

CAPACITY BUILDING AND TECHNICAL ASSISTANCE

Building credible competition authorities in developing and transition economies

Report prepared by the
ICN Working Group on
Capacity Building and Competition
Policy Implementation

ICN 2nd Annual Conference
Mérida, Mexico
23 – 25 June 2003

INTERNATIONAL COMPETITION NETWORK
www.internationalcompetitionnetwork.org

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FOREWORDS

Mario **Monti** –
MEMBER OF THE EUROPEAN COMMISSION



After the good progress that the ICN is already making in other areas, I am particularly pleased to present this first report on Capacity Building and Technical Assistance to you.

I could see no more noble task for our network than supporting the establishment of competition authorities in developing and transition economies. This is not only because a helping hand has been promised by developed countries on several occasions. I also consider the creation of effective enforcement structures in many parts of the world as a conditio sine qua non for functioning governance mechanisms in a globalising world.

On behalf of the European Commission – the world's largest donor of development assistance – I have therefore gladly accepted, together with my friend and colleague David Lewis, the mandate given to us by the ICN's Inaugural Conference in Naples last year.

The opportunity to pool and share Members' vast expertise is one of the ICN's great strengths. In keeping with this mission, we have approached our task by building essentially on the experiences with capacity building and technical assistance made by competition agencies themselves. I am most grateful to the many colleagues who have made their time and expertise available to us.

One of the key challenges that we have encountered is to do justice to the variety of both local conditions and ways in which capacity building can be fostered. Not one project is like an other, and drawing horizontal conclusions out of this puzzle sometimes seemed like squaring the circle.

It has primarily been this diversity that has discouraged us from trying to elaborate a set of "best practices" at this stage. We have rather attempted to identify the issues and mechanisms that seemed relevant to us in making capacity building a success.

This must, however, not be the end of our ambitions. I believe that by putting together a 'Checklist of issues', we have made a decisive first step towards more operational conclusions. This remains a task for the time after Mérida. I would therefore be delighted if ICN Members could extend our mandate.

Capacity building is, indeed, a learning process for all those involved in this exciting, and sometimes challenging, process. May this report be a useful source of inspiration.

David **Lewis** –
CHAIRPERSON OF THE SOUTH AFRICAN COMPETITION TRIBUNAL



The past decade may reasonably be viewed as a golden age for competition law and policy. One measure of this is the extraordinary proliferation across the globe of national competition authorities. Much of this growth in the number of competition authorities has occurred in developing and transition economies.

A second measure of the increased urgency attached to competition law enforcement is the vigour with which national competition authorities and the international competition community have pursued illegal international cartels, whose price fixing and market sharing practices impact grievously on the consumers and, indeed, the development prospects of developing and transition economies.

However, formulating and enforcing a competition policy, particularly in developing economies, is not a simple matter. It is a technically demanding field of economics and law that draws on scarce, skilled personnel. And while the financial resources required to implement competition policy are not, by any measure, huge, they compete with other basic development projects that resource-constrained treasuries may view as immeasurably more urgent. This competition for scarce resources is often compounded by the lack of appreciation of the potential benefits of competition even from its most likely beneficiaries, and by the resolute opposition of powerful institutions that have long benefitted from the absence of effective competition.

These are the factors that underpinned the very formation of the ICN and the determination to ensure that developing and transition countries joined and actively participated in the Network's leadership and projects. The decision to form this Working Group is an expression of the ICN's desire to understand and find solutions to the particular problems that developing countries face in this important area of policy, solutions that demand the active co-operation of developed and developing jurisdictions.

The co-operation between the European Union and the South African competition authorities is a salutary example of effective co-operation between developed and developing countries. We have co-operated not merely as equals, but as partners that have appreciated our respective strengths and that have drawn on these to produce a product superior to anything that we could have produced working alone and that, in the final analysis, is the real test of a collaborative venture. I would like to express my profound gratitude to Mario Monti and his dedicated and empathetic team of officials who have helped make this such a valuable learning experience for our still fledgling authority. Equally, this report rests on the active participation of all the working group members and those officials from the ICN members and non-governmental organisations that have devoted valuable time to filling in endless questionnaires and to responding to our entreaties for assistance and comment.

LIST OF ABBREVIATIONS

| | |
|-----------------|---|
| ABA | American Bar Association |
| APEC | Asia Pacific Economic Cooperation |
| ASEAN | Association of Southeast Asian Nations |
| CADE | <i>Conselho Administrativo de Defesa Econômica</i> (Administrative Council for Economic Defense, Brazil) |
| CARICOM | Caribbean Community |
| CIS | Commonwealth of Independent States |
| COMESA | Common Market for Eastern and Southern Africa |
| CUTS | Consumer Unity & Trust Society (India) |
| DDA | Doha Development Agenda |
| DfID | Department for International Development (UK) |
| DOJ | (United States) Department of Justice |
| ECN | European Competition Network |
| ESCWA | United Nations Economic & Social Commission for Western Asia |
| EU | European Union |
| FCC | <i>Comisión Federal de Competencia</i> (Federal Competition Commission, Mexico) |
| FTC | (United States) Federal Trade Commission |
| GDP | Gross Domestic Product |
| GTZ | <i>Gesellschaft für Technische Zusammenarbeit</i> (Germany) |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| ICN | International Competition Network |
| IDRC | International Development Research Centre (Canada) |
| JFTC | Japan Fair Trade Commission |
| JICA | Japan International Cooperation Agency |
| KFTC | Korea Fair Trade Commission |
| KPPU | Commission for the Supervision of Business Competition (Indonesia) |
| MERCOSUR | <i>Mercado Común del Sur / Mercado Común do Sul</i> (Common Market of the South) |
| NGA | Non-governmental advisor |
| NGO | Non-governmental organisation |
| OAS | Organization of American States |
| OCCP | Office for Competition and Consumer Protection (Poland) |
| OEC | Office for Economic Competition (Hungary) |
| OECD | Organisation for Economic Co-operation and Development |
| SADC | South African Development Community |
| TA | Technical assistance |
| TRTA/CB | Trade-related technical assistance / capacity building |
| UEMOA | <i>Union Economique et Monétaire Ouest Africaine</i> (West African Economic and Monetary Union) |
| UNCTAD | United Nations Conference on Trade and Development |
| USAID | United States Agency for International Development |
| WTO | World Trade Organisation |

INTRODUCTION

The 2002 Naples ICN conference established a new working group – the Capacity Building and Competition Policy Implementation Working Group. This working group is essentially concerned with the introduction of competition policy and law in developing and transition economies.

It is a response to the extraordinary proliferation of competition authorities in these countries, which is clearly manifest in the number of agencies that have joined and are participating actively in the work of the ICN. As markets are opening up and industries are being privatised, an increasing number of governments are recognising that competition authorities have a key role to play in safeguarding the benefits that such policies are expected to generate.

The introduction of competition policy, however, has also been confronted with a certain reluctance in some quarters. It is clearly difficult to implement a competition policy and establish an effective enforcement capacity where the viewpoint of the public and opinion leaders is characterised by scepticism, at best, or outright opposition, at worst. And so, the first major challenge will be to address these concerns by finding convincing ways of establishing the case for competition policy in transition and developing economies.

The second major challenge lies with the conditions under which many competition authorities have to operate. Gaining stature on the domestic scene through credible and consistent enforcement is a tall order for any competition authority. In the particular context of an emerging market economy, it is likely to be an even more difficult task.

These two challenges are, however, intimately connected. If ways can be found to make an agency's enforcement more effective, this would not only be a respectable outcome in its own right, but would also provide a powerful argument that would mute some of the opposition to the introduction of a competition regime. One potential mechanism for 'hitting the ground running', for establishing, from an early stage, the efficacy of competition law, is to draw on the accumulated wisdom and experience of peers and experts in other countries and in multilateral agencies; in other words, to seek technical assistance.

The mandate

When establishing this Working Group, the Naples conference identified three broad themes. These have subsequently been refined and elaborated by the Working Group under the guidance of the ICN Steering Group:

- the case for competition policy and law in developing and transition countries;
- challenges confronting the implementation of competition policy and law in these countries; and
- technical assistance for their competition regimes.

The main themes of this report

Inspired by these three themes, this report sets out by illustrating how the case for the introduction of competition law and policy could possibly be made, taking account of the conditions that prevail especially in many developing countries. Although we recognise that these conditions vary significantly from one country to another, we think that the introduction of an effective competition regime is regularly confronted with a number of recurring concerns. These concerns relate to (i) the relation between competition policy and industrial policy, (ii) the benefits of consumers, (iii) the informal sector and lawlessness, and (iv) the cost of establishing a competition authority. For those countries that have decided to introduce a competition regime, Chapter 1 illustrates ways that, in the light of these concerns, the case for **competition law and policy** could be built.

Chapter 2 then looks more closely at five concrete challenges for the **competition authorities** in developing and transition countries. These challenges are linked to an agency's standing (i) within government, (ii) within the judiciary, (iii) within civil society, (iv) within the community of competition 'professionals', and (v) within the business community.

Finally, Chapter 3 takes stock of and analyses various models of outside support to the **capacity building** process. The overarching aim is to make the most effective use of the scarce funds available for **technical assistance**. To this end, support mechanisms that have worked well in certain jurisdictions are highlighted.

Throughout this report, we have attempted to identify issues that merit further examination. In this sense, we hope that this report will be a useful point of departure for the pursuit of more advanced work projects.

The main approach: survey of ICN Members

In keeping with ICN's objective to serve as a platform to share and pool the expertise of its Members, the main source of information and inspiration for this report were the experiences gained by the competition authorities themselves. To this end, this Working Group set out by canvassing ICN Members by means of two questionnaires.¹

Questionnaire 1 on capacity building was targeted at a representative selection of competition authorities, mostly in developing and transition economies. A total of 17 replies were received². Respondents were invited to provide background papers explaining the circumstances under which competition policy had been introduced in their jurisdictions.

Questionnaire 2 solicited Members' experiences with technical assistance programs. It was addressed to both recipients and donors of such assistance. A total of 28 replies were received³. In assessing the answers, particular emphasis was given to the views expressed by recipient agencies, as the main 'target audience' of this project.

Most of the responses were from agencies located in either Europe or the Americas. Consequently, the results of this analysis are weighted towards experiences gained in these regions. As far as technical assistance is concerned, it seems fair to say that this observation in itself already reflects the main geographical thrust of such support since the fall of the

¹ See www.internationalcompetitionnetwork.org/wg5.html

² From the jurisdictions of Brazil, Estonia, Hungary, Italy, Jamaica, Lithuania, Mexico, the Netherlands, Panama, Poland, Romania, Slovakia, South Africa, Taiwan, Uzbekistan and Zambia, as well as from the Indian NGO CUTS.

³ From the jurisdictions of Brazil, Canada, Cyprus, the Czech Republic, Estonia, the European Union, Finland, Germany, Hungary, Italy, Jamaica, Japan, Latvia, Lithuania, Mexico, Norway, Panama, Poland, Romania (2x), Slovakia, Slovenia, South Africa, South Korea, the United Kingdom, the United States and Yugoslavia, as well as from UNCTAD.

Berlin Wall. There is ample evidence, however, that this focus is now gradually shifting. An increasing proportion of more recent projects focuses on Asia and Africa. The adoption of the Doha Development Agenda in November 2001 is widely believed to be lending additional momentum to this trend.

The contributions from the Working Group's non-governmental advisors once again demonstrated the value added by integrating their expertise into the work of the ICN. They provided valuable insights from the perspective of the 'clients' of the capacity building process.

Finally, reference is made to the abundance of empirical and theoretical work already undertaken in the fields covered by this report. These works offer a most stimulating range of views and information. We have not had the intention to represent all arguments that have been put forward. The scope of our exercise is more modest: to offer a snapshot based on the experiences of ICN Members. However, for further study and information, we have annexed a non-exhaustive bibliography of useful material.

The presentation

We had initially intended to report statistically those replies to questionnaire 2 that would lend themselves to quantitative presentation. After analysing the material at hand, however, we changed our minds because the different manners in which many countries and international entities answered questionnaire 2 rendered it unfeasible to draw reliable numeric and statistical summaries. Some countries/organisations, for example, made one global response for all programs given or received; other replies contained several separate responses for each individual program or contract for assistance that they were a party to. Thus, averages or totals would have given disproportionate weight and significance to some countries or programs. Moreover, some countries and large national private organisations who gave or received large amounts of technical assistance did not respond at all.

Despite these caveats, the data do show certain trends and patterns, and point to some general conclusions. These are set out – in narrative style – in this report, and especially in Chapter 3.

The general discussion is supplemented and illustrated by a number of more anecdotal case studies. These focus on either specific technical assistance initiatives, or present a particular perspective on one of the main themes. Some of the views expressed in these case studies therefore do not necessarily represent the view of the whole Working Group.

Acknowledgements

Many individuals have contributed to this report. The foremost gratitude is owed to the many colleagues in ICN Member agencies who made their expertise and time available to this Working Group when drafting responses to the two questionnaires.

We are particularly indebted to *Frédéric Jenny*, Vice-President of the Conseil de la Concurrence of France, for skilfully drafting key sections of the first chapter. *Alberto Heimler* has generously made his time available by providing substantial and insightful comments on various drafts of this report.

The working group's non-governmental advisors *Jacques Bourgeois*, *Tad Lipsky*, *Frank Montag* and *Tomas Wardynski* made valuable contributions from the perspective of the private sector.

The Working Group has also greatly appreciated the good collaboration with *Paul Crampton* from the OECD. The US FTC's *Richard Gold* provided support by compiling summaries of replies received to questionnaire no. 2. *Anne-Marie Stroem* from the European Commission was indispensable in having this report printed despite tight deadlines.

The main drafting work was shouldered by *David Lewis* and *Georg Roebeling*, who also acted as the Working Group's secretariat.

CHAPTER 1

THE CASE FOR COMPETITION POLICY AND LAW IN DEVELOPING COUNTRIES

Many countries have introduced or are in the process of introducing a competition regime. An impressive number of these are developing countries.

The experience of many emerging competition authorities underlines the relevance of identifying the specific challenges developing countries face in adopting and enforcing competition law as part of an overall public policy mix in pursuit of economic development. This introductory chapter seeks to offer some practical considerations on how to argue the case that competition policy and law in developing countries can contribute to economic growth and development.

Competition and economic development

The link between economic development and competition policy and law is a complex one. Social, political, economic, and legal characteristics all influence the nature of a country's developmental potential. These factors will also influence the competition problems a developing country is likely to face, the possible design of a competition authority and the eventual costs or benefits of competition law. Thus one has to be very cautious when generalising about economic development and its relationship with competition and competition law enforcement.

In this context, we must keep in mind the difference between competition and competition ('anti-trust') law enforcement. There are many factors which can increase competition in an economy. Deregulation, trade liberalisation, market opening policies, and the convergence of technologies all are important means through which competition is increased. Competition or antitrust law enforcement is only one of the ways to achieve this.

As a point of departure, it may be useful to recall that developing countries are not homogeneous. Some have very few mineral resources whereas others (such as Congo or Nigeria) have vast ones. Some are very large (such as Brazil, China or India) in terms of geographical size and in terms of population, whereas some others are very small (such as the island states of the Caribbean). Some have a quite satisfactory transportation infrastructure allowing them to integrate their domestic market (such as India) while others have very poor infrastructure (such as Congo). In some developing countries, the central government is very strong in terms of economic leadership whereas in others it is very weak. In some countries (such as China or Vietnam), state-owned enterprises play a major economic role while in other countries (such as Hong Kong or Pakistan) there is a high level of concentration of economic power in the hands of a few powerful, private players. In some countries, it is the coexistence of a small formal sector and a large informal sector which is

the main characteristic of the economy. In some countries, most of the trade is in the hands of operators belonging to a tight-knit ethnic minority whereas in some other countries there is a more diversified class of entrepreneurs. In some developing countries in Asia and Latin America there is a strong academic tradition, good universities and a comparatively large pool of qualified professionals whereas in some other countries, for example in many African countries, there is a deficit of professionals.

Despite these variations, there is a common challenge that many developing – and developed – countries are facing: to further their economic development by exploiting their comparative advantage in a globalising world economy.

There is some debate about whether it is appropriate to implement competition law and policy in developing countries. Many economists are of the opinion that developing countries, like developed countries, could benefit from the introduction of a competition regime. The argument is often made that, first, market rivalry would lead to increased efficiency and that, second, the adoption and enforcement of a competition law would provide a more stable legal environment for business.

Rather than repeating these arguments – or the arguments that challenge this view –, this chapter starts from a very different premise: those governments which have decided that, on balance, their countries stand to benefit from the introduction of a competition regime, often find it difficult to argue the case for competition policy to a sometimes sceptical audience. In order to make the introduction of a competition regime a lasting success, it is therefore critical to address, and if possible dispel, fears of possible negative consequences of such a step.

Specifically, we want to illustrate how this case could be built by concentrating on four concrete concerns that typically arise in developing countries when the implementation of competition policy and law are discussed:

- Given developing countries' focus on economic development, does the adoption and enforcement of a competition law prevent policies that are perceived to stimulate competitiveness and industrial growth?
- Do consumers stand to benefit from the introduction of a competition policy despite potentially low income levels and high illiteracy rates of significant parts of the population?
- Is it appropriate to have and enforce a competition law despite the fact that a country struggles with lawlessness, and that a large part of the economy is in the informal sector?
- What about the cost of having a competition law enforcement system – will it be too expensive given developing countries' limited resources?

Competition law and industrial policy

A number of developing countries are quite attached to some kind of industrial policy. A concern that therefore needs to be addressed is that the introduction of a competition regime will prevent them from engaging in this type of policy. But good arguments can be found with which to address and refute these concerns.

A useful starting point when discussing the relationship between industrial and competition policy may be to focus on those sectors in which competition concerns are likely to arise most frequently in developing countries. As illustrated by **Box 1**, many people would argue

CASE STUDY

Box 1 – Some recent anecdotes: reports on anti-competitive practices in developing countries

‘In 1994 Jordanian coffee prices went up because of a harvest freeze in Brazil which decreased the supply of coffee and increased its price worldwide. However, a year later, prices remained high even though consumer demand worldwide had lowered prices as more people shifted to the relatively less expensive, yet caffeine rich, tea. (...) Both government and the public were helpless against what seemed to be an import cartel. The price of coffee in Jordan remains high today.(...)’

(Source: *Yusuf Mansur et Bashir Zu'bi 'Competition Law and Policy in Jordan', presented at the Expert Group on Competition Laws and Policies: Identification of Common Ground in ESCWA Countries, Abu Dhabi, 28-30 January 2002*).

Lebanon has a few importers of food and medical drug products who dominate the business and set prices with and without collusion. (...) the medical drug market is tightly controlled by fewer and fewer importers effectively controlling the USD 270 million annual market and realizing large markups. As social security in Lebanon is not universal, the price of drugs becomes extremely important for everybody, especially for the poor and old people.

(Source: *Louis Hobeika 'Competition Issues in Lebanon' presented at the Expert Group on Competition Laws and Policies: Identification of Common Ground in ESCWA countries, Abu Dhabi, 28-30 January 2002*).

‘The Federation of Sabah Manufacturers (FSM) has taken to task eight shipping lines in Sabah for behaving like a cartel when imposing congestion surcharges on imports(...). FSM President Wong Ken Thau said the effect of the surcharge will no doubt increase production cost and render the finished products less competitive compared to those from Peninsular Malaysia’.

(Source: *Borneo Bulletin, April 2001*).

‘Representatives of almost all local cement producers met last week (in Cairo) and set a price range for cement of between LE167 and LE176 a ton. Just hours before the meeting, the price had fallen to an exceptionally low LE125 a ton. The drop had caused serious worry among cement producers, pushing traded cement shares over the edge and rendering the sector less appealing to foreign investors.’ Maged Nezzar, head of Suez cement sales department, agreed that such agreements would violate market forces, but he believes that they would be better than the price wars.

(Source: *Al Ahrām, December 19, 2002*).

that these tend to be sectors such as bus transportation, retail sales of food, petroleum or drugs distribution, construction materials (such as cement or bricks), bakeries, distribution of water, gas or electricity, legal services etc.¹ It should also be stressed that spending on products and services related to those sectors will account for a substantial share of family budgets.

It is now interesting to set these sectors into perspective with those that are most frequently cited by the proponents of an industrial policy. Their argument often centres on considerations related to the learning curve effects, the possibility that economies of scale do not permit the presence of several firms of minimum efficient size on small markets, and the difficulty of acquiring technologies needed to be competitive. Whatever the merits of the argument that an industrial policy instrument may be useful for small developing countries in sectors exposed to international competition (i.e., often those for which scale, experience or network effects are important, such as the manufacturing of computers, microchips or automobiles) – it seems fair to say these sectors are mostly different ones compared to those mentioned in the preceding paragraph. So, arguably, many industrial policies are likely to have little bearing on those sectors where the effect of anti-competition practices will be most directly experienced by consumers.

A CASE FOR INDUSTRIAL POLICY?

What is more, empirical evidence that governments can successfully build national champions which then become efficient firms and major players on the international scene is patchy at best. Indeed, there is some controversy about the generally assumed role of MITI – a frequent reference among advocates of industrial policy – in the development of Japan. It should also be noted that countries which most adamantly cling to the idea of a pro-active industrial policy (and the building of national champions through protection and subsidisation) are for the most part far from achieving a high degree of industrialisation.

It is telling that countries that have had some success in industrialising – for example certain Asian countries, which supposedly have successfully used the industrial policy tools and for several decades have achieved remarkable rates of economic growth – insist either that their development was also based on an active competition policy and competitive pressure (Japan), or that they were misguided in not paying enough attention to competition law enforcement (Korea).

On the other hand, it should be recognised that most developed countries continue to pursue selective industrial policies. In some sectors – for example steel – the industrial policy takes the form of implementation of trade remedies and subsidising domestic producers; in others, for example armaments, aircraft production and other security-related or high-tech sectors, this often takes the form of technology policies, subsidies and procurement policies. In those countries, a robust competition policy has not prevented the pursuit of industrial policies where governments deem these to meet some or other national policy objective.

INDUSTRIAL POLICY, COMPETITION POLICY AND EMPLOYMENT

One of the key motivations for introducing an industrial policy is usually the desire to protect and/or create employment. However, policy makers may sometimes underestimate the degree to which competition law enforcement can contribute to the creation of jobs. In

¹ For additional illustrations, see also CUTS, *Spine Chilling Experiences of Anti-Competitive Practices in Malawi* (2003).

contrast to industrial policy, which often only looks at one sector – or firm – in isolation, the perspective of competition policy will regularly include an analysis of upstream and downstream markets as well. Where anti-competitive conduct leads to a reduction in the supply of goods and services, this may not only stifle innovation, but may in certain cases also diminish the opportunities for other firms (see the illustrative case in **Box 2**). In this sense, a competition policy can actively protect the generation of employment growth as well.

COMPLEMENTARITY OF COMPETITION AND INDUSTRIAL POLICIES

There may also be other, non-economic (i.e., socio-political) objectives which explain why a developing country government may want to intervene in a measured way in market mechanisms. One could think, for example, of the desire to promote previously disenfranchised groups in the population, the perceived unfairness of markets, or the desire to decrease costs of social dislocation, for example in industries undergoing a rapid decline that require major restructuring. While a competition policy may not be the most appropriate instrument for achieving such social policies, competition enforcement to counter the accumulation of private market power may advance perceived socio-political goals. It is difficult to argue that, for reasons of economic development or industrial logic, particular sectors must inevitably be protected from competition.

Governments can, and frequently do, exempt a limited number of sectors from the application of competition law. These sectors may, for example, include those where there are no or underdeveloped markets (e.g., the defence sector), those which are felt to be critical to the preservation of cultural diversity (e.g., segments of the media sector), or those which are marked by a high level of regulation (e.g., energy and agriculture).

There are tools that allow governments to tailor the scope of application of competition law enforcement to their economic and developmental needs. This can in particular be achieved by granting – partial – exemptions for a given sector, based on clear and objective grounds of market failure or a societal decision to displace competition with regulation. For example, in a number of countries some anti-competitive practices which would otherwise be prohibited are allowed if it is established that they are strictly necessary to achieve benefits such as allowing an orderly reallocation of resources in crisis industries, promoting exports, allowing small and medium-sized industries to gain access to a market which they could not otherwise enter, and so on.

The fact that a sector or a firm is partly subsidised or is protected for industrial policy reasons does not mean that competition law cannot, as a matter of principle, be applicable to this sector or this firm. Competition law can be applied to practices which go beyond what is allowed by public authorities unless all aspects of business strategies in the sector are regulated, which is rare.

It may therefore be useful to recall that the introduction of a competition policy has not stopped many developed countries having an enterprise policy (primarily focused on promoting 'competitiveness' by shielding domestic enterprises from foreign competition in the belief that, by so doing, they will somehow be better able to compete in export markets). Competition in the economy rather than its absence contributes to competitiveness in developing as in developed countries. Competition policy, especially during the early stages of its introduction, can be focused on cartel enforcement, and in market economies, industrial

CASE STUDY

Box 2 – Case study: the Philippine cement industry

After deregulation and privatisation during the 1990's, the Philippine cement industry saw cement prices go down when the effects of the Asian crises began to be felt. A subsequent wave of consolidation resulted in large foreign cement manufacturers buying up local producers, acquiring some 80% of industry capacity in the process. Thereafter, prices started to increase even though the domestic demand for cement was still weak. Some local observers attributed these price increases to a pricing behaviour inconsistent with competitive principles.

At the same time, it is reported that cement manufacturers from the Philippines exported cement to other markets at prices lower than the price charged on the domestic market. The cement manufacturers in late 2001 also obtained a tariff protection against imports. Eventually, however, several consumer organisations brought a cartel case against the industry.

What is of interest here is the way in which the theme of the relationship between competition and employment came into the debate. When they argued for tariff protection, the cement manufacturers claimed that it would save jobs in the Philippines.

However, their opponents responded that in order to protect the few thousand workers in the cement industry, the cartel's high priced cement had sent the construction industry into tailspin, with many more thousand construction workers losing their jobs.

Sources: R.A.M. Aldaba, 'Tacit Collusion in the Philippine Cement Industry' *Philippine Institute for Development Studies*, Nov. 2002, and N.H. Cruz, *Philippine Daily Inquirer*, of 26 Nov. 2001 and of 3 Apr. 2002.

policy does not require the creation of cartels. Thus, for example, the European Commission recently sanctioned a number of professional organisations in the agricultural sector for having attempted to drive up the price of beef over and beyond the price which would have resulted from the European regulation of this sector.

The competition law instrument is therefore a flexible instrument allowing the prevention and repression of anti-competitive practices which are detrimental to consumer welfare. In short, the case against the adoption of competition law because the enforcement of such a law would clash with a country's developmental objectives and prevent its government from using pro-active industrial policy is, at best, weak.

Competition and consumer benefits

Whatever one accepts as the appropriate objective of competition law and policy – be it the promotion of efficiency by fostering an efficient allocation of resources, or be it the promotion of economic opportunities as a means to facilitate growth, and related issues such as fairness – it is fair to say that consumer welfare is generally viewed as *a*, if not *the*, central concern in competition policy¹. Moreover, it is the choice of consumers choosing between alternatives that will reward the suppliers of goods or services offering the best quality price ratio.

Consumers are in general a natural constituency for credible competition law enforcement as a means to prevent exploitation of market power. However this in itself does not turn all consumers into strong supporters of competition. Many competition enforcers have experienced surprising difficulty in winning over consumers to actively support the establishment of a competition regime. So ways must be found to persuade consumers to support competition law enforcement efforts and institutions². In the specific context of developing countries, consideration must be given to potentially low income levels and high illiteracy rates, both of which may impact on the ability of consumers to make choices.

Competition enforcement can be focused on anti-competitive practices relevant to the family budget. Some competition authorities have consciously selected cases that will make a difference to the ordinary lives of low-income consumers. Peru, for example, took early action against cartels in the bakery industry, which resulted in a reduction of the price of bread. While a low-income parent may fail to understand the value of competition in high technology or industrial sectors, he or she can easily grasp its importance in this context.

At the outset, it seems difficult to argue that poverty diminishes the importance of protecting consumers against abuses by the providers of the goods or services with market power. However, one has to take due account of the income levels of many consumers in developing countries: if they have, say, a level of income around or below the poverty level of USD 1 per day, it has to be acknowledged that the question of choosing between alternatives is to a considerable extent irrelevant. Moreover, in very poor communities, because of the narrowness of the markets due to the poverty level, there will often be no choice as only one supplier of each good will be present.

In such circumstances, when considering the lengthy and complex legal proceedings it takes to sanction *ex post* cases of abuse of market power, price controls by the government may sometimes look like a more effective tool. However, one of the downsides of price controls is

¹ On this point, see also OECD Secretariat Note (2003), cited in the bibliography.

² A former Prime Minister of France (who had previously been an economics professor), for whom F. Jenny once wrote a speech which the Prime Minister was to deliver to Parliament at the start of the debate on a competition bill, sent back the speech with the following note: "It is no use arguing that competition will improve the allocation of resources because nobody in Parliament cares about or knows what an efficient allocation of resources is; if you want to make an impression on Members of Parliament rewrite the speech to say that competition will decrease inflation. That will catch their attention".

that they prevent market mechanisms from functioning, and it is not clear that sectors where this mechanism is set aside will always produce the kinds of goods and services that consumers really want. In addition, the implementation of price controls requires a body that sets the prices and there is the risk that this body is captured by those who have an interest in protecting high margins.

These problems tend to be aggravated in those developing countries where a large percentage of the population is still illiterate. Even if the level of income of these consumers is above the poverty level, and if they have choices, they may still have difficulty in gathering or processing the information necessary to exercise their ability to choose in a meaningful way.

In more developed countries, governments can protect consumers by obliging suppliers to provide information which will enable consumers to exercise informed choices. It is recognised that such a solution may be less effective in developing countries where consumers are not necessarily able to understand the information if it is provided. Some therefore demand that the government intervene to protect consumers against 'dishonest' retailers or suppliers and choose for consumers what should be supplied and at what price.

One interesting idea to make the introduction of a competition law more acceptable in developing countries could be to echo these voices by adopting a consumer protection law at the same time as a competition law, and to have both sets of laws administered by the same agency.¹ Thereby, competition policy would become more visibly associated with consumer protection. It should however be recognised that such a step may create new challenges, such as, in particular, the need to ensure that the two policies work in a complementary way by focusing jointly on consumer welfare.

Informal sector and lawlessness

Another issue that needs to be addressed concerns countries that are marked by a sizeable informal economy and/or outright lawlessness. In this context, two related concerns can be made out: first of all, some see competition law as inflicting an extra (unfair) burden on the operators in the formal part of the economy while these operators are already competing with difficulty against the informal sector not subject to these rules. Secondly, there is a fear that competition law might be misused by the enforcers. In response, some of the counter arguments that could dispel those concerns will be identified.

INFORMAL SECTOR

To begin with, it might be worthwhile to research better why and how this informal sector tends to grow in developing economies. It is quite possible that the informal sector develops not least due to the fact that there are too many restrictive regulations – often encouraged by incumbents – in the formal sector that prevent the entry of new comers.

Another motive for the activity of the informal sector might be that firms with significant market power restrict their own output and impede entry to preserve their profits by means of anti-competitive practices. There is reason to believe that in some developing countries the

¹ This has indeed been the case in jurisdictions as diverse as Australia, Brazil, Canada, Costa Rica, France, Jamaica, Japan, Korea, Panama, Peru, Poland, the Russian Federation, the United Kingdom, and the United States. See T. Muris, *The Conjunction of Competition and Consumer Protection*, 2002 Fordham Corp. L. Inst. (B. Hawk, ed. 2002).

lack of economic opportunities in the formal sector, which is in all likelihood an important factor contributing to the growth of the informal sector, may be a direct consequence of monopolistic or cartel practices in the formal economy. Consequently, there are compelling reasons for implementing a competition law and policy as a means of enlarging economic opportunities in the formal sector. It is also important to ensure that financial and capital markets, including the banking sector, operate along market principles.

Moreover, an argument can be made which puts into perspective the fear of some that competition law will add an unfair or unbearable burden on firms in the formal sector that are already at a disadvantage compared to their competitors in the informal sector. Indeed, in many instances firms in the formal sector of the economy, if they are under considerable pressure from competitors in the informal sector, would see significantly reduced possibilities to engage in anti-competitive practices. This is not to say that the existence of a large informal sector does not raise concerns, but it seems that those concerns are mostly of a different nature and relate, for example, to the necessity to protect consumers from defective products and from unfair practices.

COMPETITION AND THE LEGAL ENVIRONMENT

It is clear that the benefits that may be expected from competition will depend to a large extent on the quality of the legal environment of business transactions. For example, it has to be recognised that one amongst several other reasons for which the introduction of market-oriented reforms in certain former planned economies did not immediately lead to increases in GDP (on the contrary, they led to a significant decrease in GDP) was the absence of a centralised law and its proper enforcement.

Most people would agree that if there is no law and order, if corruption is rampant and if the informal sector is large, the immediate benefits in terms of economic development are likely to be small. However, it seems that, even in those circumstances, competition agencies can have a beneficial impact: they can play an important advocacy role in trying to prevent the adoption of overly restrictive regulations which, by relying on quotas and licenses or inefficient regulatory oversight, may limit economic opportunities. Furthermore, in such an environment, transparency of procedures and due process safeguards that accompany credible competition law administration would also sustain the process of competition.

The cost of a competition authority

Frequently, public policy officials in developing countries say that competition law enforcement is too complex and too expensive for them and that, therefore, even if one considers that competition is good for development, it does not follow that competition law, which is one of several policy instruments that foster the functioning of a market economy, is useful for these countries.

This argument rests on two hypotheses. The first is that other policy instruments can be substituted for competition law. The second is that the costs of a competition authority for a (small) developing country is likely to be larger than the benefit of competition law enforcement.

ALTERNATIVE POLICIES?

The main instruments of a 'market-oriented reform' are trade liberalisation, deregulation, privatisation, competition law, as well as sectoral regulations for those industries in which competition is perceived not to function. The first, trade liberalisation, aims at facilitating the introduction of foreign competition. The second aims at limiting the intrusion of government restraints on business behaviour to what is strictly necessary. The third is aimed at opening up statutory monopolies to market mechanisms. The last two are designed to prevent the emergence of anti-competitive behaviour or transactions.

These instruments are complements rather than substitutes. This is, at the international level, well illustrated by the widely publicised efforts of certain competition authorities to detect and proscribe a number of international cartels. Their existence – and the likelihood that there may be more – has given some plausibility to the view that trade liberalisation, even if it is a necessary condition for the development of competition, is in itself insufficient to ensure that open markets will be competitive.

WEIGHING THE COSTS

Attempts to quantify the harm done to all countries in general and to developing countries in particular by anti-competitive practices (and more specifically by cartels) – whether domestic or international – have been more frequent in recent years than they had been in the past. Simultaneously, several enquiries have tried to assess the cost of a competition agency in a number of developing and developed countries.

Without any claim to exhaustiveness, it seems fair to say that three major trends have come out of this type of research. First, the harm done to developing countries by anti-competitive practices is substantial. Second, the existence of an effective national competition agency in a country makes that country less vulnerable to the effects of international anti-competitive practices. Third, the cost of a competition agency tends to be small compared to the harm done by anti-competitive practices in developing countries.

In particular, the argument that there is considerable harm to developing countries from anti-competitive practices is particularly well established for international cartels¹. It has also been argued that the active enforcement of domestic anti-trust laws deters cartel activity. This has been demonstrated by recent studies on the vitamins cartel².

The overall conclusion resulting from these studies suggests that for developing countries the cost of a competition authority is rather small compared to the cost of cartels. Indeed, from different sources, notably the OECD and the CUTS 7-Up project, one can obtain data on the cost for a developing country of a reasonably well-funded and efficient competition authority. The annual budget of the competition authorities of Mexico and South Africa is in the range of USD 9-10 mill. The antitrust enforcement systems of Mexico and South Africa have been examined by the OECD Competition Committee in the context of the OECD regulatory reform project and the assessment of the Committee was that both competition authorities were enforcing very credibly by international standards. If one compares their budget to the overcharges of certain cartels that have been computed in the studies referred to earlier, it appears that for many countries the yearly overcharge from the cartel in question was larger

¹ See for example the works by M. Levenstein et al, as well as by F. Jenny, cited in the bibliography.

² See for example the work by J.L. Clarke and S.J. Evenett, cited in the bibliography.

than the annual budget of a competition authority. Assuming that these calculations are accurate, this would suggest that the authority would pay for itself if it did nothing but prevent the operation of this one cartel.

REGIONAL APPROACHES

Finally, it is fair to say that the mosaic of studies on the benefits and costs of competition authorities in developing countries does not enlighten us about whether it is worthwhile for the smallest and least developed countries to establish national competition authorities. It is quite likely that the cost of establishing a competition authority in small economies (such as, for example, the small island economies in the Caribbean), or in some of the least developed countries of Africa, may be very large compared to the resources of the country.

Furthermore, given the relatively small size of the national markets in these economies, most competition problems may be best handled in a regional context rather than at the level of each country. This is why the current attempts to establish such regional frameworks in the context of CARICOM in the Caribbean, COMESA and UEMOA in Africa, or the Andean Community in Latin America, merit serious attention.

Conclusion

As this chapter has tried to demonstrate, there are ways of countering and actively addressing the frequent scepticism vis-à-vis the introduction of competition policy and law. It may not be easy to make a case for competition, but upon closer inspection, many of the counter-arguments that are advanced by the opponents of competition policy and law enforcement fail to demonstrate that it is inefficient or ineffective in dealing with problems of economic development.

It may sometimes be easier to build a convincing case for competition by focusing more on examples and success stories derived from the experiences of developing countries, rather than simply highlighting those of developed countries. Taking examples from environments that are seen to resemble the local context more closely may help to make policy makers in developing countries aware both of the seriousness of the competition problems in their countries and of the benefits they could derive from adopting a competition law. A systematic attempt to identify competition problems in the home jurisdiction could help to raise this awareness.

There are good arguments to believe that competition policy can contribute to economic development. However, in order to create a framework that is conducive to this complex process, it is important to flank a competition policy with other appropriate policy initiatives, such as the creation of a sound legal environment, the implementation of an active consumer protection policy, and the pursuit of other social policy objectives such as education.

However, as far as competition policy is concerned, in order to create the self-reinforcing process that can generate economic growth, the challenge lies with building up the necessary capacity over a reasonably short period of time. Well-conceived capacity building and technical assistance initiatives can crucially contribute to addressing this challenge. The following two chapters will discuss these issues in more detail.

CHAPTER 2

IMPLEMENTING COMPETITION POLICY IN DEVELOPING AND TRANSITION COUNTRIES — IDENTIFYING THE CHALLENGES

Introduction

This chapter of the report is concerned with identifying the challenges confronting the implementation of competition law in developing and transition countries. In drafting this report, we have drawn heavily on the responses to our questionnaires from ICN Members. The responses to the questionnaires reveal, perhaps predictably, that each authority is dealing with problems that, while of a diverse range, are often nevertheless strikingly similar between the various competition authorities. Many authorities struggle to find a satisfactory place within the structures of government; almost universally, they complain of having to deal with a judiciary content to apply inflexible legal doctrine to the complex economic issues that inevitably inform competition enquiries; they bemoan the lack of a clear constituency of supporters among the general population; they identify the business community's refusal to recognise the legitimacy of competition enforcement as a major stumbling block; they are all significantly constrained by their inability to attract and retain the skilled professionals who are, inevitably, so central to the effective enforcement of competition law.

We have attempted to reduce this diverse range of problems to a common theme. In the end, we have been persuaded that the overarching challenge confronting competition authorities in developing and transition countries relates to their stature and standing within the ranks of key stakeholders or interest groups as well as the public at large. In other words, all struggle to make their voices heard and it is this that constitutes the gravest challenge confronting competition authorities in these countries. This is eloquently expressed in **Brazil's** response to the questionnaire:

'The greatest failures of the Brazilian System for Competition Defence are related to its inability to communicate the importance of competition values inside the government and throughout the Brazilian civil society. Despite the strong antitrust enforcement of the last years and the numerous advocacy projects developed by the three bodies, competition is still not a value homogeneously cherished among consumers in Brazil.'

These views are repeated in various diverse forms in most of the questionnaire responses. For example, **Estonia** identifies 'judges and politicians (who) do not have sufficient understanding of competition law and policy' and 'employees of the Competition Board (who) lack experience in the competition field' as the major constraints encountered in the implementation of competition policy. **Zambia**, asked to identify actions or initiatives deemed necessary to impart credibility to its enforcement agency, lists 'transparent decision making',

achieving ‘high levels of professionalism in investigations’, ‘closer cooperation with the consumer movement’ and ‘participation in key economic discussions which have substantive public effects’. Each of these may be understood as the necessity to enhance the enforcement agencies’ authority with various groups in society – in particular, as we shall elaborate, with judges, the government and political establishment, the professions and the public at large.

It is this then – **the standing of competition authorities** – that we have selected as the overarching theme for our examination of the challenges confronting the implementation of competition policy in developing countries. ‘Standing’ or ‘credibility’ is not simply a public relations question, although that is part of it. Rather, a discussion of standing involves an investigation of, inter alia, the structure and the extent and nature of the resources, critically including the human resources, which the competition authority requires to fulfil its designated functions. As we shall elaborate below, the functions of a competition authority are essentially two-fold – enforcement of competition law; and support for competition policy.

Within the broad overarching theme that we have designated as ‘the standing of the competition authority’, we have selected the following five sub-themes:

- The standing of the competition authorities in relation to **government**;
- The standing of the competition authorities in relation to the **judiciary**;
- The standing of the competition authorities in relation to **civil society**;
- The standing of the competition authorities in relation to the **community of competition ‘professionals’**; and
- The standing of the competition authorities in relation to the **business community**.

It is necessary to clarify that implementing competition **law** is the major activity of an antitrust authority. It is designed to ensure that businesses do not enter into agreements that prevent or distort competition, do not abuse their market power and do not engage in anti-competitive mergers. Competition law is directed at the autonomous behaviour of businesses, not at behaviour sanctioned by law. In fact a competition law by itself does not impede the adoption of anti-competitive legislation. Indeed, in all the ICN Member jurisdictions, including those where competition laws have been in place for decades, restrictive rules and regulations are quite commonplace. Certain of these may be directed at overcoming market failures or at meeting a specified national policy objective (e.g., food security or banking stability) that, the law makers fear, will not be attained through the operation of the market alone. However, certain of these interventions may, and clearly do, generate significant distortions and act as a burden on society and a very significant constraint on growth. This is why competition-oriented reform – or competition **policy** – is so important. As a consequence, a key activity that competition authorities perform is to advocate competition, to seek, in other words, to influence competition policy. The focus of this enquiry is to identify the ingredients for acquiring a reputation as an independent enforcer of competition law and as a credible advocate for competition policy.

Just as the instruments most powerfully associated with the enforcement of competition law are a statute and the enforcement and decision-making institutions created by it, so the instrument associated with competition policy is privatisation. However, competition policy

includes a diverse range of policies – frequently the province of sector regulators – designed to simulate competition in areas of the economy that, for one reason or another, are still in public ownership or subject to licensing regulation.

There is no bright line demarcating the jurisdictional limits of a country's competition law. This is clearly evidenced by the responses to our questionnaires. In certain jurisdictions, the competition authorities – that is, the authorities established by the competition **law** – have jurisdiction over all competition matters, although clearly, in any jurisdiction, the demarcation between a licensing matter and a competition matter is, at times, bound to be murky at best. At the other end of the spectrum, one finds jurisdictions, or, more commonly, sectors within jurisdictions from which the competition authorities are firmly and clearly ousted. In between these two extremes there are a variety of arrangements in place that seek to govern the interface between sector regulators and competition authorities.

What is clear, however, is that in the vast majority of jurisdictions that responded to the questionnaire, the competition authorities have the right, and, in many instances, a positive duty, to advocate competition, to promote the spread of competitive market relations to those areas subject to state ownership and regulation. The extent of advocacy powers varies significantly ranging from re-active advocacy through to the pro-active power to vet legislation and regulation that impede competition. Moreover, it appears that some of the most conspicuous successes identified by developing country and, particularly, the transition economy jurisdictions are precisely in this area, that is, in rolling back and inhibiting anti-competitive legislation and other interventions by government. Hence **Jamaica** lists its involvement in the '*evaluation of major Government privatisation contracts for rail, motor vehicle inspection and airport services*' as one of its most significant achievements, while **Hungary** identifies its participation in and influence over the liberalisation of the telecommunications, electricity and gas markets as one of its key activities.

This duality of function – enforcement/advocacy corresponding to law/policy – informs the discussion of each of the sub-themes. We will see that the relative weight accorded to each of these functions varies between countries. So too will the human resource requirements, and hence the relationship with the professions, differ between the respective authorities. For the moment we simply stress that our focus is on **identifying the challenges confronting the competition authorities**, the institutions established by competition **law**, in the fulfilment of their statutory responsibilities including the responsibility to promote a sound competition **policy**.

Two additional qualifications are in order:

Firstly, the task of this Working Group inevitably overlaps with that of the Working Group on Advocacy. This is particularly, although not exclusively, evident in those sub-themes focusing on the competition authorities' standing with government and with the broader society. We have attempted to minimise the instance of overlap but where this occurs we content ourselves with the observation that our work and that of the advocacy working group is complementary rather than repetitive and that, in any event, it raises important issues that benefit from repetition.

Secondly, while, in line with the practical orientation of the ICN, we are intent on not merely understanding the world but rather in promoting positive change, this phase of the Working Group is inevitably directed more at identifying the challenges than in advancing elaborated

solutions. We hope that the work in this phase of this project will provide the necessary platform for the exploration of solutions and best practices at a later stage. However, it is our view that many of the challenges identified here are not susceptible to resolution through single, optimal solutions. The diversity of experiences found amongst the various members of the ICN – divergences which occur not only between developed and developing countries but also within each of those broad categories – is, perhaps, the most striking feature of the questionnaire responses and persuades us that many of the challenges are fundamentally ‘home-grown’, that is, they are deeply influenced by particular legal systems, stages of economic development systems, cultural factors and the economic and political histories of the various countries out of which the competition laws have emerged and in which the various competition authorities function.

Why have competition laws proliferated in developing and transition countries?

The standing of the competition authorities amongst the various interest groups identified is clearly influenced by the circumstances in which they are introduced into any given country. Hence, in a number of countries – **South Africa** is a good example here – the introduction of competition law enjoyed significant popular support. In other countries the competition law was introduced as part of a package of liberalisation measures, on occasion – such as in **Romania** – even incorporated as a condition in a multilateral loan programme. Many countries – representing both **transition economies** and **developing economies** – introduced competition laws in the immediate aftermath of the introduction of far-reaching structural adjustment programmes that were frequently associated with spiralling price inflation. At times then, the competition authority was associated with the pain of structural adjustment while at other times and in other places it was viewed as a potential antidote. Hence, some of the fledgling competition authorities were tasked with responsibility for controlling prices, effectively for re-introducing the administrative measures that were, in significant part, the reasons for the reforms in the first place. The competition authorities in **Romania** and **Brazil**, two otherwise thoroughly divergent societies, appear to have grappled with this inheritance. The **Romanian Competition Council** notes that:

‘...initially many people viewed the competition law as the new and modern instrument of exercising the same type of centralised control on the activities of the firms. At the request of the international financial organisations more and more prices were liberalised. However, the competition law provides also for cases when price controls could be reintroduced – natural monopoly, other situations not very well defined, etc – and attempts to use these provisions appeared in the first stage of competition policy enforcement.’

In recent years, the requirements for EU accession have focused attention on competition enforcement in many of the **transition economies**. This is confirmed by, inter alia, the **Slovak Republic**.

These diverse backgrounds obviously impact differentially on the standing of competition authorities although none are devoid of complexity. Hence, while it is unquestionably preferable that competition law should enjoy widespread popular support at birth, this may give rise to unrealistic and skewed expectations and, ultimately, severe disillusionment. It may

also, as in the case of **South Africa**, account for the introduction of complex public interest considerations in the legislation. On the other hand, to be bound up at birth with a painful and unpopular economic reform program creates obvious challenges of its own.

However, in recent years the introduction or strengthening of competition laws has become increasingly associated with a single phenomenon, namely, market liberalisation. Moreover, it appears, that the introduction of competition law is increasingly perceived as a mechanism for ensuring that the broad reform program realises its promise, that, in other words, the newly established markets remain accessible and contestable, defended from their most powerful opponents, large monopolists or oligopolists. This places a huge burden on enforcement agencies, particularly in the transition economies, where the expected declines in prices promised by the introduction of competition does not materialise because prices were previously set at levels subsidised by the state. In short, in order to realise the promise of competition, the government, in addition to placing a competition law on the statute book, also has to demonstrate a strong commitment to taking on vested interests in order to ensure that new entry does actually occur. In the absence of this commitment on the part of government, it is likely that consumers will experience all the pain and none of the gain from the partial introduction of competition and this will impact negatively on the standing of the fledgling competition authorities. **Uzbekistan** clearly articulates this dilemma:

'Enacting a law on competition in 1992 was conditioned by the necessity to create a legislative framework for undertaking economic reforms. There was a need to ensure that with privatisation and demonopolisation of the economy, enterprises would not exploit their market power and engage in anti-competitive practices. Many of the industries were very concentrated being represented by only one or two companies and there was a very high chance that these former fully state owned enterprises with huge production capacities and market power could abuse their position.'

CUTS, the **Indian** research and advocacy group, notes:

'In brief, the need for a new competition law was based primarily on two factors. First, the economic environment has been undergoing substantial transformation following the structural reforms initiated in 1991. Government controls on industry have been reduced, licensing and other restrictions on firms have been removed and the government has been moving out from non-essential commercial arenas. Lowering of barriers to external trade, generally, increased the scope of competition in the economy. Second, parallel to domestic reforms, the global economy has been undergoing wide-ranging changes, resulting in far greater integration of markets and economies. An important element of the changing global environment was the signing of the WTO agreements. In the light of these developments, a fresh look at India's competition regime was inevitable and imperative.'

This view is restated in numerous responses to the questionnaires. **Jamaica, Zambia, Poland** and **Mexico** all identify economic reform as the key factor underpinning the introduction of new or strengthened competition law. Many countries that had weak competition statutes for many years significantly strengthened their competition enforcement

regimes in line with an increasingly unambiguous commitment on the part of their governments to economic reform. **Brazil's** progression in this regard is clearly laid out in a background paper prepared for this Working Group:

'Although Brazil has had an antitrust system for more than 30 years, it was only after all the necessary structural reforms had been implemented that it did in fact become operational. The reforms included trade liberalisation, privatisation and the creation of sectoral regulatory agencies, which made it possible to enforce competition rules. These reflected the change in understanding over who should be responsible for the promotion of economic growth: before, there was the government leading the investment and indicating the relevant sectors for the private businesses, and then free market allocation of resources.'

In fact, many of the **transition economies**, most of whom introduced competition laws for the first time in the early 1990's, have gone through several versions of competition law in a relatively short space of time, as their statutes have been strengthened. **Hungary, Poland** and **Lithuania** are clear examples.

This is, of course, not to say that any government can ignore its heritage. It is interesting to note that the **transition economies** often appear to have the most 'pure' competition laws, that is, competition laws that enshrine economic efficiency as the sole objective of the law and where public interest plays little apparent part in competition decisions. This can to a large extent be attributed to the strict requirements that the EU asked the acceding countries to fulfil in the competition field. Starting *tabula rasa*, with a clean slate untrammelled by the demands of strong groups in civil society, particularly business and labour organisations, enables the introduction of text book-type, 'pure' competition laws. However, these societies, as we shall elaborate below, have to deal with the legacy and continuing existence of a very powerful state and, hence, the competition authorities in these countries have been careful to assume considerable formal status in the policy-making and executive apparatuses of their governments.

On the other hand, the competition laws introduced in those countries with well-established non-governmental sectors, notably business and organised labour who have grown under conditions of protection, are characterised by a significant role for public interest or wide-ranging carve outs for specified sectors. **South Africa** clearly exemplifies the former whereas **Mexico**, with its carve out for export associations as well as 'strategic sectors' such as postal and telegraph services, oil and hydro-carbides, basic petro-chemicals, radioactive minerals and electric and nuclear power generation typifies the latter.

However, these formal statutory differences should not be read as necessarily indicative of the efficacy of competition enforcement in the different regimes. **Romania** clearly lays out some of the difficulties confronting competition enforcement in the transition economies:

'In Romania, competition protection legislation is enforced in a somewhat different environment than that in countries with fully-fledged market economies. Romania still has to create a favourable climate for private initiative, but in an economic environment used to, and still heavily influenced by, the direct control and intervention of the state. This is complicated by the

incredible influx of new technologies and industries in an economy that is in many ways closer to the industrial revolution than the microprocessor revolution. And this is because the state is still a significant stakeholder in the economy, and therefore acts in its dual capacity as a regulator and an economic operator. Most of the cases analysed by the Competition Council during the past years had the state – though its central, local or other various institutions – as an involved party.'

The challenges

THE STANDING OF THE COMPETITION AUTHORITIES – THE GOVERNMENT

As we have already observed, competition authorities perform two broad functions, namely, enforcement of competition law and advocacy of competition policy. Unfortunately there does not appear to be an optimal institutional structure that would simultaneously achieve both objectives. If enforcement is the most important goal that the authorities are pursuing then the institutional structure should favour predictability and fairness of decision-making, or, as it is commonly referred to, independence. On the other hand, if competition-oriented reforms are the most important policy objectives, then the institutional structure must allow for the greatest possible influence with the policymakers, thus providing expertise for the political debate.

Indeed, different institutions may be classified according to the two characteristics of independence and influence. For example, leaving antitrust decision-making to a judge favours independence while downplaying advocacy, especially when antitrust is completely left to private initiative. At the other extreme, ministries, whose main activity is political and are therefore well organised for advocacy, are sometimes less well placed to give reasoned and credible decisions on specific cases, although in those legal and political systems where the independence of prosecutorial decision-making is well-established and respected, the mere fact that the prosecutorial body is part of the executive structure is not a necessary or likely constraint on its independence. This is why in many of the newer regimes, where a perception of political influence over prosecutorial and even judicial decision-making is prevalent, formally independent administrative authorities are often favoured – they associate high degrees of independence with a significant degree of influence in the policy-making apparatus. But strict, formal independence or insulation from the state may embody important trade-offs – it may compromise access to appropriate levels of funding, it may reduce influence with other key governmental agencies, and it may undermine the democratic accountability of the competition authority. Hence, while the choice for independence is universal, the actual powers and positions of the various national authorities within their respective governmental structures differ significantly. The **Polish** authority clearly identifies the delicate balance that has to be maintained:

'The credibility of competition policy enforcement depends almost entirely on one single element – a transparent legal system providing the agency with the necessary degree of independence, without excluding it from the control mechanisms of the democratic state.'

This is borne out by the responses to our questionnaire. At the risk of oversimplification, it appears that there are two dominant **models** that structure the relationship between the competition authorities and the government. The first is characterised by the very firm insertion of the competition authorities into the executive apparatus. In this model, the head of the competition authority often enjoys, formally at least, the stature of a minister of state. Indeed in some national jurisdictions, the head of the competition authority *is* a member of the cabinet. This model usually goes hand in hand with the granting of strong formal powers to the competition authority to intervene in legislation, although often with no formal veto power, and other government interventions that impact upon competition. The structure and powers described here are generally associated with the **transition economies** where competition *policy*, extending the reach of markets and defending fledgling markets from the state, is predictably a major concern and pre-occupation of the competition authorities.

The other model is characterised by an independent competition authority, that is, one characterised by separation from the government and, presumably, relative freedom from government intervention in its decisions, which are principally enforcement decisions. Under this model, a competition authority's ability to influence competition policy suffers somewhat in consequence of its separation from government. In these jurisdictions the mechanism for influencing state policy is limited to the exercise of greater or lesser powers of advocacy, the strength of which will depend more on the strategies and tactics of the competition authority and rather less on the extent of its formal powers. In short, in these systems, successful advocacy will rely on the extent of political support enjoyed by the authority. Strident advocacy combined with a lack of political support will condemn the agency to public displays of impotency which, in turn, will detract from its overall authority in the eyes of civil society.

There may be a difference between an authority's formal relationship to the government and its de facto relationship, with respect to both its ability to be influenced and to influence. Authorities formally inserted in the executive apparatus can be de facto independent, and indeed some are. Likewise, authorities that are formally independent commissions or councils can and do in fact have important, even legally-mandated, input into certain government policies. Different countries have creatively addressed the challenge of maintaining de facto independence from political interference, while at the same time retaining a voice in governmental decisions on economic policy issues. Hence, for example, the competition authorities in **Lithuania, Romania, Uzbekistan, the Slovak Republic, Poland and Hungary** – whether they are formally inserted in the executive apparatus or are independent agencies – appear to be inserted into some of the highest policymaking councils of government and are formally tasked with prior examination of government measures that may impact on competition. **Lithuania's** account is typical:

The Law on Competition provides that the Competition Council may submit conclusions to the Parliament (Seimas) and to the Government on the effect of draft laws and other legal acts on competition. The Chairman of the Competition Council has the right to participate in meetings of the government and must voice his comments if the proposed decisions contradict the law on competition. The officials of the Competition Council participate at the meetings of the relevant committees of the Seimas. During

such meetings, the officials of the Competition Council and parliamentarians have an opportunity to exchange their views on topical issues and to discuss further legislative developments in the area of competition policy.'

In **Romania**, the competition statute specifies that the Competition Council must:

- *inform the Government about interference of central and local public administration bodies in enforcing the present law;*
- *give advisory opinions on government decisions that may have anti-competitive impact and to propose amendments to the acts having such effects;*
- *recommend to the government and the local public administration new measures facilitating the market and competition development;*
- *propose to the government and local public administration bodies, disciplinary measures against their staff for not observing the mandatory decisions of the Competition Council;*
- *draw up studies and reports on its field of activity and inform the government.*

In **Uzbekistan**,

'One of the distinctive powers given to the Committee is to require state administrative bodies and state authority bodies in regions to terminate or modify legislative acts and orders which are found to contradict anti-monopoly legislation.'

In **Poland**,

'The President of the OCCP [editor's note: Office for Competition and Consumer Protection], though not being a member of the Council of Ministers, is invited to the Council's meetings whenever competition related issues are on the agenda. In addition, he is a member of the Permanent Committee to the Council of Ministers (an advisory entity).'

These – or similar – powers are not confined to the transition economies. In **Jamaica**, the competition authorities receive prior notification of potentially anti-competitive policy interventions and officials of the competition authorities participate in ad hoc bodies set up by the Government or a minister. In **Mexico**, it is striking that although there are no formal avenues for the intervention of the competition authorities in government policies and decisions, the FCC nevertheless participates in a number of key government commissions, an activity which it describes as *'the principal route for advocating competition in the design and implementation of economic policy'*. These include the Inter-Ministerial Privatisation Commission, the Inter-Ministerial Public Expenditure and Financing Commission, the Federal Regulatory Reform Commission, the National Standards Advisory Commission and the Foreign Trade Commission.

In some countries, while competition authorities are given the power to advocate competition-oriented reforms, the Government ensures that it is represented on the decision-

making bodies of the competition authority, thus enhancing government influence over the decisions of the competition authority while simultaneously constraining its independence. The Government of **Zambia** has two representatives – from the Ministry of Commerce, Trade and Industry and the Ministry of Finance and National Planning – on the Competition Commission Board. In **Romania**, the Competition Office, described as a *'specialised competition body subordinated to the Government'* represents government in the plenary meetings of the independent decision-making body, the Competition Council, and *'has the right to ask for a second deliberation when its interests have not been satisfied'*.

Where markets are already well-developed and where major concerns are the independence of enforcement, antitrust authorities are structured in a somewhat different way. In **South Africa** members of the Tribunal, the decision-making structure in the hierarchy of institutions created by the Act, are appointed by the President of the Republic on the recommendation of Cabinet. They are to be selected for their knowledge of economics, law, commerce, industry or public affairs. They may not be office bearers in any 'body of a partisan political nature'. The Act specifically provides that both the Commission – the investigative and prosecutorial arm of the authority – and the Tribunal – the decision-making or adjudicative arm – are 'independent and subject only to the Constitution and the law' and 'must be impartial and must perform its functions without fear, favour or prejudice'.

Most of the respondents to our questionnaire attach considerable significance to the modality for the appointment of the head of the competition authorities. Hence we are informed that in **Hungary**, the leading officials of the competition authority are appointed by the President of the Republic on nomination of the Prime Minister, and, significantly, that their appointment is for six years, two years longer than the mandate of the government. Moreover, it is noted that the members of the Hungarian competition authority are subject only to the law and no instruction may be given to them when arriving at their decisions. The same mode of appointment is used in **Lithuania**, where, we are informed, *'the Competition Council has the status of a public agency whose decisions are taken on the basis of the Law without any possibility of interference by the government.'* However, **Romania** notes that,

'The nomination of the members of the Council is a moment when political parties play a significant role. The law asks for the nominees not to be members of any political party which sounds like a reasonable request. In practice those nominated in the Competition Council may subsequently resign, more or less formally, from the party where, at the moment of nomination, they were active members. Such a framework can raise question marks about the real independence of these members'

The observations of the **Polish** authority regarding the appointment and accountability of the head of the OCCP are apposite:

'The OCCP forms part of the central public administration. It is headed by the President, who is chosen for a term of five years by an independent panel of recognized experts in the area of law and economics. The President is appointed by the Prime Minister and reports directly to him. Importantly, supervision of the Prime Minister covers the institutional aspects and not the merits of the President's decisions.'

CASE STUDY

Box 3 – Case study: the shift of the JFTC to the Cabinet Office

The Japan Fair Trade Commission (JFTC) is a central governmental agency established by the Antimonopoly Act, in order to attain the purpose of the Act. The independence and neutrality of the performance of the JFTC's duties are clearly specified by the Act, and actually, there is not necessarily a serious problem whichever ministry the JFTC belongs to within the central government.

In Japan, the central government agencies were reorganized in January 2001 as a part of administrative reform. The JFTC was placed as an external organ of the 'Ministry of General Affairs'(*) which was established by the integration of the Management and Coordination Agency, the Ministry of Home Affairs and the Ministry of Posts and Telecommunications. However, after the reform, an argument arose that it was necessary to improve the status of the JFTC from the following viewpoints.

First, it has been an important issue for the government to promote the economic structural reform for business recovery in Japan. Under the circumstances, such recognition has been widely spread that it is particularly important to promote competition policy which aims at realization of free and fair competition rule in a market, and that competition policy has characteristics to be positioned in the fundamentals of economic policy. Thus, it has been considered that the appropriate status of the JFTC, which leads in competition policy, is not under the ministries which have jurisdictions over various industries, but under the Cabinet Office, which is in a higher status within the government and manages planning the important policies of the cabinet.

Second, in a worldwide trend of deregulation in the telecommunication sector, also in Japan, the expectations for the efforts of the competition authority toward this issue have been growing. However, since it happened that the Ministry of General Affairs would have jurisdiction also over the telecommunication sector, concerns were expressed whether the JFTC could stand on the independent decision and could fairly and neutrally play its role from the standpoint of competition policy, under the umbrella of the same Ministry. Although such concerns were legally unnecessary, lack of transparency might be taken up as a problem on the occasion that the JFTC actually exercised its authority. Thus, it has been considered to be desirable to make the JFTC shift to the Cabinet Office which has no jurisdiction over a specific industry in order to clarify the independence from the regulative authorities and wipe away such concerns.

In response to the above, the bill was submitted to the Diet in the beginning of this year and was approved unanimously. The shift of the JFTC to the Cabinet Office was brought into effect on April 9, 2003. The JFTC, getting the new status, resolves that it strive for more positive development of competition policy.

(*) 'Ministry of General Affairs' is a literal translation from Japanese 'Somusho'. Formal translation is 'Ministry of Public Management, Home Affairs, Posts and Telecommunications'.

Source: JFTC.

The process of making senior appointments to the soon-to-be-established **Indian** competition authority appears to have generated some controversy. Hence in the Bill originally submitted to Parliament, the Chairman and members of the decision-making authority were to be selected by a committee chaired by the Chief Justice. However, in the parliamentary process it was decided that these appointments should be in the sole discretion of the government and a requirement that the Chairman had to be selected from among the ranks of retired judges was also dropped.

THE STANDING OF THE COMPETITION AUTHORITIES – THE JUDICIARY

If there is one common concern expressed across the diverse jurisdictions that responded to the questionnaire, it is directed at the perceived difficulty of the judiciary to come to grips with competition law. We should, however, note that relations with the judiciary are predominantly, if not exclusively, a pre-occupation of developing rather than transition economies where the courts belong predominantly to the realm of competition law enforcement rather than the realm of competition policy. **Brazil's** views are representative:

'According to Brazilian law, an appeal to the courts is always possible from CADE's decisions. [editor's note: CADE is the administrative tribunal that is the decision maker in the Brazilian system]. One of the main queries faced by antitrust enforcers is the response of the courts to competition cases. By endorsing or rejecting administrative decisions, they will play an essential role in shaping anti-trust policy. Thus, any actions or initiatives that can promote greater efficiency and transparency regarding court decisions can impart credibility to the Brazilian enforcement agencies.'

Jamaica, asked to identify the main constraints encountered in the implementation of competition law, is more forthright. It simply states:

'The judiciary is not conversant with competition law.'

Indeed, so commonplace and so seemingly self-evident are our respondents' frustrations with their respective judicial authorities, that few have seen fit to specify a closer identification of the problems that they encounter with the judiciary. The all-but unanimous view expressed is that the judiciary is a major stumbling block in the path of effective competition enforcement – the judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side streets out of which the substantive matters at issue rarely emerge.

A caveat, possibly self-evident, is in order here: it would perhaps be surprising if the prosecutorial authorities, in any field of law, did not periodically complain about the adjudicative authorities. After all, the enforcement authorities make prosecutorial decisions, or, as in the case of many of the authorities, impose remedies, regarding mergers or anti-competitive practices that they believe correctly promote their mandate to maintain and promote competition. No prosecutorial authority enjoys having its decisions, often taken after intensive and time-consuming investigations, second-guessed by adjudicators, particularly

when, as so often appears to happen, the latter's decisions are taken on the basis, not of a consideration of the competition merits, but because of the contravention of one or other arcane procedural requirement.

Moreover, these procedural challenges are bound to proliferate at the early stages of the enforcement of the law when the procedures are still being tested, often, in the case of the transition and developing economies, against recently enacted constitutions which are themselves still relatively untested by the courts. Hence, just at the very time that a fledgling enforcement agency is attempting to establish its standing with government, the public and the business community, it is finding its best efforts thwarted by judges who seem more concerned to ensure that a filing was completed in the prescribed time period and format than in robustly assisting in the enforcement of the law. Important stakeholders thus gain the impression that the competition authority, far from meeting society's already ambitious and frequently skewed expectations, is pre-occupied with fighting, at considerable cost, obscure legal battles.

These frustrations are common across the world of enforcement. While insistence on adherence to procedural requirements may, and often does, form part of an opportunistic and obstructionist defence strategy, the intent of many of the important procedural requirements is to protect the rights of citizens, including corporate citizens, from the arbitrary or capricious exercise of power by a public authority. Hence, though often frustrating from an enforcement perspective, resort to procedural review may often reflect the strength of the competition law system. Indeed, the reasonable assurance that due process will be accorded may be precisely what is required to ensure the standing of the competition authorities with not only the judiciary, but also with the business community and the public at large. After all, competition law establishes important limits on the use of private property – the stakes are considerable and those whose property rights are under scrutiny are entitled to know that those who seek to circumscribe these rights do so within the overall framework of law and legal principle that govern the society. In short we must allow for the possibility that the concerns expressed regarding the judiciary may actually reflect the degree of 'creative tension' appropriate to the relationship between prosecutor and adjudicator.

But in truth it appears that the concerns of competition enforcers with respect to the role of judiciary do extend beyond the predictable frustrations occasioned by procedural challenges or even opportunistic technical reviews. Indeed their concerns go to the heart of the entire competition project, to the reality that a legal process is being used to judge the laws of economics and that judges, expert in the law, but untrained in economics, are expected to participate, as the final decision makers, in judging economics. The problems are numerous. Hence the fact that mergers – particularly in the large number of regimes in which pre-merger notification is required – are judged prospectively, or in the term often used pejoratively by defence counsel, 'speculatively', rather than on the basis of a retrospective gathering of evidence, is alien to most conventional legal proceedings. In many 'rule of reason' anti-competitive practices, the decision-makers are required to consider the impact of the practice in issue on the incentive structure in order to predict the behaviour of a range of economic agents, an enquiry generally involving a consideration of complex economic theory and a degree of 'probabilistic' reasoning at odds with the standard adjudicative process.

There are two complementary approaches to what is undoubtedly a significant problem confronting competition enforcers. The first involves the introduction of programs designed to

train judges in the economic theories underlying competition analysis and in the evaluation of economic evidence. These programs will be considered in the section of this report dealing with technical assistance.

The second has to deal with the structure and character of decision-making in competition matters. Recall that in our earlier discussion of the relationship of the competition authorities to government, we noted that the norm was increasingly moving in the direction of administrative authorities, which may improve opportunities for striking a balance between the dual requirement of independence and influence. This choice in favour of placing independent administrative authorities in charge of competition law impacts on the relationship between investigation and adjudication, and, hence, on the relationship between the competition authorities and the judiciary.

It appears that many competition statutes favour a structure in which the first decision, including the imposition of remedies, is taken by the specialist institutions set up by the competition law with the normal high courts responsible for considering appeals from the decisions of the competition authorities. In this structure, the extent of the court's role is often determined by the degree of deference that an appeal body accords to the first decision-maker's consideration of the evidence. If the appeal body confines itself to a consideration of the law, including a review of the procedures adopted by the competition authorities in the exercise of their investigative and decision-making functions, the role of the courts is limited relative to that of a system in which the court hears, *de novo*, both evidence and legal argument.

In many instances, it appears that the court's role is most prominent in the conduct of procedural review rather than a consideration of the competition merits of the case. In this case, an important factor in judicial review is often the relationship between the investigators and the adjudicators. In many legal systems, structures of decision making in which the investigative and adjudicative processes are strictly separated are more likely to pass muster at judicial review than systems in which the exercise of these functions is conflated. Hence **Jamaica** is in the process of amending its Fair Competition Act in order *'to clarify and distinguish between the role of Commissioners as a quasi-judicial body and the role of staff as investigators, acting on behalf of the Commission.'*

South Africa has adopted a hybrid decision-making structure for the administrative authority established by its competition statute. In that country the Competition Act has established three wholly separate and independent structures. Note that the respective bodies have separate staff, including separate heads, and separate budgets. The first, the Competition Commission, is principally responsible for investigation and advocacy. Its decision-making powers are limited to mergers falling below a pre-determined threshold and to the granting, on grounds specified in the statute, of exemptions. These decisions may be appealed against to the second institution established by the Competition Act, namely the Competition Tribunal. However, in addition to acting as an appeal body in respect of the Commission's limited decision-making function, the Tribunal is the first decision-making body in respect of all large mergers – that is, mergers falling above a second pre-determined structure – and all alleged anti-competitive structures. Note that in the case of large mergers, the Commission even has to refer a recommendation to *approve* large mergers to the independent Tribunal. The Tribunal is composed of 'lay-people', that is persons who are not judges. The Tribunal has exclusive jurisdiction in respect of all competition matters contained in the Competition Act –

indeed, if a matter that falls within the ambit of the Competition Act surfaces in a proceeding before the High Court the Judge is obliged to refer this matter to the Competition Tribunal for adjudication.

But why go to the trouble of ensuring such a rigid division between the investigative and adjudicative functions of the administrative authority? Why not simply grant the competition authority investigative or prosecutorial powers, leaving the adjudicative authority in the hands of the courts? After all, this system involves setting up two bodies with the attendant demand that this places on human and other resources. Or, conversely, why not place decision-making powers in the hands of the investigative bodies, with a right of appeal to the courts?

Placing decision-making in the hands of an administrative body rather than a court allows for full participation by economists and lawyers who are experts in competition law and economics, thus circumventing the oft-stated problem of generalist judges taking decisions on competition matters. It also provides for swifter access to the decision-maker and it frees the adjudicative bodies from the extreme formalism that frequently characterises judicial processes. Critically, an administrative decision-making regime also permits the decision-maker – even if institutionally separated from the investigator – to ‘step into the ring’ to intervene in the course of litigation to an extent greater than that normally associated with a court of law. Hence although the South African Competition Act specifically provides that the Tribunal ‘must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice’ it also provides that the Tribunal, the decision-maker, it ‘may conduct its hearings informally or in an inquisitorial manner’.

In South Africa’s common law system, one of the key ‘principles of natural justice’ is the separation of investigation and adjudication. However, while the structure of the Act ensures adherence to the particular interpretation of this principle in the South African legal system, it also, in line with the administrative approach which is adopted, has given the decision-maker powers of intervention that are not normally associated with standard judicial proceedings.

The third body established by the Competition Act is the Competition Appeal Court. This is a specialised division of the High Court composed from the ranks of sitting judges of the High Court and which is exclusively empowered to hear appeals on competition matters decided by the Tribunal. This allows for a small body of judges to develop experience in the application of the competition law. Although the Appeal Court still has to determine the precise degree of deference that it will accord to the decisions of the Tribunal, early indications are that it will confine itself to a traditional appeal role, where it will consider appeals on points of law but will defer to the Tribunal’s evaluation of the evidence.

In the end it may be that these are problems that only time and experience will ameliorate. In the mature administrative systems – for example, in many of the large European jurisdictions – the decision-making role of administrative bodies and the distinction between administrative and criminal offences is a well-established feature of the legal system as is the role of the courts in the appeal process. In the newer jurisdictions administrative authorities will, over time, begin to appreciate that just and fair administrative procedures critically influence the standing of the authority and are as important as just and fair judicial procedures and that great care should be exercised in order to make sure that procedures are respected. In turn, the Courts, especially when the review or appeal is carried out by the same group of judges, will, over time, learn the guiding principles of competition law and will be less inclined to uphold purely technical reviews in preference to determining the merits of

a matter before it. Provided that the morale of the competition authority is maintained and the public is well informed, learning from past mistakes may lead to great improvements in performance.

THE STANDING OF THE COMPETITION AUTHORITIES – CIVIL SOCIETY

Competition law faces a problem similar to many other programs designed to strengthen market disciplines. Its opponents, those who fear that their interests will be compromised by the introduction of competition law, particularly organised business but also labour, are well-resourced, coherently organised and usually know how to influence the political process. This is reflected in the existence of active and powerful lobbies. **Mexico** provides an interesting illustrative example arising from the Federal Competition Commission's position with respect to the privatisation of two state-controlled airlines which gave rise to a range of *'interest groups'* engaging in *'lobbying activities at levels of decision-making such as Congress, Ministries or regulatory agencies.'* On the other hand, the potential beneficiaries of competition law, small business and, particularly consumers, are generally under-resourced, poorly organised and, in consequence, have very limited voice.

In short, competition *law* often appears to be an idea in search of a strong champion. On the other hand, in the transition economies where, as we have outlined, the promotion of competition *policy* is the major task, the recent experience of the impact of centralised command economics on economic welfare and democratic governance ensures greater, immediate support for the activities of the competition authorities. There may also be a case for introducing greater competition components into the *curricula* of economics, business and other courses in universities and colleges.

Many of the respondents to the questionnaire emphasised the importance of publicising the activities and decisions of the competition authorities in their continuing efforts to increase the level of public awareness and support. **Brazil** and **South Africa** stressed the importance of holding public hearings and of issuing public, fully-reasoned decisions. **Zambia** identified *'transparent decision making procedures'* as a key initiative necessary to impart credibility to the enforcement agency. Several authorities clearly place great importance on encouraging wide-ranging participation in investigations and hearings. **Brazil** stressed that *'the authorities can ask for information from anyone including individuals, firms, unions and public institutions'*. In **South Africa**, the Minister of Trade and Industry and the representative trade union in the affected firms must be informed of merger filings and they are entitled to make representation at any stage of the investigation or hearing. Other parties materially affected by a merger – for example, consumers or competitors – are entitled to apply to intervene in a hearing into the merger even if their views have been considered by the enforcement authority in preparation for its own representation before the adjudicative body.

Most of the respondent's underscored the importance of engagement with their legislative authorities. **Hungary** notes that *'the President of the OEC submits annual reports to parliament and upon request to the competent parliamentary committee on its activities. This is an important advocacy tool'* and it also enables *'members of parliament to express their views and desires concerning competition policy'*.

It goes without saying that the media is a vital instrument in the competition authorities' efforts to enhance their standing with the broader public. Again, accessibility through the

holding of public hearings and transparency in decision-making is identified as a key element in cementing relations with the media, although several respondents be-moaned the media's lack of understanding of competition law and economics.

In the final analysis, consumers are, arguably, the only reliable allies of the competition authorities. Consumers tend to be very poorly organised. Even in a society like **South Africa** where interest groups tend to manifest high levels of organisation, coherent consumer organisation is conspicuous by its absence. One possible way of overcoming this is for the competition authority to be given responsibility for consumer protection. In **Lithuania**, for example,

'the Competition Council has very close relations with the consumer institutions, which were re-organised and created in 2000. The Competition Council has experience accumulated during the six years of application of the Law on Consumer Protection, and is still involved in consumers' matters.'

Another way of addressing the deficiencies in consumer organisations and their perfectly understandable ignorance of the benefits of robust competition enforcement is to select cases that resonate loudly with consumer concerns – the decision of **Peru's** competition authority, a decision taken in the early days of its existence, to attack bread and chicken producers' cartels, is often cited as an example of the sort of strategic case selection designed to shore up vital consumer support for competition enforcement.

THE STANDING OF THE COMPETITION AUTHORITIES – THE COMMUNITY OF COMPETITION 'PROFESSIONALS'

There are a range of issues that may be considered under this heading. Our focus is, however, on the technical competence of the competition authorities. There is nothing that will undermine the standing and reputation of competition authorities more rapidly than persistent displays of technical incompetence. And while excessively short-sighted private lawyers may initially welcome the opportunity to 'out-gun' their opponents on every occasion, a drastic imbalance between the technical competence of, on the one hand, the members of the authority and, on the other hand, that of their private sector opponents serves no-one's interest – after all, the authorities will, technical incompetence notwithstanding, still retain their statutory powers and it requires no great expertise in competition law or economics to deploy these powers to harass and obstruct their opponents. Indeed, the less competent the authority, the more likely is it to deploy its powers in a 'gate-keeping' and bureaucratic manner.

In order to maintain and enhance its technical competence, the authorities have to be able to attract and retain quality staff from the private bar and from the universities and consultancies that train and employ high-level economic analysts. Note that the agencies that focus on the implementation and development of competition law tend to employ a higher ratio of economists to lawyers than do their counterparts in those agencies predominantly concerned with enforcement. **Romania** specifically cites a shortage of trained lawyers – there is a suggestion that this may be a problem that characterises the transition economies generally.

The respondents to the questionnaire recite a familiar litany of problems. CUTS, the **Indian** NGO, is outspoken:

'Another reason for the poor performance of the MRTTP Commission was the quality of its personnel, both staff and members. Most of them did not appreciate the science of competition policy and law. The members were usually drawn from a pool of retired judges and civil servants, who were hardly imaginative or had any depth of understanding of the science of competition policy.'

Lithuania identifies the inability, arising from budgetary constraints, to hire experts to assist in investigations and to train new employees. High employee turnover is identified as a major problem arising partly from a significant, and familiar, pay disparity between the public and private sectors. **Romania** identifies as one of its main constraints

'...the lack of specialists to be hired from outside the competition authority. Training in competition protection starts in the Council (and not, for instance, in the universities), while subsequently the private law firms are much more attractive, mainly for young and dynamic specialists. As a result staff turnover is rather high.'

The **Slovak Republic** has identified *'insufficient language skills'* as a major constraint given that *'the specialist literature is exclusively in foreign languages'*.

That these problems can be safely said to characterise all developing country jurisdictions does not diminish the need to confront them urgently. Many countries identified training programs as the key mechanism for overcoming these crippling human resource constraints and they are dealt with more fully in the section of this report dealing with technical assistance. **Romania** notes that

'Our experience has shown that effective twinning arrangements with international competition advisors have proved to be a significant step forward for staff, managers' and decisions-makers' legal and analytical skills.'

Hungary has clearly confronted this problem with some significant measure of success:

'With a larger budget we managed to overcome these problems. At present the OEC offers competitive salaries for young expertise compared with the private sector at least for the first 5-6 years. The prestige of working at the OEC increased substantially. The employees of the OEC regularly give lectures at several universities, and, in this way...finds appropriate staff. The OEC started to organise a competition for young lawyers, which serves as a good recruitment base.'

Given the inevitable disparities between private and public sector salaries, the authorities will have to accept that it is the reputation or standing of the authorities among the ranks of professional lawyers and economists that will determine their ability to attract quality professional staff. Top class young and even mid-career lawyers and economists will be

attracted to the competition authorities not because of their salaries or the prospect of life-time employment but rather because they offer a stimulating working environment, one in which they will be able to hone their skills and reputation and their own currency in the labour market. The emphasis then should probably be less on retaining staff and more on ensuring that high quality staff are constantly attracted to the agency.

In the long run, the competition authority has to be able to utilise its reputation in order to attract and retain the best staff. There is something of a familiar chicken and egg problem here because in order to achieve that reputation it will rely on its current performance and just as a competent, reputable agency generates a virtuous circle which attracts appropriately skilled and competent staff, so too does a poorly performing agency repel those who may be able to turn it around. This is why intermediate solutions are so important and why training programs, vital though they are, may not be sufficient to confront these challenges in the crucial short and medium terms – staff secondments from more experienced agencies is one such short term expedient; finding mechanisms to leverage the resources of private complainants in investigations and prosecutions is another.

This matter warrants considerably more attention – indeed it may be said to be the most critical challenge facing the implementation of competition law and policy in developing countries.

THE STANDING OF THE COMPETITION AUTHORITIES – THE BUSINESS COMMUNITY

Our questionnaire was not addressed to the business community and, accordingly, has not assisted us in assessing the standing of competition authorities with that critically important group. Although we have, in drafting this section of the report, enjoyed the invaluable assistance of some of our non-governmental advisers, this is clearly an important area that warrants additional consideration.

There is, at the risk of stating the obvious, an inevitable element of tension in the interface between the anti-trust authorities and the business community – the latter is after all the effective target of anti-trust enforcement activity. However no system of regulation – or of governance generally – can be effective without the consent of those regulated or governed. For this reason, above all, while any anti-trust authority worthy of the name will insist on robust enforcement of its statute – this is indeed a pre-condition for earning the respect, if not the love, of the business community – it is equally well-advised to heed the minimum requirements of that community at whom most of its enforcement activities are directed.

It should come as no surprise then that when we asked our NGA interlocutors to identify the minimum requirements that an anti-trust authority must satisfy in order to earn the respect of the corporate sector terms like **'impartiality', 'objectivity' and 'freedom from political influence'** come to the fore.

These issues are traversed in other sections of this report. However we should consider a number of useful, practical mechanisms that will promote these core values and practices. For example, **transparency** in both process and decision-making is an effective mechanism for promoting impartiality, objectivity and freedom from the undue influence of government or, for that matter, powerful private interest groups or institutions. Certainly, a lack of transparency would foster the notion that the decision-makers were subject to unseen influences and, true or not, this would serve to substantially undermine the standing of the

competition authorities, particularly in the eyes of the business community. Mechanisms to ensure transparency would include the publication of fully reasoned decisions and, where feasible, the maintenance of a web site on which the authority publishes its decision as well as guidelines and speeches and other public statements. Transparency of the sort suggested here contrasts with an approach that seeks to communicate pending decisions by way of media leak.

Interest group influence will undoubtedly begin to infect decision-making if **excessive leeway is given to private complainants**, particularly to the views of competitors. This is a complex issue because while all competition authorities are sensitive to the need to protect competition rather than competitors, the latter are often important sources of intelligence that lead the authorities to serious contraventions of the law. But, that having been said, all competition authorities consistently encounter attempts to use their procedures as mechanisms for resolving commercial disputes and for leveraging favourable settlements out of competitors or suppliers. While this cannot be entirely avoided, one way of limiting the incentive for complainants to abuse the competition authorities is for the authorities to avoid a tendency to 'split the baby', that is, to set themselves up as mediators between contending interests, as opposed to taking decisions on clear principles – to vindicate intelligent enforcement it is often necessary to leave a party with nothing.

Strong, decisive and visible leadership is identified as a mechanism for promoting impartiality and objectivity. 'Excessive deference' of the leadership to the staff of the authority is, conversely, thought to promote partiality and bias in decision-making.

A strong emphasis in **consistency** of approach and decision-making would also limit the opportunity for bias and the exercise of undue influence. This could be achieved, in part, by adopting guidelines and notices setting out the manner by which the authority will apply substantive and procedural elements of the law. While guidelines and notices should not fetter independent decision-making, they should be followed to the greatest extent possible so that the corporate community understands how the authority will interpret and apply the law. By the same token, **vague admixtures of competition and other considerations** undermine consistency and provide room for influence peddling. A significant number of competition laws provide some scope for reference to social and political objectives (indeed some laws require it), however it ought to be possible to find some form of rationality to justify a specific trade-off between competition and non-competition objectives and to apply these trade-offs in a consistent manner. Note, however, while it is important to strive for consistency, this should not be at the expense of the necessary degree of **flexibility** demanded by fact-intensive, economic analysis which are hallmarks of most anti-trust enquiries.

Consistency is also undermined by a tendency to react to the in-box, rather than to choose and **pursue articulated priorities** with a reasonable and well-explained relation to the overall context. An authority that does nothing more than put out fires that arise day-to-day will be seen as *ad hoc* and likely to sow confusion, and its staff will wander without firm guidance. It has also been suggested that support with the business community could be built by advocacy work targeted at particular segments of that community, such as small and/or medium-sized enterprises, importers, etc.

Finally all competition authorities are familiar with the concerns of the business community for maintaining **confidentiality** and for **expeditious decision-making**.

A critical element for building trust amongst the corporate community is the ability to maintain confidentiality. This most certainly applies to all information provided to the authority that contains business secrets. However, it also extends to investigations and reviews where the authority has pledged to maintain confidentiality of the process (for example, this would include a commitment by the authority not to make public the notification of a proposed merger until a particular date or event has occurred, such as the public announcement of the merger by the merging parties).

Speed in decision-making may appear to be a 'motherhood and apple-pie' issue but it too is riddled with complex trade-offs. Hence investigations and decision-making should neither be too fast nor too slow. With respect to the former, if too fast, the authority runs the risk of making decisions in the absence of sufficient facts or understanding of the law. On the other hand, in light of the rapidly evolving nature of markets, decision-making cannot be so slow that it loses relevance.

CHAPTER 3

TECHNICAL ASSISTANCE FOR CAPACITY BUILDING

Capacity building is a learning process.

Capacity building is, naturally, foremost a learning process for the emerging competition authorities. Apart from the initial creation of the necessary physical, organisational and legal structures, they need to gradually build up their experience and expertise in enforcement and advocacy, so as to establish themselves as credible institutions in their jurisdiction.

The previous chapter discussed some of the key challenges that are likely to arise in this process at the domestic level. This chapter, in turn, considers how to further improve the effectiveness of the outside expertise of mature competition regimes that is made available to, and equally importantly, assists this process.

In this sense, capacity building is also a learning process for the donors of technical assistance. The number of competition authorities that have been involved in technical assistance for a long period of time is rather limited. Arguably, it has only been in more recent times that authorities have begun to fully grasp the demanding peculiarities of creating effective enforcement structures in developing and transition economies (see the instructive case study in **Box 9**). Their different economic, political and cultural contexts – as sketched out at the beginning of this report – will often require different approaches and solutions than what may be customary in a donor's home jurisdiction.

This chapter begins with a stock-taking exercise. Based on a survey among ICN Members, the existing models of technical assistance are highlighted, and elements that tend to contribute to successful capacity building identified. Subsequently, areas are indicated where, first, respondents see the greatest need for further assistance, and where, second, in their opinion the ICN could give a helping hand in this process. Finally, we recognise that the debate on capacity building too often focuses on the public sector institutions involved. But what about the private sector which is, after all, the protagonist of the competitive process? This report offers some reflections in this respect.

This chapter concludes with an inventory of elements – or 'checklist of issues' – that are likely to impact on the effectiveness of technical assistance. We view what we have done so far as a significant first step and indicator of where further questioning and exploration would be beneficial.

The basis of this survey

The task of surveying what technical assistance has been given and received and how donors and recipients feel about it has proven to be daunting. We received replies from 17 jurisdictions that tended to classify themselves as recipients and 10 jurisdictions that tended to classify themselves as donors, as well as from UNCTAD and CUTS (India).

Many of the jurisdictions that responded limited the time frame of their responses to the past few years. It is not clear if they did so because a comprehensive answer would simply have been too burdensome, or if they have little institutional memory going back more than a few years. Because our initial survey was limited to ICN Members we have not (yet) incorporated the vast experiences of many assistance entities such as DfID, GTZ, USAID or the World Bank, to name only a few. Nor have we attempted to survey the extensive experience of the many private contractors and academics who have a wealth of experiences that undoubtedly would be helpful. This chapter provides a factual overview as communicated by those ICN Members who responded.

Existing programs of technical assistance

TWO TERMS

'Technical assistance' and 'capacity building' are two terms that are often used in the same breath. However, respondents to the two questionnaires clearly have two distinct concepts in mind. A good starting point for this chapter, thus, is to clarify the terms used hereinafter.

Technical assistance is the *transfer* of skills and know-how from one agency / jurisdiction to another.

Capacity building, in contrast, is the more *indigenous process* of putting into place, at the national or regional level, sustainable competition policy frameworks and processes.

The capacity building process centres on the enforcing – and advocating – competition authority itself, but in a wider sense encompasses all actors involved in the creation and implementation of a competition regime. As is aptly noted by the Guidelines developed by the OECD's Development Assistance Committee (DAC):

'For a long time, capacity building was synonymous with institution building, or technical assistance, with a focus on one institution or a few individuals. Today, it is becoming synonymous with building systems or networks – across institutions and individuals, often across borders, to achieve common objectives. The network promotes a critical mass of human and institutional resources that transcends the limits in the old approach. A key role for donors in trade development, and in general, is to facilitate the processes that lead to this critical mass. ...'

Capacity building and technical assistance, although depicting distinct concepts, are however closely interrelated: the successful introduction of a credible competition regime requires a range of sophisticated skills and expertise. Some of this know-how may be initially difficult to obtain on the national scene for the prospective competition agency. External support can give access to this know-how through technical assistance.

In this sense, technical assistance can, in some cases, turn into capacity building. In other words, technical assistance can be the seed which, if sufficiently comprehensive and nurtured, can be the basis from which home-grown, sustainable competition policy frameworks and policies develop.

TECHNICAL ASSISTANCE – THE MAIN CATEGORIES

One of the key difficulties that we have encountered in trying to come to terms with this subject is the diversity of projects and initiatives that can be grouped together under the heading of 'technical assistance'. In the competition field, it can range from large-scale aid programs to ad-hoc assistance.

As is illustrated by the case studies included herein, technical assistance, at the one end of the spectrum, includes, for instance, a short phone call to clarify past case law on a certain sector. At the opposing end, one finds comprehensive programs that run for several years and provide for a whole package of assistance initiatives.

This enormous variety cautions against any sweeping statements on 'technical assistance'. Having said this, there are, in very broad terms, nonetheless three main categories of assistance that emerge upon closer inspection. Although there are any number of gradations in between them, they can be distinguished by their respective characteristics.

Large-scale aid programs

First of all, there are aid programs that provide for a comprehensive package of assistance. A good illustration of such comprehensive aid programs would be the competition components of development aid programs that, for example, the European Commission and EU Member States sponsor for many countries (see **Boxes 4** and **6**). This category of assistance typically features the following characteristics:

- **Content and focus:** this model of technical assistance frequently takes a rather broad focus, and combines, depending on local needs, various forms of support. It may contain, for example, (i) the long- or short-term secondment of experts to the recipient agencies, (ii) advice on the drafting of legislation, (iii) the training of staff in the analysis of cases, and (iv) advocacy and training events for policy-makers, judges and the media in order to promote competition policy. In many instances, aid packages will also contain some cash funds to allow the recipient to purchase such items as books, or IT equipment.
- **Funding:** these packages frequently reach a financial volume well into 6- or 7-digit figures (in EUR or USD terms). The funds are usually provided under the development aid programs that the governments of many developed countries sponsor in various parts of the world. Enforcement agencies do not usually command the financial means to fund assistance on such a scale on their own. Some of these aid programs specifically aim at enhancing the trade-related capacity of the beneficiary country, with a competition component being one among several fields of action.¹
- **Timeline:** The programming and implementation cycle typically stretches over a period of between two and six years. This rather lengthy period can often be attributed to the many steps that need to be completed before a project is authorised for implementation as part of a larger development assistance framework.

¹ A large number of such programs of "Trade Related Technical Assistance and Capacity Building" are being compiled by a joint WTO-OECD project, available at <http://tcdb.wto.org>

CASE STUDY

Box 4 – Case study: long-term technical assistance by the Italian Competition Authority

The Italian Competition Authority, since it was set up in 1990, has always contributed to technical assistance programs in the field of competition policy through various formats such as internships, seminars, advice on draft laws, etc. In the early years the most common forms of assistance have been the participation to initiatives of technical assistance (seminars, conferences or short-term courses) organised by international organisations (OECD, World Bank, UNCTAD, EU) on behalf of developing countries and the organisation of short internships for foreign officials in Rome. More recently the Authority started to be directly involved in a number of European Commission twinning projects on technical assistance, in Romania, Malta and the Czech Republic. The major characteristic of these projects is that an official of the Authority was seconded to the candidate country for a period of up to two years.

Twinning projects provide the framework for administrations in candidate countries to be assisted by their counterparts in member States. The parties agree in advance on a very detailed work programme approved by the European Commission and which represents the benchmark with respect to which the results of the project are assessed. In general the projects require candidate States to adopt new regulations and guidelines and to improve the decision-making and investigative skills of the staff, strengthening enforcement and competition advocacy activities.

There is no doubt that seconding an official to the candidate country competition authority is very important, as it permits the recipient country to receive day to day assistance. Furthermore the deep institutional involvement that such a secondment generates leads to a better understanding of the cultural and political environment of the two countries. Finally the whole system of the twinning project (organization of seminars and study visits) enhances the effectiveness of assistance and strengthens even further the institutional ties.

Activities under these projects are not limited to the antitrust authority of the beneficiary country and a number of complementary initiatives are carried out (contacts with universities, attorneys, judges, other parts of government etc.), improving the role of competition in the candidate country.

Source: Italian Competition Authority.

- **Initiative:** Technically speaking, the programming of such assistance is usually demand driven: in most cases only those projects are eligible for assistance which have been formally put forward by the government of the recipient jurisdiction. However, in some instances proposals for projects may have to be tailored to comply with the donor's program guidelines. Such tailoring may lead to a different project design than the one initially favoured by the recipient body. It is fair to say, however, that in more recent years aid grantors attach particular importance to only support those projects to which the recipient is fully committed, or which are, in the jargon, 'owned' by the recipient entity.
- **Actors:** comprehensive aid programs are typically administered, at the granting end, not by the competition authorities, but by governmental departments associated with development policy or financial matters. Moreover, the responsible counterpart for the program at the recipient's end is sometimes a body of central government, and not the competition agency. The implementation of these programs is usually sourced out to contractors and subcontractors. Invariably, this multitude of actors tends to produce cumbersome, if not arcane, procedures. In addition, it is tempting to ask what role this administrative set-up actually leaves for the competition authority – with its special expertise in this policy field – of the donor jurisdiction. One has to recognise that in the past, their involvement has been rather negligible in some cases. In other instances it may have been limited to advising on, for example, the feasibility of a particular assistance initiative. However, it should not go unnoticed that in some jurisdictions, such as the United States, the competition authorities deliver the bulk of the assistance.

Targeted programs

A second model used in some cases is a program targeted to the needs of a single competition agency or a group of competition agencies in a region. This model is exemplified by the United States' assistance program. The program is typically a free-standing program that is not necessarily integrated with a larger assistance scheme, although the funding agency will doubtless ensure that it is consistent with the funding nation's overall aid priorities.

- **Content and focus:** the focus of assistance under targeted programs is to enhance the recipient authorities' capacity to detect, investigate, and remedy anti-competitive conduct through sharing accumulated experience, expertise, interactive investigative skills workshops, and short-term assistance targeted at specific problems, and tapping into the 'institutional knowledge' of more experienced authorities. The mode of assistance varies depending on the needs of the recipient and available resources, but can include resident advisors, interactive skills training seminars based on hypothetical cases similar to those encountered in actual practice, and short-term missions tailored to address specific and well-identified problems.
- **Funding:** under these programs, a funding agency such as USAID provides a block of funds to the national competition agency, in order that it may provide assistance based on its own experience and expertise to competition agencies in recipient countries. In the case of the US, in some cases this has been done on a regional basis (e.g., for Central and Eastern European nations; the former Soviet Union; the Andean Community nations; or Mercosur nations), and in other cases funds have been provided to a particular nation (e.g., Romania, Indonesia, or Ukraine).

- **Timeline:** once such a funding mechanism is in place, the competition agencies concerned are able to react quickly and flexibly.
- **Actors:** this type of assistance may be provided by a national competition agency to its counterpart in the recipient country with funding by a national donor, such as USAID. While for example USAID approves general guidelines for the project, decisions on implementation are left to the US competition authorities, in consultation with the recipient agency.
- **Initiative:** in the vast majority of cases, the recipient agency or relevant government ministry has taken the initiative by making a request for assistance to the donor's competition authority, which in turn relays the request to the funding organisation. The funding organisation, in turn, assesses whether to fund the request in accord with its own assistance priorities and available resources. Such requests and discussions at the outset are typically very informal. Likewise, discussions and agreements regarding the nature of the assistance are typically informal and flexible.

Ad hoc assistance

The models of technical assistance just described contrast with more informal, ad hoc-style assistance, which tends to be of a much more limited scope.

- **Content:** ad hoc assistance typically focuses on a specific issue, for example by sending staff to speak at dedicated workshops, by discussing aspects related to the liberalisation of certain sectors, by commenting on draft legislation, or by providing documentation based on the donor agency's own activities.
- **Funding:** such assistance has typically to comfort itself with a significantly smaller budget. The funds are usually provided directly from the budget of the donor competition authority itself. Not many competition authorities' budgets, however, make provision for ad hoc assistance. More often than not, where essentially human capital is made available, the corresponding costs are simply absorbed by the donor authority's overhead budget. Experience shows that under the existing aid programs referred to above, it is sometimes difficult to find external funding for this type of activity, especially on short time scales. What is more, the jurisdiction that is approached with a request for assistance may not even have a program that covers technical assistance in the competition field for the region or country in question.
- **Timeline:** ad hoc assistance can usually be delivered unhampered by burdensome procedures. Thus, this form of assistance is highly valued for its responsiveness by allowing agencies to swiftly address well-defined needs.
- **Actors:** this assistance is often granted directly by the competition agency to the recipient agency, and in most instances does not require the intervention of any other governmental body.
- **Initiative:** ad hoc assistance is in almost all instances genuinely demand driven. As there are usually no pre-set criteria that this assistance has to comply with, there is much less risk that the request as formulated originally by the recipient has to be re-formulated. Ad hoc assistance is likely to work particularly well where there are pre-existing relationships, i.e.,

CASE STUDY

Box 5 – Case study: a look back after more than 10 years of technical assistance

The United States Federal Trade Commission and Department of Justice have jointly operated a technical assistance program since 1991. The program, which is funded by the United States Agency for International Development because the agencies' own budgets are earmarked for the enforcement of the U.S. antitrust laws, is staffed exclusively by DOJ and FTC career professionals. It emphasizes the pragmatic over the theoretical, and focuses on transferring institutional skills and experience investigating, analyzing, and remedying anticompetitive business conduct.

For developing competition authorities that have actually begun operation, DOJ and FTC have found that the most effective way to provide technical assistance is the use of resident advisors who work directly in the office of the new competition authority for several months. This approach has been used successfully in Poland, Slovakia, Lithuania, Romania, Bulgaria, Hungary, Ukraine, Russia, Argentina, South Africa, and Indonesia. Resident advisors have also branched out to serve neighboring countries, including Latvia and Estonia (from Lithuania), the Czech Republic (from Slovakia), and Bulgaria (from Romania). Investigation and analysis is best learned in the context of real cases in local context. Advisors are thus in place when a case presents the proverbial 'teachable moment' that cannot be replicated in a scheduled seminar. Advisors build relationships of trust and rapport, as colleagues, which results in their advice being more readily sought, accepted, and applied. Their regular presence permits insights about case selection, internal procedures, and priority-setting that are not obvious to short term advisors.

The next most useful assistance tools for existing agencies are interactive investigative skills workshops. In these workshops, FTC and DOJ use hypothetical but realistic cases that present issues typical of those found in monopolization, cartel, or merger cases. DOJ and FTC professionals guide participants through an interactive role-playing process of issue identification, development of an investigational plan, witness interviews, document gathering and analysis, evaluation of results, and devising an appropriate remedy. This tool allows participants to effectively watch a real investigation unwind, but with the facts tailored to those that might be encountered locally. These programs have been presented on a regional basis in the Andean Community and MERCOSUR in Latin America, in Southeastern Europe, and in the CIS region.

Other short-term assistance can be targeted to a specific purpose or as an adjunct or follow-up to work done by resident advisors. Recent examples include a visit to three nations in Southeastern Europe by a three-person team of experts in electricity market issues, and visits to two Latin American countries that were preparing competition laws to help explain the benefits of competition policy to local leaders and to assist in legislative drafting.

Internships have proven to be of limited utility relative to their high costs. While observation and participation in actual U.S. antitrust investigations would be useful, U.S. confidentiality laws limit this possibility. Internships tend to benefit only a few individuals, as opposed to the entire agency, and turnover by former interns can vitiate the investment of time and attention.

Source: US competition authorities.

close geographic or linguistic ties, part of a trade bloc, etc. Otherwise, recipients may not be comfortable enough to pick up the phone or send an email asking for this kind of assistance.

RECENT TECHNICAL ASSISTANCE PROJECTS AS DESCRIBED BY ICN MEMBERS

A factual overview

In the case of the majority of respondents, the **triggering event** that led to the implementation of a technical assistance program was a bilateral co-operation framework. The next most commonly cited triggering events were regional multilateral co-operation frameworks, followed by 'other events'. Donors were more likely than recipients to give this answer, and explained that technical assistance typically evolved over a number of years rather than having been triggered by a single event, agreement or policy. It would not seem unreasonable to infer from recipients' reluctance to answer this question that it is in many instances the donor which is the incipient of a given project. A privatisation policy was the least frequently cited triggering event.

Another question asked respondents to describe the **main content** of technical assistance programs and the **key initiatives** that were launched. Among a selection of pre-defined answers, the training of officials was most frequently mentioned by both donors and recipients of assistance. The next two places are occupied by implementation/enforcement work; and setting up/strengthening of the competition agency. The drafting of the legal framework, including by-laws (on which, see **Box 7**), and the development of the competition agency's advocacy functions (on which, see **Box 8**), were the least mentioned. Other items of assistance mentioned include the development of an agency's library and information technology system; services related to translations, interpretations, and document procurement; and procuring sponsors to fund visits.

When respondents were asked to express, in percentage terms, which **forms of assistance** they had received or granted, short-term training missions (defined as those taking less than 3 months) were identified as making up the largest slice of the assistance pie, followed by regional seminars, resident advisors staying for 3 months or longer, staff visits to donor agencies, and finally written comments on draft legislation.

Turning to the **provider** of the assistance, assistance delivered by experts of national administrations was most frequently mentioned. This may be partially explained by the so-called 'twinning program' that the EU Commission finances for a number of countries in Eastern and Central Europe that seek to join the EU (see **Boxes 4** and **6**). The US competition authorities also operate a technical assistance program that draws upon the expertise of their enforcement staff (see **Box 5**). Another substantial part of the assistance was delivered by private contractors and experts of an international administration.

Interestingly, a larger proportion of donors than recipients stated that an **initial assessment** of country-specific needs was carried out before the final programming of the support. To some degree, this may be explained by the fact that donors usually are under an obligation to justify internally their decision to engage funds for external support. Another possible explanation would be that some recipients may be unaware that an assessment is actually taking place, especially when it is done relatively informally.

CASE STUDY

Box 6 – Case study: support for regional competition enforcement

The role of the European Commission as a donor of technical assistance in many of the countries that aspire to join the EU is relatively well known. For example, at the beginning of 2003, the Commission sponsored so-called 'twinning projects' in the anti-trust field with a combined budget of over EUR 10 mill. As described in more detail in **Box 4**, these projects are implemented by EU Member States, and primarily aim at building the institutional capacity of the young competition authorities in countries that only recently adopted a market economy. However, where these countries accede in 2004 to the EU, this assistance also prepares the competition authorities to function as part of the future **European Competition Network (ECN)**.

The beginnings of the ECN's operations are scheduled for 1 May 2004 - and thus coincide with the accession of 10 countries to the EU. The ECN will be a new kind of a regional enforcement framework: both the regional competition authority (i.e., the European Commission) and its counterparts at the national level are jointly responsible for the enforcement work. In this sense, supporting the **national competition authorities** not only reinforces the enforcement bodies in the acceding countries, but at the same time helps to strengthen the future **overarching enforcement structure** at the regional level.

It is however a lesser known fact that the European Commission is also active as a donor of technical assistance for **regional competition authorities** in other parts of the world. This is in line with the European Commission's overall policy that places a particular emphasis on regional approaches to development issues.

More concretely, the European Commission is currently supporting the establishment of two regional competition authorities on two other continents. The comprehensive **packages of assistance** that have been made available to this end feature many of the ingredients that are described in this report. The budget for each of these projects is in one case below, and in the other case above EUR 1 mill.

Apart from potential language issues, there are two particular **challenges** that need to be addressed when establishing a regional competition authority: first of all, it is essential that the countries that are part of the regional framework back the creation of the regional authority in political terms. Secondly, on a more technical level, the right formula of co-operation and co-existence between the regional and the national levels needs to be found. Over time, this formula should be reviewed and possibly fine-tuned - as indeed has been the case in the European Union.

Source: European Commission, Competition Directorate-General.

CASE STUDY

Box 7 – Case study: assistance in drafting legislation

The **aim** of our project was on the one hand to assist the Drafting Committee in the gathering of public support for the introduction of a Law on Competition and on the other hand in working out a draft of the Law. While the first aspect was in the focus of the first and second seminar, the following seminars concentrated on the second aspect.

One of the problems encountered was interference by other technical assistance ('TA') projects, which in some points led to a **mixture of components** in the draft, which had been taken from different competition law systems. While these systems may be coherent in themselves, a mixture is clearly not. An example is the combination of the SLC ('substantial lessening of competition') test AND a market dominance test in merger control, which seems an obstacle to quick and successful implementation of the Law for a developing country.

Another general problem of TA missions is the **unfamiliarity** of the experts with the specific competition related problems in the recipient country, such as the existing regulatory framework (e.g. price controls), the role of state owned enterprises or actual competition problems which have occurred and which the Law is expected to tackle.

The **reservations** against a Law on Competition, encountered during the first seminars, were not voiced again in the course of the follow-up seminars. Thus, it can be assumed that the first aim of the TA has been achieved.

The work on the draft itself - first on its structure, later on the fine print - proved successful as well, since a fast and constant evolution of the draft (through five versions) could be noted. Here the assistance given proved to be especially valuable: Because, while the Drafting Committee (set up by the Ministry of Trade) had done thorough research work and acquired an outstanding **theoretical** knowledge of Competition Law, the layout of the procedures often made them difficult to implement and apply **in practice**. An example here is the acknowledgement of different procedural requirements for dealing with mergers, vertical and horizontal restraints. So the seminars could provide valuable input from the participating practitioners' experience.

To **conclude**, for the reasons stated above it seems to be desirable for the recipient of TA, to pursue only one TA project at a time. Furthermore the recipient should scale down the number of people attending the seminars, when the process starts to move from gathering support for the law to working out the detail. When discussing the details, the sessions should be more of an informal dialog - actively including the working level of the Drafting Committee - rather than an 'official'-style exchange of statements. The same person should be assigned to a project for the whole of its duration, in order to develop better personal ties enabling a more open exchange of opinions and a better understanding of the domestic implications and necessities with respect to Competition matters.

Source: *Bundeskartellamt, Germany.*

CASE STUDY

Box 8 – Case study: experiences with technical assistance in Indonesia

Indonesia's Commission for the Supervision of Business Competition (KPPU) has been receiving technical assistance (TA) from several international institutions i.e.: GTZ Germany, the World Bank, JICA/Japan FTC, USAID/ELIPS and US DOJ/FTC. These TA are incorporated into KPPU strategic planning as a whole and integrated program.

Two of the most effective TA, among others, are the dissemination of competition law to the stakeholders (government officers, judges, lawyers, police officers, business actors, business association, NGO etc.) through direct meetings (workshops/seminars), and studies on economic sectors. The other very useful TA is continued consultation, training and studies involving local or foreign resident experts. The most ineffective programs are (i) studies by foreign experts which do not involve the local counterparts, and (ii) the placement of foreign experts without supporting programs.

In the early stage of its operation, KPPU had to **disseminate and communicate** the Indonesian competition law and the function of KPPU to its stakeholders. In the same time, KPPU had to obtain an idea of **stakeholders' perception** of competition law and policy. KPPU and some of the donor organizations designed the programs to disseminate the law and created a discussion through **direct meetings**. Many important things arose in the meetings and broadened KPPU's knowledge on competition-related problems in Indonesia. Information on monopoly and unfair business competition cases was found during the workshops. (...) The only weakness of this kind of TA is its limited coverage, consequently it needs a large amount of time to achieve a widespread competition awareness and attitude. Selecting the target participants by their leadership is one of the key success factors to cope with this weakness. (...)

Economic sectors studies were of much benefit to KPPU when they started and ended in competition-related problems such as anti-competitive government policy or the failure of markets mechanism. Those studies that were followed-up on by a series of meetings with government officers or other stakeholders, will be the most valuable studies. KPPU can effectively influence the government or the stakeholders in the markets, by presenting the result of the studies. One good example in this kind of TA is when KPPU assisted by the World Bank conducted a study in Indonesian transportation sectors. The study deeply explored and analysed the competition in the transport industry in Indonesia. During and after the study, KPPU has been conducting several meetings with the Ministry of Communication, Association of the transport businesses, Consumer Organization and other NGOs related to transportation. As a result of these processes, KPPU found fixed pricing cases and some of them are unlawful. The final result of the studies become good resources for KPPU to prepare policy advice to the government on the related matters.

Source: KPPU, Republic of Indonesia (excerpts).

Members' assessment

Respondents to questionnaire 2 were also invited to indicate which of the forms of assistance that they received was, from their perspective, the **most effective** in helping to develop an effective competition regime. This question was mainly addressed at recipient agencies.

When analysing the responses, the clear pattern emerges that if recipients received a type of assistance, they expressed satisfaction with it. This makes it difficult to conclude that any particular type of assistance is superior to another. Moreover, recipients who received both short-term missions and long-term advisors did not express a preference; they typically are happy with both of them. Recipients also largely expressed satisfaction with regional seminars.

In part, this rather cautious attitude of recipients may reflect the fact that replies were being viewed by donors, on which some recipients may feel somewhat dependent. Such a conclusion would suggest that the ICN might find it interesting to follow up on these responses with a series of interviews of recipient agencies. Such an informal approach would provide a setting that will not evoke a fear of possible negative consequences for an adverse response, and might thus offer a more conducive framework for collecting this critical data.

One other point is worth noting. Despite the fact that written comments on draft legislation has not been, according to the information above, a primary focus of assistance received, it is generally considered as quite effective. This could indicate that recipients particularly value the type of fundamental assistance that helps to overcome the first hurdles in the initial setting up of a new competition regime.

Another set of questions asked about the **final assessment**, and potential **follow-up** initiatives. From the replies at hand, it seems prudent to say that there is no clearly accepted way to measure the effectiveness of a technical assistance program. This area, thus, may be a suitable field for future examination.

Respondents usually state that final assessments focused on whether the objectives and expected results from the assistance were achieved, and on how future technical assistance could be improved or better focused on the existing needs of the recipient entity. Invariably, whenever follow-up action occurred on the basis of the findings of a final assessment, this action seemed to be tied to whether the donor and recipient had an ongoing technical assistance relationship. This could indicate that an ongoing technical assistance relationship between a donor and a recipient has certain advantages over one-off projects.

Elements that contribute to successful technical assistance

There seems to be a relatively uniform set of key ingredients that many agencies believe are key factors in rendering a technical assistance initiative particularly worthwhile. One agency identified the following six elements as key ingredients to success; many agencies would probably agree:

- a) 'Good programming
- b) Availability of the resources in short time
- c) Amplitude of program
- d) Reduction of bureaucracy to execute
- e) Bottoms to facilitate the hirings and purchases
- f) Mechanisms to evaluate the results'

GENERAL ISSUES

More generally, agencies identified the following elements that are likely to be critical to the effectiveness of a particular assistance project:

- It must take a **proper analysis of local needs** as its starting point. In practice, this can be ensured by a demand-driven culture, assuming that the agency requesting the assistance is the entity best placed to evaluate what are its most pressing needs.
- Along similar lines, several agencies have stressed that an **early co-ordination** between donor and recipient of the assistance greatly helps to enhance the effectiveness of the activities.
- Especially more comprehensive projects of technical assistance should be preceded by an understanding and **joint definition of the objectives** of the assistance by both the donor and the recipient entity. As the project progresses, it may also be helpful to conduct a **mid-term review** in order to adjust these objectives to shifting needs and a potentially changing environment.
- Equally, comprehensive programs should be concluded with an **ex post assessment** of the assistance delivered. This assessment should be elaborated jointly by donor and recipient, and, where practical and/or feasible, should usefully include the point of view of third parties (the private sector, academia, etc.). Ideally, the findings of this ex post assessment would be directly fed into the formulation of a more targeted **follow-up action**, where indicated.
- As mentioned above, many agencies value the short or medium-term **secondment of experienced staff** from well-established agencies as a productive form of technical assistance. A similar logic applies to internships in well-established agencies.
- Some agencies have stressed that long lead times – sometimes several years – before assistance programs are actually implemented should be reduced towards a better level of **responsiveness**. Delays in implementation do not help to address needs swiftly when they most acutely arise. The phenomenon of long lead times is typically associated with classic aid programs, whereas the ad hoc assistance that some agencies are able to deliver proves particularly responsive.
- Also, there is often merit in associating **regional entities** with technical assistance programs. This may be straightforward where these entities perform genuine anti-trust tasks, as with, for example, the Andean Community and COMESA. However, also such co-operation fora as APEC, ASEAN and SADC may be interesting multipliers in order to reach several agencies in one go.

CASE STUDY

Box 9 – Case study: The "7-Up" project

'7-Up' was a study of the competition regimes of seven developing countries. The two-year project, concluded in February 2003, was undertaken by CUTS, an Indian NGO. It is one of the largest competition activities DFID has funded.

In the past decade there has been a quiet revolution in competition law. When the WTO was established in 1995, under half of its members had a competition law. Now about two-thirds do, and others plan to introduce one. Most of the recent adopters are developing and transition economies. Despite the scale of this change, little comparative research had been undertaken on the practical experiences of developing countries in introducing competition law.

7-Up is the first in-depth research in this field. It examined and compared competition law and policy in four countries in sub-Saharan Africa: Kenya, Zambia, Tanzania and South Africa, and three in South Asia: Pakistan, Sri Lanka and India. The researchers carried out stocktaking of the seven competition regimes, analysed their findings and made recommendations for improvements. The task was undertaken through a mixture of in-country research, case studies and national and regional meetings. Experiences were shared, and possible solutions identified.

The project has helped to build national capacity and to promote awareness of the role of competition law and policy. It has helped to highlight the need for policy changes, including more effective consumer protection, amendments to legislation, the development of appropriate regulatory machinery, enhanced cooperation between competition authorities, and more extensive technical assistance and training for staff at all levels in competition regimes. Another of the outcomes was the creation of an international network of competition experts who are contributing to the ongoing discussions about the possibility of an international competition agreement under the WTO.

In DFID's view, 7-Up was a noteworthy success. Several lessons can be drawn from it that might be applicable to other technical assistance projects:

- There is considerable merit in carrying out cross-country comparisons, rather than single country studies. A good deal of what was learned from the project came from these comparisons.
- It is important to obtain buy-in from the key stakeholders. The creation of a national reference group in each of the seven countries brought a range of partners into the project. They both provided information to it, and were informed by it.
- There is value in involving other donors early on, in project meetings and workshops, even if they are not co-funders. For 7-Up, IDRC collaborated with DFID, and DFID found this helpful. While IDRC did not co-fund 7-Up, it subsequently decided to fund related CUTS projects, and its knowledge of CUTS and 7-Up enabled IDRC to quickly assess what further work could have valuable impact.
- Project methodology must be sound from the start. For example, the individual country studies must be undertaken in ways that allow the findings to be compared.

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- It can be very effective to combine research with advocacy and capacity building. These were the three central elements of 7-Up. Advocacy was undertaken both at the national level, through the national reference groups, and at the international level through the coordinators.
 - It is essential at the outset to establish proper channels for reporting problems and initiating arrangements to deal with them. The donor needs to have confidence that the group undertaking the research has the capacity to identify problems, and to solve and manage them.

Source. *John PRESTON, DfID (United Kingdom)*.

- Finally, one word of caution may be of order: donor and recipient competition authorities must both be mindful when giving or receiving technical assistance that their laws and economic **systems likely differ**, even if only to a small extent. As such, they must be careful to consider how the skills and training fits within their specific regimes, otherwise donors run the risk of promoting their own laws and systems into an inappropriate context, and recipients run the risk of applying foreign laws in the context of their own laws.

It is submitted that some or all of these elements, tailored to the case in question, help to make the most efficient use of the scarce resources available for technical assistance.

REPERCUSSIONS AT DONOR LEVEL

The question may be raised to what extent donor countries can also improve their internal arrangements in order to enhance the effectiveness of the technical assistance that they deliver.

With the notable exception of the US and arguably one or two other authorities, it has to be recognised that many enforcement agencies in donor jurisdictions are not themselves involved in the selection and programming of assistance projects. The unique expertise of these agencies is thus often not adequately tapped into. When this expertise is brought in at all, this will in most cases only take place downstream, i.e. for the implementation of a program that already has been designed and specified by other bodies. This issue is aptly summarised in the following response to the questionnaire, when asked about possible improvements:

'From the point of view of a donor country consideration might be given to the question of whether technical assistance programmes in the field of competition law could be concentrated to a larger extent under the umbrella of the national competition authority with regard to content-related, financial and organisational aspects. The advantage would be to concentrate existing know-how in the field of competition-related technical assistance thus optimising the selection of countries and authorities to be supported, the definition of objectives and the planning process regarding content and organisation of the technical assistance as well as its implementation. However, this requires considerable personnel, financial and organisational measures which for the most part do not fall within the competition authority's area of competence. [...]

Another donor of technical assistance is reflecting along similar lines:

'The agency is in the process of reviewing its approach to the provision of technical assistance. Although ad hoc programmes of inward visits and participating in seminars or programmes funded by external agencies are a useful means of providing information and background to recipients, the adoption of a more strategic and co-ordinated approach would give the agency a more in depth and practical focus to providing technical assistance. This could include being able to resource training missions or secondments,

CASE STUDY

Box 10 – Case study: the experience of Korea

Korea since 1960s have conducted 5 Year Economic Development Plans, which brought about growth in the Korean economy. Scarce resources have been strategically allocated to selected industries by the government. However, market distortions arising from heavy economic concentration became prevalent. Many attempts were made to legislate the competition act, but the government only succeeded in 1981 after overcoming severe **resistance** by the regulators and companies under protection by the regulatory agencies.

The KFTC was established in 1981 and enforced the 'Monopoly Regulation and Fair Trade Act' since then. However, the KFTC was not as efficient as it is now. It was through rigorous efforts to enhance efficiency in competition law enforcement techniques that raised KFTC's profile that it now enjoys. Every week, the KFTC invites a competition law expert or legal expert from both academic and business sectors and holds the '**Thursday Competition Forum**.' The KFTC staff gains knowledge of the changing environment and develops an understanding of difficulties faced by the private sector. The KFTC is organized by investigative functions rather than by industrial sector. Therefore, it is possible that staff from one bureau might not have same degree of expertise that staff from another bureau might have. To overcome this issue, the KFTC holds '**Case Study Presentation**' where each staff can share his or her experience in respective competition law enforcement areas such as cartels, merger control, or consumer protection.

There are different stages in competition law enforcement, starting from the legislation to actual implementation. It greatly helps to learn from the experiences and acquire the know-how of competition authorities with more experience. The KFTC has **benefited** from having members of its staff study actual enforcement of competition law by more experienced competition authorities of the US, Germany, Australia, Canada, and Japan.

Since 1996, the KFTC has become a **donor** of technical assistance, with the determination that Korea shall play the '**bridging role**' between countries with more experience in competition law and relatively new competition regimes. For example

- each year, it hosts an **International Workshop** on Competition Policy, where 20 to 40 countries are invited;
- the KFTC and **KOKICA** (Korea International Cooperation Agency) run a training programme for Chinese competition policy officials each year;
- in 2002, the KFTC hosted the **Seoul Forum on Competition Policy** which will be held every two years. The Forum will provide an opportunity where the less experienced authorities can learn from the more experienced authorities and utilize the occasion for networking.

Source: KFTC (Korean Fair Trade Commission; excerpts).

and being able to undertake country specific competition and economic assessments. The agency could also ensure that it avoids duplication of effort by not devoting funds to overlapping activities.'

Particular needs of technical assistance

Agencies' needs for technical assistance develop over time. During the initial setting-up period of a new agency, full-scale programs combining various forms of assistance, and including resident advisors, is likely to be the most appropriate and effective kind of assistance. In particular, it is convincingly argued that long-term stays not only improve the donor's understanding of the local economic, political and cultural context, but also help to build up the essential trust between donor and recipient that makes the cooperation prosper.

Typically, the subsequent phase of strengthening the agency's enforcement capabilities will focus on the training of officials. Thereafter, as the agency gains in sophistication, more targeted and specialised training will be the key need. An advocacy component should be included in all of these stages.

Emerging agencies from around the world find themselves in various stages of this process. Their needs will inevitably differ, especially when taking into account the local context. Notwithstanding this variation, there are a few common themes that emerge from Members replies to Questionnaire 2:

- A large number of respondents from developing and transition economies insisted that more **'hands-on training'** on case-work was necessary, to develop the practical skills essential to efficient case-handling. This desire was succinctly summarised by one respondent: 'less theory, more practice'. In many cases, such an intensive form of training will entail the secondment of an enforcement official for a longer period of time to the recipient agency, and will thus draw heavily on the donor's resources. A possible second-best solution to this dilemma is presented in the following comment:

'Resource constraints often mean these requests [for short or long-term visits to overseas authorities] cannot be fulfilled, but the agency's alternative proposal of developing a tailor-made programme of briefings for officials from the overseas administration to attend at the agency's premises is regarded as a valuable substitute.'

However, where the recipient state's competition authority sends an official, the success of the program depends on that official's ability to understand and absorb the information, and then to convey it to his/her colleagues.

- As for particular skills that need training, two issues are frequently mentioned by respondents to the questionnaire: they would need assistance in developing their skills (i) in **investigative techniques**, and (ii) for the **economic analysis** of cases.
- Similarly, many agencies expressed an interest in more **visits** to and **internships** with mature anti-trust agencies, allowing the visitors to obtain a first-hand impression of how these agencies conduct their investigations.

- Especially among economies that have no long-standing experience with market mechanisms, agencies attach particular importance to including **advocacy** activities (directed especially at policy-makers, the private sector and the media) in a comprehensive package of technical assistance.
- Several agencies also replied that assistance with regard to specific sectors undergoing **liberalisation** (mainly utilities) would be of high value. Such assistance, it is mentioned, should ideally include a component targeting a jurisdiction's **sector-specific regulators**.
- Another area for assistance that is among the most frequently identified needs is to include the **judiciary** in the training process. The critical role that the judiciary plays, in most jurisdictions, in the implementation of competition policy, has been highlighted already in the preceding chapter.

Possible contributions from the ICN to technical assistance and capacity building

The ICN in its existing form as an informal and virtual network of competition authorities does not command the resources or infrastructure to carry out technical assistance projects itself. For the foreseeable future, the financing and delivery of comprehensive aid programs will thus remain the domain of the existing national, regional and international donors of technical assistance. In the view of ICN Members, however, the ICN can contribute to successful technical assistance in several other ways.

ICN AS AN INVENTORY

To begin with, ICN unites both recipient agencies and competition authorities of donor jurisdictions. This should place it in a privileged position to aggregate Members' first-hand expertise in this field. The information thus collected will help to identify what has worked well, and where improvements to existing models of technical assistance could be made. This report is intended to be a key step in this direction. This perspective is echoed in the following statement:

'An inventory of technical assistance programmes that ICN members participate in or receive would facilitate the exchange of experiences and would provide donors with examples of programmes or activities worth emulating. The inventory could also provide an assessment by recipients as to the effectiveness of the programme or activity in meeting the recipient's objectives.'

'An inventory would also provide a snapshot of current technical assistance activities and could facilitate the identification of areas where capacity building is lacking or where there are areas of duplication. This could assist both individual competition authority donors and international organisations in better targeting their resources and promote increased co-operation.'

More concretely, one of the key challenges of technical assistance is to match the – properly identified – needs of less experienced authorities with the specific expertise of more mature ones. One suggestion was to build up a database which compiles the areas of specific

expertise that each agency would be prepared to pass on to emerging agencies. Such a tool would enhance the efficiency of agencies' work since they would instantly know where to look for particular knowledge in a certain area. However, assuming that many competition authorities would in principle be happy to share this kind of expertise, it is clear the creation of such a database would entail substantial costs.

It is submitted that building up such an inventory of useful capacity building and technical assistance initiatives implemented by ICN Members would be an interesting project for future examination. In this context, it should be noted that the ICN Advocacy Working Group is currently creating an on-line Information Center that is accessible via the ICN web site. It would not seem inconceivable to expand the scope of that project to cover issues relating to capacity building as well.

PRACTICAL SKILLS

Another recurring theme among the replies to the questionnaires about possible future ICN activities relates to Members' practical skills: many emerging agencies see a particular need to deepen their expertise in investigative techniques, for both merger and general anti-trust work.

If organised in seminar style, such training can reach the staff of many agencies at the same time. The first ICN Merger Investigative Techniques Workshop, held in Washington in November 2002, is regarded as a good model in this respect. This model could be expanded to the non-merger area as well. The merger workshop specifically targeted agencies' staff involved in on-going casework. It focused on the practical aspects of merger investigations, including discussions on a hypothetical case. In the future, similar workshops may be envisaged on a variety of subjects. However, it is clear that for some agencies funding will have to be made available to allow them to participate.

In addition, it may also be interesting to explore the possibilities of organising electronic workshops, for example via internet-based interactive programs. Once set up, such a format is liable to be much less costly, and, therefore, could be held more frequently than face-to-face workshops.

FACILITATING INTER-AGENCY CONTACTS

Finally, the work undertaken by the ICN in the merger area provides an additional useful inspiration also for this Working Group: the ICN Merger Working Group is currently preparing a list of dedicated contact points for the co-operation of competition authorities in the conduct of multi-jurisdictional merger investigations. It may be of similar interest for the ICN to establish such a list of contact points also for agencies' co-operation in the field of technical assistance.

Addressing long-term training needs

The proliferation of competition agencies around the world continues at an unabated pace. All of these emerging and future agencies will have to be staffed with skilled people. As with any long-term forecast, the estimates of how many competition officials will be needed by, say, 2010 invariably differ. What is undisputed, though, is that the number will be in the thousands.

This prospect raises the question of who should train all this staff. Universities certainly have a key role to play, but, as many a senior competition official has come to realise, not every graduate makes an efficient case-handler as from day one of employment. It is equally clear that the mature competition authorities, even if assisted by the younger agencies that are currently still receiving technical assistance, will not be able to shoulder this burden of training alone. Already now some well-established agencies feel that their current assistance activities are stretching their own human resources to the limits.

A VIRTUAL NETWORK OF ACADEMIES?

Therefore, as a long-term project, there was also some support in the Working Group to reflect on the possibility of setting up an international network of competition academies.

What kind of initiative did those who suggested the idea have in mind with this? In line with ICN's light-weight and network structure, it is not envisaged to set up a brick and mortar institution in a leafy suburb. Rather, proponents of the idea suggest co-ordinating dedicated programs of existing teaching institutions with special expertise in competition matters.

In principle, such teaching bodies – universities, specialised graduate colleges, and so on – already exist in many parts of the world. However, their programs have so far not been co-ordinated, and most enforcement agencies do not (yet) play a major role as lecturers in these academies. Arguably, building on the existing teaching structures would greatly reduce the burden of setting up such a program.

It was suggested that the bulk of teaching would be entrusted to local academics, the bar, and consultants with relevant expertise in competition matters. In addition, a significant part of the teaching would be delivered by staff from mature competition agencies. With their practical experience as case-handlers, they would share the kind of hands-on skills that budding competition officials most frequently need.

Clearly, despite its virtual nature, the operation of such a program would not come free of cost. Lecturers and teaching facilities would have to be paid. Course participants would typically need a scholarship to defray their extra cost of living, accommodation and travelling. It is submitted that all these issues merit further exploration.

Perspective from the Competition Bar

The legal profession plays an important role in the enforcement of competition law. Through their daily work, members of the competition bars often command a good insight into the strengths and weaknesses of their respective national competition regimes.

Therefore, members of this Working Group thought it would be interesting to hear the view of the other side of the practice, and inquired in particular how the competition bar would see its own role in the capacity building process. To this effect, a member of the Working Group addressed a separate short questionnaire to a number of international law firms that are active in seven transition and developing countries: Colombia, Indonesia, Kazakhstan, Russia, Thailand, Venezuela and Vietnam. The Working Group member that conducted the survey recognised that this approach invariably leads to a somewhat 'impressionistic' picture, both in terms of the statistical base, as well as the inevitably subjective nature of the views expressed. However, with this caveat, there are nonetheless a few common themes that the Working Group member believed to emerge from the responses received.

The Working Group member reports that in several respects, the views put forward echo what has been observed elsewhere in this report. In particular, there is broad support for the continuation of comprehensive technical assistance initiatives that address the various actors involved in the implementation of competition policy, such as policy makers, and the judiciary. There is however no uniform view on who should ideally deliver such assistance. The proposals range from training offered by experienced practitioners, to inviting enforcement officials from either the home or another jurisdiction. Some respondents also propose that experienced competition lawyers should be invited before legislative committees to comment on draft legislation.

As to the situation of the national competition bar, the Working Group member reports that many responses suggest that its development essentially goes hand in hand with the development of the national competition regime. In jurisdictions where the introduction of a competition discipline is still in its infancy, a national competition bar to speak of has still to develop. The absence of an organised competition bar in the vast majority of developing competition jurisdictions also inhibited this Working Group from soliciting the views of national bar associations directly. Typically, law firms in such jurisdictions treat their competition practice as ancillary to their general transaction work.

Some respondents also indicated to the Working Group member that, in their jurisdictions, first certain legal and practical imperfections of the local competition regime had to be overcome before the national competition practice would expand significantly. Those challenges notwithstanding, the overwhelming majority of respondents across all jurisdictions expected that the introduction or consolidation of the national competition regime would lead to a notable increase in the demand for specialised advice on competition matters over the next 5 to 10 years.

Moreover, several respondents told the Working Group member that they accepted that the building of a competent competition bar was foremost a task for the members of that bar themselves. Concerning possible contributions of the competition bar to the capacity building process, not many concrete suggestions were put forward. Conceivably, both the local bar association as well as international bar associations could play a role in this process.

One important element in this context will certainly be the transfer of specific competition skills through in-house training offered by international law firms. While a law firm's focus is on advocacy and not enforcement, through their internal networks and practice groups, these law firms can give access to relevant expertise. And this is already happening to some extent: respondents explained to the Working Group member that they had made this kind of training available to, on the average, one lawyer annually over the last five years. But there are reported to be significant local variations to this number, again broadly reflecting the state of development of the national competition framework.

Thinking the opposite way, according to another suggestion that was made to the Working Group member, law firms in developed countries could receive interns from developing economies as part of their *pro bono* work. This seems to be a particularly interesting proposal, provided that such interns would not otherwise have been invited in the course of law firms' commercial training efforts.

Finally, the Working Group member reported that several respondents suggested that another way to allow for a transfer of skills would be through the exchange of information on current competition issues. A framework for such exchanges would however still need to be put in place.

Conclusions on technical assistance: fields of further study

Technical assistance, in order to be effective in its support of creating credible competition structures in developing and transition economies, has to meet a number of requirements.

For one thing, technical assistance should put competition authorities in a position to better come to terms with the various challenges that were identified earlier in this report. Secondly, it has to take due account of the economic, political, institutional and cultural context into which a competition regime is invariably embedded. Thirdly, any jurisdiction's needs for technical assistance are set to shift over time. This makes no one technical assistance project like the other. This multitude of aspects creates a very complex **matrix** of factors which impact on the overall effectiveness of a given project of assistance.

This complexity has encouraged us to be modest in our ambitions during the first year of the ICN Working Group on Capacity Building and Competition Policy Implementation. Instead of presenting – possibly prematurely – ready-made solutions, we have thought it prudent to simply aspire to boil the inherent complexity of technical assistance down to a number of issues that can be then singled out for further analysis. The elaboration of more concrete or even operational proposals, if any, is thus a task for the future.

However, we believe that the inventory of leads contained in this report provides a very useful starting point for such future work, provided that ICN Members decide to prolong the mandate of this Working Group at ICN's Second Annual Conference in Mérida.

By way of summary, we have compiled a **Checklist of issues** (see below) that are relevant to the design and delivery of effective technical assistance. The list identifies the main themes that were raised in this regard by ICN members that were surveyed by the Working Group. This checklist is meant to stimulate discussion at Mérida and also to identify focused issues that might require follow-up work, should ICN Members wish that we continue in our efforts.

These themes and issues arise in connection with the full range of technical assistance programs, from delivery of larger, more long-term technical assistance projects to more narrowly focused forms of assistance. The Working Group notes that such targeted assistance is often particularly appreciated for its responsiveness and low delivery cost.

CHECKLIST OF ISSUES FOR TECHNICAL ASSISTANCE PROJECTS

A. THE DESIGN OF ASSISTANCE

- 1. Ownership and commitment.** How can we ensure that technical assistance programs are demand driven and allow the recipients to give input at an early planning stage and to improve their commitment to achieving the intended outcomes?
- 2. Identification of needs.** How can we ensure that the needs of the recipient agency and jurisdiction have been thoroughly assessed and identified by both donor and recipient? What methods have been used for assessing particular needs? Have indigenous researchers familiar with the nation's economic, legal, and political circumstances participated in the needs identification process? What has worked? Who should do the assessment?
- 3. Involvement of enforcers.** What is the best way to ensure that the expertise of the competition enforcer is being drawn upon? Under what circumstances should the competition enforcer provide the actual assistance / training?
- 4. Coherence of strategy.** How can we ensure that the planned assistance coincides with the overall development strategy of the recipient jurisdiction? What is the recent history of economic law reform measures in the country? What is the status of such measures? What has accounted for the success or failure of economic law reform initiatives to date? How can we ensure that the planned assistance is sufficiently relevant – and sensitive – to the unique challenges faced by the recipient and the legal, economic and cultural circumstances in which it operates? What methods have been used by donors to do this? What has worked well?
- 5. Capacity of authority.** What factors have been – or should be – considered when determining whether the beneficiary authority has the capacity to receive, sustain, and make positive use of the assistance offered?
- 6. Co-ordination of initiatives.** How can we ensure that cooperation with other donors has at least been considered? What is the best way of obtaining a clear picture of parallel or planned assistance projects? When should overlap be avoided? When is overlap desirable? Should contrary messages be avoided at all costs? Under what circumstances do recipients prefer to hear different approaches and philosophies?
- 7. International convergence.** Where the assistance encompasses the drafting of competition-related legislation, what is the best way of ensuring that internationally accepted principles and model provisions endorsed by bodies such as ICN, OECD, UNCTAD, or other relevant international or regional bodies, are adequately understood and considered?

B. USEFUL COMPONENTS OF ASSISTANCE PROJECTS

8. **Training of officials.** How can we ensure that a sufficient part of the assistance is dedicated to developing the 'hands-on' skills of case officers? What sorts of technical assistance best develop practical skills? Who should be involved in providing hands-on training?

9. **Competence of judiciary.** Under what circumstances should the judiciary also be trained? How has the judiciary been trained in the past? What methods are particularly effective in training the judiciary? Who should train the judiciary?

10. **Integration of stakeholders.** Should assistance projects also extend to other relevant stakeholders in competition policy, such as policy-makers, the bar, the business community, consumer groups, and the media? Under what circumstances? What are some effective ways of assisting these groups?

11. **External in-house training.** How effective are internships with or study trips to well-established and / or neighbouring enforcement agencies? When should they be considered?

12. **Budgeting for procurement.** Should technical assistance programs include financial provisions for (i) the acquisition of goods such as books or IT equipment, and for (ii) support for the participation of officials, and in particular at staff-level, in conferences and training events? And if so, under what circumstances? How can the need for this type of assistance best be assessed?

13. **Intellectual infrastructure.** How can the jurisdiction's universities contribute to the development of the requisite human capability? Do law schools, business schools, and economic departments teach courses relevant to competition law? What steps should be taken to develop relevant courses? Have the jurisdiction's academics performed research relevant to competition law? What is the existing state of applied industrial organization research in the country, and how might it be improved? How might academics be enlisted to perform relevant research and teach relevant courses?

14. **Administrative infrastructure.** Does the country have adequate safeguards to ensure the integrity of the competition agency's decision making process? If existing safeguards are weak, how can such measures be adopted in the context of building a new competition authority?

C. FOLLOW-UP

15. **Final assessment.** Is it possible to determine whether a particular program was effective or not? What methods have been used for this purpose? What factors should be considered?

16. **Follow-up.** What methods have been used to ensure that follow-up action is suitable to address remaining problems and other relevant issues?

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