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DR. STANLEY WONG: My name is Stanley Wong. I've been asked by the International Competition Network to share with you some ideas on building new or young agencies and how to do so in an effective manner.

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Advocacy is a very important part of the work of new and young agencies for the very simple reason is that compliance with the law can be achieved only through advocacy because there are never enough resources to pursue every possible contravention. No agency will have enough resources to pursue every possible contravention. But one should remember that advocacy has two different meanings in the competition context. There is advocacy about compliance, but there's also advocacy about promoting the value of competition; that is, the use of markets where possible.

Compliance with the law is really about encouraging businesses to understand the norms established by the law. Thou shall not engage in price fixing, especially with your competitors. Thou shall not abuse your dominant position or your superior position in the marketplace and thou shall not engage and enter into anticompetitive mergers.

But the law also carries with it sanctions, and this is the most difficult part for businesses to understand. It's one thing to advocate not engaging in price fixing; it's quite another to say that if you engage in price fixing, we may be able to -- or have the decision-maker -- impose fines. And in some countries, that may include criminal sanctions, as well.

And, so, in the early stages of operation, a young agency should focus on encouraging compliance with the law as their primary advocacy function because no one else will do this for a simple reason: this is a new law. However, with respect to encouraging, advocating, the use of markets, probably this has been going on for some years in the country. So, it's sort of an old story, if

you will. And, clearly, there will be other government agencies, government departments themselves who will be promoting this theme. But it is only the competition agency that have the expertise and the need to encourage compliance with the law and the full understanding of the consequences of not complying with the law.

Now, the ICN has an advocacy tool kit that deals with a range of different measures and different techniques to comply and agencies are encouraged to consult this.

Now, another very important part of advocacy focused on compliance is to make sure that the materials you develop are suitable for the target audience. And, so, there's a whole range of possibilities from guidelines, which in itself is an advocacy tool, but it's clear that guidelines are really designed for professional advisors, lawyers and accountants and business advisors. They're not suitable for many, many businesses, trade associations, the general public.

And, so, I mean, there are things like – you know, around the world, you'll see things like videos, which are shown on public television, on buildings, because these are intended to focus on the persons who are likely to be exposed to this.

For example, one can consider developing a pamphlet for the small business community focusing on some very, very simple messages to allay their fears that there's a tremendous compliance burden of the new law.

And the four points are very simple: Don't engage in price fixing with your competitors. That's not difficult to understand. Do not engage in bid-rigging. That clearly is not difficult to understand. Don't engage in output restrictions, and don't engage in market sharing.

And if one is successful in conveying these messages, then the small business should not have a difficulty understanding these provisions.

Now, it's also important to convey to the small business community that they may well be

targets of anticompetitive conduct. And by developing compliance materials for the group, one should also encourage them to understand and spot conduct for which they are the victim and why they need to spot that and report that appropriately.

Now, another important part of advocacy, which sometimes is forgotten, is that advocacy to governments, government departments and regulators should be a very important part of the work of the newer agency for a number of different reasons. Often, these government entities are engaging in conduct which encourages contraventions. And, so, that's important to explain to them why they should not do so.

Number two, many government entities are the target of anticompetitive practices and conduct. For example, bid-ridding, you know, in public procurement is a very important area in most countries and teaching them how to spot the issue and how to engage in practices themselves which discourages bid-rigging, such as, for example, requiring the bidder to sign a statement that they have not talked to their competitors would be an example.

Another important part of developing the relationship with government is that the government entities often have valuable information, especially if they are regulators or departments that keep statistics. And the agency -- the new agency -- should develop these relationships early and spend time fostering that relationship because competition enforcement is fact-based, and much of relevant facts are in the hands of these government entities and, so, one wants to work out what can be done to get access to this. Some of it may be restricted by law. Others may require entering into some sort of protocol or memorandum of understanding with a government agency to get access to the information if and when it's needed.

Often, there's expertise at the technical level in these government entities that you may wish to access. So, if you are -- you know, you are often able to -- if you're able to get access to this, this will

make your life very much easier.

Developing materials for advocacy, focusing on compliance, what is very important is that the materials are developed for the target audience. Preparing, for example, guidelines is probably useful, but it will only reach professional advisors on competition law and not the businesses that have to comply with the law. And, therefore, it's important to develop the right tools.

Some countries, like Brazil, have a competition day where they have the president of the country wear a t-shirt fighting cartels. That might not work in some countries, but may work in others. It very much depends on the audience that you want to reach and how to best reach them.

You know, videos could be useful, comic books could be useful, but it requires a lot of thought and reflection to make sure that the materials you use is appropriate for the audience you're trying to reach.

Now, the ICN has a number of materials on advocacy. They have an advocacy toolkit and people should refer to that to see what can be used to – and adapt their programs to their local conditions.

Now, an important group to target advocacy are government departments and government agencies and regulatory agencies for several reasons. Some of them may be victims of anticompetitive conduct. For example, bid-rigging is a good area where government agencies or government ministries could be targets. So, it's important for them to understand.

But also important is that often government departments engage in conduct which encourages anticompetitive conduct. So, it's very, very important for the competition agency to explain to the government department or the government agency the consequences of some of their policies and hoping that they can be convinced to avoid encouraging conduct which contravenes the competition laws.

I think another important point here concerning relationships with government and government departments and regulators is the fact that maintaining good relationships and helping the government side understand competition law will help the agency in fostering competition. Because, after all, the agency will never have enough resources to pursue every contravention of the law and, ultimately, advocacy and compliance are the means to encourage abiding by the law.

Another reason to develop and maintain strong relationships with government departments and regulators is that they may have information that will be very, very valuable in pursuing investigations into contraventions of the law. And developing those relationships in the early days will make the life of the agency much easier.

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One of the most important challenges for newer agencies or younger agencies is staffing and training. Because the law is new, the young agency has a challenge of where they're going to get that expertise from. The normal route, in my view, must come from foreign sources. And, ideally, one should use the foreign resources in the following way: That is bring foreign specialists in on an extended secondment, perhaps up to two years, to work with the staff on understanding the law and applying the law.

Competition law is one of those areas which is not self-enforcing, and it only comes from -- that is one's understanding of competition law -- only comes from working on competition matters. So, if possible, one should hire foreign experts to work in the domestic agency for up to two years is the ideal approach.

Another source of hiring staff is to consider, if permitted by the laws of the country, to hire senior experts to join the staff. And that, of course, gives you instant capability in competition matters. That has to be considered, but one has to appreciate that that may not be possible in some countries.

The other area that's very important in terms of a source of recruitment is skills in related area. Quite often, you know, investigative skills, in areas such as white collar crime, can be very, very useful for younger competition agencies. And, so, one should consider hiring them from other parts of government or generally.

Obviously, there are related areas of importance to competition enforcement, such like, you know, statistical capabilities, economic capabilities, and these can be recruited domestically. But, again, they still have to go through this same exercise to understand how to apply competition law using the economics. Agencies are encouraged to use the agency practice manual, in particular the human resources chapter of the ICN Agency Effectiveness Working Group Handbook.

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Related to staffing is the issue of training. As I have said earlier, training is really about developing the capability to apply the law. As I said, competition law is an area where you won't go very far without hands-on experience. There's two ways of achieving that. One is through actually working on cases, either bringing in the foreign expert or arranging for secondments for one's staff to work in agencies, and some agencies are quite willing to do that.

The other is to focus on having training programs that are based on hypotheticals. If you cannot do actual experience, then doing a hypothetical is very important. And the ICN has a number of workshops in all the major areas of enforcement where the workshops focus on hypotheticals.

If one decides to place senior staff in other agencies, it is very, very important that the staff spends a minimum of three months and that the three months they spend on secondment has to be focused on working on cases. It is not very useful to have your secondments where your staff is given a tour of the office, put in a corner of the office and engage in light work. Not all agencies are prepared to host visitors this way. But I think this is an important requirement.

So, that means that the younger agency will have to talk to the more experienced agency saying, can you or will you accept a placement of our senior staff, but can you and will you treat them as if they were staff members so they get the same experience as the staff members of the host agencies. That is the only way you're going to learn to do cases.

As I said, it's very, very important here to understand that it is learning by doing, that's where training is important. You won't go very far if you have programs repeatedly about generalities, such as what is a -- how to define a market, what are competitive effects. Defining the relevant market, as we all know, sounds like a simple thing to do. But you have to teach people how to make choices, what piece of evidence do you want that will help you decide whether the market is this particular -- is defined this particular way or some other way. And the only way you can do this is by going through that exercise, ideally through hands-on experience; failing that, through training on hypotheticals.

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One of the greatest challenges for young agencies is developing guidelines. Let me start by saying that guidelines are -- the general experience with guidelines is that usually guidelines are adopted when an agency has extensive experience, drawing on their case experience and also on the law. But many agencies are either required or expected to prepare guidelines.

The first point to note is that guidelines have to be understood in the proper context. Under some competition regimes, the agency is the decision-maker in the first instance. They make the ruling whether or not there's a contravention. Guidelines, in that context, is generally seen as soft law. And the courts often confirm this and, so, of course, such guidelines that are prepared and published have a very, very important legal significance.

And other jurisdictions, and there are not that many, produce guidelines as part of helping compliance and understanding with the law. But it is not law or not even soft law because these

agencies are not decision-makers in the first instance. So, it's important to understand the different type of agencies that are publishing guidelines.

Now, why -- there's arguments that can be made for why an agency should not publish guidelines, if there's a choice, and the answer simply is, you have no experience. You can sit in a room and think hypothetically of how each of these provisions of your law can be interpreted and there are many, many guidelines available from other jurisdictions that you can adopt.

On the other hand, publishing guidelines can help the public, especially businesses, to understand what does the competition law mean. After all, the laws are brand new. It also, as a side benefit in developing the guidelines, is that the agency itself develops a greater appreciation of their laws. There are some obstacles in developing guidelines. The most -- the greatest one is the danger of taking guidelines from other jurisdictions and making some changes and making them your own. The temptation is there because the guidelines are well-established and, quite often, one can justify it on the grounds that, well, we have very, very similar wording to the statutes in the foreign jurisdiction.

But there are cautionary notes here. I'm not aware of two countries, two jurisdictions, that have exactly the same law. As we know, when you interpret law, it is important to interpret every word in the statute and to interpret it in the context of the entire statute. So, having -- even if the provision is exactly the same, there are obviously other provisions in the competition law which are going to be different. And, so, one has to interpret that particular provision in the context of the law. And, yet, there's another complication is that there are general laws in the country which also will guide interpretation. And, so, when one adopts guidelines, whether because one is required or one feels it's a good idea, one has to spend a lot of time to make sure the guidelines that are developed is -- fits in the context of the local jurisdiction. Much easier said than done.

For that reason, it is important to have people draft guidelines who are aware of these issues.



Sometimes one sees guidelines that are drafted by foreign experts, well-meaning, well-schooled in competition laws of a number of jurisdictions, who are not sensitive to this particular point. And, so, you -- one ends up adopting guidelines which are similar to those of the other jurisdictions, but which may not fit, and then they will discover this perhaps some years later when one faces a challenge to enforcement and have to explain to courts why the particular guideline has been adopted. Of course, you can always amend them.

Amendment to guidelines is often easier said than done, because there's obviously a consultative process, and in some jurisdictions, the guidelines must have the sanction of governments or legislatures. And, so, when one selects advisors to develop guidelines, they will need to work very, very closely with one's staff and the staff will have to make sure that the advisors who are working on the guidelines fully understand the importance of guidelines being developed that is fully reflective of the law, of the entire law, that is -- first of all, the provision which you want to interpret, but also how it fits into the entire law and, more generally, the laws of the country.

The ICN has a wealth of material on guidelines best practices and agencies are encouraged to look at the best practices that have been developed by the ICN and the guidelines of other jurisdictions to choose and to consider how they can be incorporated, if appropriate, into the domestic guidelines.

In this short video, I have touched upon a number of topics that have to be considered by young and new agencies in building their organization. It obviously has not been possible to go into any of these topics in depth and, of course, there are many, many other topics that have to be considered. There is a vast wealth of material on building an agency available through the ICN and through ICN activities, as well as many, many agencies around the world that openly and willingly share their experience and knowledge. And, therefore, it's important to consult all these things as the agency faces new and continuous challenges in enforcing the law.

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