompetitive practices 4. Analysis of the authorative procedures (mergers, economic concentrations) 5. Promotion and communication about free competition	2. Hydrocarbons 3. Telecommunications	2. Autonomous and independent judicial power with knowledge in competition 3. Law which regulates competition 4. Resources and trained personnel 5. Cooperation between the public administrative organ and the competition organ

II. Influence of Political-Economy Considerations and Resource Availability:

*** COUNTRY (Competition and Regulatory Agency)**	4) What is the competition authority's regulatory budget?	5) Is there a specific procedure used by the competition authority for allocating resources?	6) Approximately how long does it take for the competition authority to investigate and bring a case to trial?	7) Does regulation/bureaucracy/ transparency impinge on the competition authority's ability to operate?
AFRICA:				

South Africa	For 2006 financial year Total: 9.6 million euros Salaries: 2.8 million euros (29%) Enforcement: 895 000 euros (9.3%)	Yes. Through a process of strategic planning and budgeting annually.	This depends on the case.	No
Zambia	US$100,000	Yes. Which: Priority is given to activities where there is blatant disregard of the law followed by awareness activities. The policy of the Commission is that competition enforcement must start with the general public thus public awareness is vital. Other activities that promote competition and consumer protection and welfare such as economic power regulation and or dominant position of market power (compliance	One month after the decision of the Board.	No

		programmes with dominant players) follow the hierarchy.		
Zimbabwe	- Total 2006 for the whole organisation Z$60m (US$240,000) - Tariff operations Z$20m (US$80,000) - Competition operations Z$20m (US$80,000)	Yes. Which: We are guided by the business plan.	3 months	No
ASIA				
Azerbaijan	Since the Anti Monopoly Agency was established in Azerbaijan only in December 2006 it has a budget which is established every year and different from year to year. In fact, the budget is divided according to the articles.	Yes	Usually there is no trial because all the matters are solved in the administrative level, however if the case needs to be taken to trial it takes from 3 days to a 2 month time.	No answer
Indonesia	No exact answer given. The Indonesian Competition Commission has an independent Secretariat free from government intervention. However, there	Yes	The period determined by the Commission shall take 3 months and could be extended depending on the needs.	Yes. The Competition Commission encounters regulatory environment influenced by policy and business behaviour. Many

	is a problem regarding the Commission's budget and status of its secretariat employees.			government policies are not extending its support or relevant with competition policy.
EUROPE:				
Armenia	300,000 USD approximately varies from year to year	Yes. Which: Every year government establishes a budget and its expenditure.	Approximately 3 months	No
Bulgaria	949,113 Euros	No	3-6 months depending on the case	Yes
Croatia	10,.000,.000 HRK In addition to resources from PHARE programme and CARDS projects.	Yes. Which: 1% of the budget has been allocated to further education and training of the staff. A part of the above resources will cover the bar examination fees of the staff, whereas the funds received from the CARDS projects will be spent on the organisation on in house seminars.	No specific time given. However, the amendments to the Competition Act would ensure that only one court rules on the legality of the decisions, and at the same time decides on the level of fines imposed by the Agency. The current legal system enables one court to decide on the legality of the decisions of the Agency but without the competency for	No

			imposing sanctions, another court imposes sanctions based on the decisions of the Agency.	
Estonia	2007 – approximately 11 million EEK	No	From one month to one year and a half	Yes
Georgia	146000 GEL, (1GEL =1,712 USD)	Yes. Which: On the basis of the agency's requirements, the State Treasury allocates a certain limited amount in accordance to the law of The State Budget of Georgia 2007.	1-2 month	No
Lithuania	500,000 USD	Yes. Which: Every year, according to the government procedure, the budget is allocated according to needs.	Misleading advertising cases are the easiest cases and they usually take up to 5 months. Cartel cases may take more than 1 year to be decided. Additionally each case can be sustained for more than a year if necessary, according to the country's legislation.	Yes
Serbia	In respect to available resources, for its	Yes. Which: Since the authority	Pursuant to the provisions of the Law, resolution on the	No

	establishment and first year of its activities, the authority is financed from budget, but in the future it will be financed out of its own funds already being generated by the Commission through application of Tariff.	has been functioning as an independent body only for the last few months, this issue shall be adequately solved in the forthcoming period.	initiation of the procedure is within the period of 8 days from the date of submission of request.	
Poland	No answer	Yes	No answer	No

LATIN AMERICA AND THE CARIBBEAN:				
Argentina	The Annual Budget is approximately 2,141,023 in Argentinean Pesos, equivalent to approximately 738,525 in USD.	Yes. Which: According to the Competition Commission's Budget and the Secretariat's budget plans.	In conduct cases, after receiving closing arguments, the competition commission must issue a decision within 60 days.	Yes
*** Brazil**				
Chile	Approximately 2,224 USD per year. (amount in 000s of USD)	Yes. The budget is funded almost entirely by the allocation it	In theory, the commission issues a decision within 45 days after a hearing has taken	No

		receives each year in Chile's Budget Law.	place. But this limit is often extended for long time periods.	
Colombia		No	The antitrust authority prosecutes and adjudicates cases. It takes 2 years on average to investigate and decide a case.	No
Ecuador	No answer	No answer	No answer	No answer
Jamaica	Approximately US$572,000 annually	Yes. Based on # 1 above largely	Approximately 18 months	Yes
Peru	Considering not only the direct budget but also the corresponding share out of the total cost of Indecopi´s (Competition Authority in Peru) administrative organisational units, in 2006 the budget of the two competition related instances (Free Competition Commission – CLC, first instance, and Defence of	No	Approximately one year and a half on average.	No answer

	Competition Chamber – SDC, second instance) totalled USD$1,837,413. This figure is broken down as follows: CLC, USD$534,712; and SDC, USD$1,302,701.			
Venezuela	2,000 million Bolivares approximately (USD$930,232,558,14)	No	Approximately 1 year	No

III. Damaging Practices:

*** COUNTRY (Competition and Regulatory Agency)**	8) What are the most damaging practices? List 5 in order of importance, 1 being the most important and 5 the least.	9) What types of behaviour are more harmful to consumers? (e.g. price fixing, bid-rigging, market sharing and primary boycotts). Please list 5 in order of importance, 1 being the most important and 5 the least.	10) What types of behaviour are more harmful to competitors? Please list 5 in order of importance, 1 being the most important and 5 the least.	11) Which are the easiest cases to solve?

AFRICA:				
South Africa	1. Cartels 2. Bid rigging 3. Market sharing 4. Others need to be judged on a case by case basis	1. Cartels 2. Bid rigging 3. Market sharing 4. Others need to be judged on a case by case basis	1. Vertically restrictive practices 2. Horizontal practices 3. Predatory pricing	Cartels Why: Once there is evidence of agreement there is a per se abuse.
Zambia	1. Horizontal mergers and acquisitions 2. Cartels 3. Abuse of dominant position of market power 4. Unfair trade practices 5. Discrimination in terms and conditions of supply and price	1. Price fixing 2. Bid rigging 3. Hoarding of goods and services 4. Supply of defective goods 5. Misrepresentation of deceptive conduct	1. Exclusive dealing 2. Transfer pricing 3. Refusal to deal (supply) 4. Vertical mergers and acquisitions 5. Horizontal mergers and acquisitions	1. Exclusive dealing 2. Horizontal mergers and acquisitions 3. Vertical mergers and acquisitions 4. Deceptive conduct and misrepresentation 5. Abuse of dominant position of market power Why: The facts and law are usually self evident in these cases.
Zimbabwe	1. Misleading advertising of consumer products	1. Misleading advertising / deception	1. Exclusive agreements 2. Predatory pricing 3. Market sharing	1. Mergers 2. Per se prohibited practices (e.g. price

	2. Price fixing 3. Bid-rigging 4. Predatory pricing 5. Conditional trading	2. Price fixing 3. Bid-rigging 4. Market sharing 5. Predatory pricing	4. Refusal to deal 5. Bid-rigging	fixing) 3. Conditional trading 4. Bid-rigging 5. Exploitative practices (e.g. excessive pricing) Why: Amount of information and depth of analysis not so much.
ASIA:				
Azerbaijan	No answer	1. Price fixing 2. Cartel 3. Market sharing	No answer	Trademark cases are the easiest cases to solve.
Indonesia	1. Bid rigging 2. Tender collusions	1. Corruption 2. Cronyism 3. Collusion in government procurement	4. Abuse of dominant position 5. Monopolists 6. Rent seekers	The commission's most difficult challenge has been reforming existing regulations and reducing governmental intrusion, which had existed in the previous years and governments.
EUROPE:				

Armenia	1. Price sharing 2. Anti competition cases 3. Boycotts	No answer	No answer	1. Anti competition market conditions 2. Price sharing 3. Misleading advertising
Bulgaria	1. Cartel agreements (price fixing, market sharing, sales quotas, bid-rigging) 2. Unilateral abusive practices (price abusive conducts, refusals to deal, tying, discriminatory conditions) 3. Public restraints to competition 4. Unfair competition practices 5. Vertical restraints to competition	1. Price fixing 2. Market sharing 3. Excessive pricing 4. Limiting production and trade 5. Limitation of the consumer's choice	1. Market foreclosure 2. Price abusive practices (predatory pricing, prize squeeze) 3. Refusals to deal 4. Tying 5. Bid-rigging	Unfair competition cases Why: Broad practice; Less influence on the markets
Croatia	1. Prohibited agreements – which have been assessed as prohibited and consequently	1. Monopolies almost always have negative consequences for consumers, given that they, as a rule, impose	The prevention, restriction or distortion of competition based on an explicit agreement concluded	Cases that involve non complex investigations and that do not require extensive legal and economic expertise

	void, considering the anti competitive effects, resulting from a direct obligation imposed on the distributors. 2. Abuse of dominant position in particular markets	different administrative or technological barriers to entry to potential markets and also inhibit development and innovation and consumer choice. 2. Investigation of liberal professions market (pharmacist, doctors, dentists) where the rules or association statutory provisions limit entry or lead to market foreclosure, and where traditional instruments of competition law do not prove satisfactory in handling market insufficiencies and unfair market behaviour of the market players.	between competitors in the market, which fixes trading conditions and controls and shares markets.	analyses.
Estonia	1. Abuse of dominant position, price discrimination (example: fixed phone prices). 2. Abuse of dominant position, refuse to sell	No answer	No answer	None of the cases are easier to solve than others.

	(example: central heating) 3. Abuse of dominant position, predatory pricing (example: cable communication services - - TV) 4.Horizontal agreement (example: wholesalers of electric materials) 5.Horizontal agreement (example: rent and sale of videos and movies)			
Georgia	Since the Agency of Free Trade and Competition was established only 1 and a half year ago, we do not possess the information to answer this question.	No answer	No answer	Price fixing Why: Since there is close contact between our agency and The Ministry of Finance.
Lithuania	1. Market share 2. Unfair conditions 3. Boycotts 4. Price fixing	No answer	No answer	Unfair conditions and Misleading advertising are the easiest cases to solve. Why: Because these cases are not complex and include all the information in order to solve them promptly.

Serbia	1. Establishment of sales or purchase prices 2. Market sharing 3. Application of unequal conditions 4. Restriction of production, market, technical development etc. 5. Imposing of additional commitments – tying	1. Imposing of unfair prices 2. Restriction of production or market 3. Imposing of additional commitments 4. Restriction to accessing particular markets/goods/service 5. Application of unequal business conditions	1. Market sharing 2. Restriction of production 3. Application of unequal business conditions 4. Imposing of additional commitments 5. Imposing of unfair purchase and sales prices	The easiest cases to solve are those where, along with the request for initiation of procedure, the party involved submits to the authority sufficient evidence and facts on the grounds of which it is possible, relatively quickly, to assess and establish the level of potential distortion of competition.
Poland	1. Clauses that infringe consumer interests. 2. Clauses that are against good practices towards consumers.	3. Failure to provide full and reliable information. 4. Issuance of false information to consumers. 5. Misinforming consumers.	1. Misleading advertising 2. Non compliance with quality standard of products.	Infringement of consumer collective interests. The basic tool used to achieve this consists in inspection of contracts clauses used by companies.

LATIN AMERICA AND THE CARIBBEAN:				
	1. Collusive practices	1. Price fixing	1. Abuse of dominant	Overt collusion practices, are

Argentina	2. Horizontal exclusionary practices 3. Vertical restraints 4. Exploitative abuses of dominant position	2. Quantity fixing 3. Horizontal market division 4. Bid rigging 5. Price discrimination or abusive pricing	position, which can be exclusionary or exploitative. 2. Illegal imposition of prices 3. Illegal imposition of commercial conditions 4. Horizontal agreements to restrict investments and to restrict research and development.	penalised without actually proving the existence of a real damage to the general economic interest, but simply by arguing that they worsen the situation that consumers have in the absence of the objected collusive agreement.
*** Brazil**				
Chile	1. Cartels 2. Mergers 3. Monopolisation	1. Horizontal agreements 2. Vertical agreements 3. Abuse of dominant position 4. Unfair competition	1. Unfair competition activities carried out by competitors 2. Illegal restrictions 3. Distribution of quotas 4. Reductions or suspensions of production 5. Exclusive distribution	When the facts are so clear that there is no need for a discovery period. The decisions of the commission are public.
Colombia	1.Price fixing horizontal cartels directly affecting consumers.	1. Price fixing horizontal cartels. 2. Horizontal agreements to	1. Horizontal agreements to predate. 2. Horizontal agreements to	1. Price fixing horizontal cartels 2. Horizontal agreements to

	2. Horizontal agreements to allocate markets. 3. Horizontal agreements to limit the supply to consumers. 4. Horizontal agreements to fix purchasing prices affecting producers of raw materials. 5. Abuse of dominant position in the form or predation.	allocate markets. 3. Horizontal agreements to impede new competitors to enter into the market. 4. Horizontal agreements to predate. 5. Abuse of dominant position to predate.	impede new competitors to enter into the market. 3. Abuse of dominant position to predate. 4. Bid Rigging 5. Abuse of dominant position in the form of not selling or supplying essential inputs.	impede new competitors to enter into the market. 3. Abuse of dominant position in the form of tying. 4. Abuse of dominant position in the form of predation. 5. Abuse of dominant position in the form of cross subsidizing.
Ecuador	No answer	According to our experience, as a consumer organisation, we think the two most harmful behaviours are: 1. Price Fixing 2. Market sharing	No answer	No answer
Jamaica	1. Collusion 2. Predatory behaviour 3. Discrimination 4. Misleading advertisement 5. Vertical restraint	1. Price fixing 2. Market allocation 3. Predatory behaviour 4. Misleading advertising 5. Vertical restraint	1. Predatory behaviour 2. Non-hardcore horizontal restraint 3. Misleading advertising 4. Exclusive dealing 5. Raising rivals costs	1. Misleading advertising 2. Discrimination 3. Non-hardcore horizontal restraint 4. Predatory pricing 5. Hardcore cartel

				activity Because Misleading advertising is easiest to solve because the relevant evidence is easily obtainable.
Peru	No answer	1. Price fixing 2. Market sharing 3. Bid-rigging 4. Boycotts 5. Unjustified refusal to buy or sell products or services/discrimination cases	1. Unjustified refusal to buy or sell products or services/discrimination cases 2. Boycotts 3. Bid-rigging 4. Market sharing 5. Price fixing	1. Naked cartels 2. Unjustified refusal to buy or sell products with direct evidence Because it is easier to solve cases with direct evidence which will help the competition authority to investigate the facts involved.
Venezuela	1. Cartels 2. Abuse of dominant position 3. Collective recommendations 4. Boycott 5. Unfair competition	1. Direct Price fixing 2. Limitation of Production and distribution 3. Market sharing 4. Unjustified refusal to satisfy the demand of products 5. False publicity	1. Price fixing 2. Market sharing 3. Imposition of discriminatory prices 4. Unjustified refusal to negotiate 5. Subordination of contracts with anticompetitive clauses	Unfair competition Because the fact finding can be obtained directly

(cont´d) III. Damaging Practices:

*** COUNTRY (Competition and Regulatory Agency)**	12) Which are the most difficult cases to solve?	13) Does the competition authority have the ability to enforce competition policy?
AFRICA:		
South Africa	1. Vertically restrictive practices 2 .Excessive pricing Why: Rule of reason	Yes
Zambia	1. Predatory behaviour cases 2. Transfer pricing 3. Excessive pricing 4. Bid rigging 5. Practices by trade and professional associations Why: No whistle-blowers in cartel cases while it is difficult to authenticate cost and prices in predatory and transfer pricing cases. Time and resources also have a huge bearing.	Yes
Zimbabwe	1. Exploitative practices (e.g. price fixing) 2. Predatory pricing 3. Conditional trading 4. Unfair business practices – per se prohibited	Yes

ASIA:		
Azerbaijan	No answer	Yes
Indonesia	Cartels in sea cargo shipping, road transportation, telecommunication, container terminal, retail, cement industries and cartel allegations in sugar regulation and handling agent/forwarder business.	Yes

EUROPE:		
Armenia	Cartel related cases. Why: Because they usually require a lot of evidence in order to prove these cases. Additionally, it is difficult to establish the facts, as they are usually well hidden.	Yes
Bulgaria	1. Cartel agreements 2. Price abusive practices Why: Secrecy; Difficulties to prove	Yes
Croatia	The Agency will continue to work on credible enforcement of the Competition Act particularly relating to the investigation of anticompetitive practices, such as conclusion of prohibited agreements, especially cartel agreements, but also other practices which have their object or effect the prevention, restriction or distortion of competition. In the Republic of Croatia greater attention is directed to economic analysis, which makes the economic approach to particular competition	Yes. However, the environment in which the liberalisation process and the opening of markets in Croatia will be carried out concurrently with the establishment of effective competition mechanisms falls pursuant to the Competition Act under the competence of the Competition Agency. And even though, the Agency's role here is crucial, the

	issues as important as the legal one. The considered decisions often involve very complex and detailed economic surveys which require an adequate number of skilled expert staff and organisational efficiency.	Croatian Competition authority is not the only authority in charge of the changes concerned.
Estonia	Difficulty is most linked to cases where different procedural rules in various time periods simultaneously coincide for the same type of infringement.	Yes
Georgia	Cases related to cartel and cases involving assets Why: The procedure which the Competition Agency investigates is complicated due to the fact that it depends on receiving petitions from other economic agencies.	Yes
Lithuania	1. Cases where it is difficult to determine the relevant market. 2. Cases without direct evidence. 3. Cases where you need to prove cartel agreements. Why: Sometimes in these cases evidence is not obvious, therefore it is very difficult to reach a decision.	Yes
Serbia	The most difficult cases are those where the Commission does not have at its disposal all relevant facts for decision making and when its fact finding requests a longer period, communication with competitors, consumers, institutions, etc.	Yes
Poland	Proceedings in the field of general product safety, which are intended to protect the health and life of consumers have led to proceedings	Yes

	against entrepreneurs who released dangerous products on the market.	

LATIN AMERICA AND THE CARIBBEAN:		
Argentina	Cartels and also where there are ancillary restraints that may facilitate collusion or act as collusive devices, the damage to the general economic interest has to be more carefully proven, since those restraints have to also be explained by efficiency reasons. The idea about insufficiency of conscious parallelism is to prove the existence of collusion.	Yes
*** Brazil**		
Chile	International cartels and anticompetitive mergers are the most difficult cases to solve. The Chilean competition law does not provide any consent or other formalised procedure to dispose of a matter with a binding negotiated order and/or fine. This may force parties to engage in a full defence of their conduct even when the matter could be settled in a much less costly manner.	Yes
Colombia	1.Abuse of dominant position in the form of discrimination. 2.Abuse of dominant position in the form of cross subsidizing 3.Abuse of dominant position in the form of denying access to markets or distribution channels	Yes

	4. Horizontal agreements to allocate markets. 5.Horizontal agreements to limit technical development	
Ecuador	No answer	No answer
Jamaica	1. Hardcore cartel activity 2. Predatory pricing 3. Non-hardcore horizontal restraint 4. Discrimination 5. Misleading advertising	Yes
Peru	1. Collusive practices without direct evidence 2. Cases where the relevant market is difficult to determine Because the evidence in this kind of cases is more difficult to obtain because of the refusal of the investigated companies to provide the information required by the competition authority.	Yes
Venezuela	Cartels Because of the difficulty in obtaining fact finding elements	Yes

(cont´d) III. Damaging Practices:

*** COUNTRY (Competition and Regulatory Agency)**	14) How many Government-owned entities are there? (please select one) - More than 20 - 10-20 - Less than 10	15) Is the underlying regulatory infrastructure for competition policy in the country sufficient?	16) Do you have any other comments that you feel could be helpful in our efforts to determine the factors that play a key role in establishing the strategic priorities of competition authorities in developing countries?
AFRICA:			
South Africa	10-20	Yes. Although more resources (human and financial) are needed	South Africa is in the process of assessing its priorities for competition matters. Given the limited resources and the objectives of the legislation, we need to assess what makes most strategic sense for the authorities to place at the top of their agenda.
Zambia	Less than 10	No. Why: The law is relatively deficient and the competition authority is largely a "lone wolf" in competition	Least developed countries prioritise their work to cases that would bring about the greatest economic effect and public awareness. The role of the

		advocacy activities. The powers of the commission require strengthening in aspects of regulations and consumer protection.	competition authorities is tilled not well understood and hence acceptance is required by the general public and political arena.
Zimbabwe	10-20	Yes	No answer
ASIA:			
Azerbaijan	No answer	No answer	No answer
Indonesia	No answer	Yes. However, Indonesia's Competition Commission is the country's first independent regulatory body, which is not part of the executive, legislative or judicial branches of government. Therefore, this agency with multifunctional powers initially has been heavily criticised and resisted due to its foreign setting in the Indonesian legal system.	With adequate budget and resources the commission will be able to recruit professional, well trained and highly motivated staff to do law enforcement, competition advocacy and business education roles.
EUROPE:			

Armenia	No answer	Yes	No answer
Bulgaria	More than 20	Yes	No answer
Croatia	No answer However, the sectors which need urgent but challenging operational reforms are the iron and steel sector and shipbuilding.	No. The Croatian Competition Agency will propose and establish an adequate judicial model as a key to obtaining a qualitative shift in the implementation of the competition system in practice. However, in the previous two years the work of the Agency has been particularly focused on the establishment of the legal framework in the area of competition, institutional building of the Agency, internal and external education of its employees, and investigation of particular markets and business practices and proposals for bringing them into compliance with competition rules and free market	In the accession negotiations of Croatia to the European Union relating to competition, one of the prerequisites for the membership is the fulfilment of particular requirements in respect of the legal framework based on market economy and competition, harmonised with the EC acquis, but which can also be assessed through its application in the everyday practice by the competent competition authorities. It is therefore the task of the Agency to participate in all forms of cooperation with the professionals from other relevant Croatian authorities (such as sectoral. regulators, Croatian National Bank, etc.), which perform the activities relating to competition issues falling under their scope of jurisdiction in

		principles.	particular sectors. In compliance with the relevant EU practice and solutions accepted by the E. Commission, the Agency will support the introduction of the "whistle blower" immunity (leniency) programme for cartels.
Estonia	No answer	No. Why: Criminal procedure rules are difficult to apply in cases where a legal entity is who violates the law.	No answer
Georgia	No answer	Yes	Closer relationships among all Competition agencies is required in order to share information and experience related to solving problems.
Lithuania	No answer	Yes	No answer
Serbia	The Serbian Commission does not have exact data but assumes there are more than 20 Government-owned entities.	No. Why: New legal framework is sufficient, however, the Commission is just at the point of increasing the number of employees, which is at present insufficient.	No answer

Poland	No answer	Yes	The active education and information policy activities carried out by The Office of Competition and Consumer Protection of Poland has served to increase the awareness of all market players.

LATIN AMERICA AND THE CARIBBEAN:			
Argentina	Until the early 1990s most of the assets in Argentina's infrastructure industries were state owned. In 1989 an ambitious privatisation programme was set in motion. Therefore, by 1994 most of the privatisation was accomplished.	Yes. The competition law gives the competition authority the powers that it needs to enforce the law. Section 24 provides the agency with standard investigative powers; including powers to conduct market surveys; to hold hearings and take testimony; to examine books and documents; to conduct dawn raids upon authorisation by the court. It also authorises the agency to engage in competition advocacy; to draft its internal rules; to prosecute actions in court; to participate with other relevant offices in the government in	Like in many countries in which competition law enforcement is relatively new, a competition culture has been slow to develop in the country, but there are signs that it is occurring.

		the negotiation of international agreements relating to competition policy; and to enter into consent agreement in cases.	
*** Brazil**			
Chile	Almost all state-owned enterprises have been privatised.	Yes	The main purpose of the amendments being discussed in the legislature is to create an independent Competition Tribunal to replace all of the commissions.
Colombia	More than 20	No. Because of: Lack of enough human resources; Lack of a more dissuasive penalty regime; Lack of leniency programmes; Lack of legal certainty regarding the priority of aims when enforcing competition law; Lack of an appropriate legal regime regarding vertical restrictions to ascertain which of them are illegal;	Several factors may contribute to define strategic priorities of those authorities: a) They should have discretion to concentrate enforcement efforts on certain markets. For instance, they should be able to focus on markets of necessary products rather than on markets of luxury products. b)_If competition law instruments laid down several aims, the Congress should define how to articulate them

		Lack of legal certainty regarding whether or not the authority can apply the reasonable test.	and what the central criterion should be. c) There should be transparent legal mechanisms to articulate competition law and sector regulatory frameworks.
Ecuador	No answer	No answer	In Ecuador there are some specific competition regulations for certain sectors, such as telecoms and electricity. Authorities of these sectors have the faculty to resolve cases of anticompetitive behaviours.
Jamaica	More than 20	No. Except for one statute, the laws do not acknowledge Competition Law or the role of the Competition Authority.	Independence needs to be recognised as being critical to the effectiveness of the agency. This should probably be addressed when establishing a Competition Authority.
Peru	More than 20	No answer	In the case of Peru, the competition authority has identified two main priorities: (i) studying market structure which will help to analyse cases and foresee agent's conducts; and (ii) shaping legal strategies to avoid delays during the investigation of cases. These strategies could be

			implemented by a guideline which establishes the procedures that the competition authority must follow to solve cases.
Venezuela	More than 20	Yes	No answer

*** Brazil:** The information regarding Brazil was received in the form of e-mails, phone conversations with the Secretariat of Economic Law (SDE) and the Conselho Administrativo de Defesa Econômica (CADE), including the agencies annual reports.

ANNEX C: RESPONSE RATES TO SURVEY AND GRAPH

Response rate to survey:

Response Rate: 70%

Responses: 21

No Response: 9

Graph of responses to survey: