



# ASEAN Regional Guidelines on Competition Policy



ASSOCIATION OF SOUTHEAST ASIAN NATIONS

One Vision, One Identity, One Community

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Catalogue-in-Publication Data

ASEAN Regional Guidelines on Competition Policy

Jakarta: ASEAN Secretariat, August 2010

338.6048059

1. Competition-Law-Regulation
2. Economics-ASEAN

**ISBN 978-602-8411-44-8**

With the Support of:



*The ASEAN Regional Guidelines on Competition Policy has been produced with the support of the project "Institution and Capacity Building for the ASEAN Secretariat", jointly agreed and implemented by the ASEAN Secretariat and InWent Capacity Building International, Germany, and funded by the Foreign Office of the Federal Republic of Germany.*

*More information on the project: [www.inwent.org/asec-project](http://www.inwent.org/asec-project)*

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## **FOREWORD**

ASEAN Leaders agreed in 2007 to the establishment of the ASEAN Economic Community by 2015 which will not only transform ASEAN into a region with free movement of goods, services, investment and skilled labour, and a freer flow of capital, but also to a highly competitive region that is fully integrated with the global economy.

The Guidelines on Competition Policy is a pioneering attempt to achieve the stated goal of ensuring ASEAN as a highly competitive economic region as envisaged in the ASEAN Economic Community (AEC) Blueprint, in particular the introduction of nation-wide Competition Policy and Law by 2015.

This Guidelines are based on country experiences and international best practices with the view to creating a fair competition environment in ASEAN. It seeks to enhance and expedite the development of national competition policy within each ASEAN Member State.

ASEAN appreciates the technical and financial assistance from InWent - Capacity Building International, Germany, in the development of the Regional Guidelines on Competition Policy in ASEAN. This Guidelines would not have been possible without the support from the ASEAN Experts Group on Competition and relevant Ministries in Member States. This is an evolving document that will be further improved through subsequent editions to reflect developments in the area of competition policy across the ASEAN region.

I am confident this Guidelines on Competition Policy will assist in accelerating ASEAN wide adoption of competition law and will set the foundation for an economically competitive and vibrant ASEAN.

Thank you,



Dr. Surin Pitsuwan  
Secretary-General of ASEAN

Jakarta, August 2010

## Preface

1. The ASEAN Regional Guidelines on Competition Policy (Regional Guidelines) were completed by the ASEAN Experts Group on Competition (AEGC).
2. Established in response to the endorsement of the 39<sup>th</sup> ASEAN Economic Ministers Meeting in August 2007, the AEGC serves as a forum for discussing and coordinating regional cooperation in competition policy, with the goal of promoting a healthy competitive environment in ASEAN. The collaborative development of the Regional Guidelines by 2010 is a priority for AEGC. Other areas of focus of AEGC during the next 3 to 5 years include the implementation of a wide range of demand-driven capacity building activities, and the compilation of a Handbook on Competition Policy and Law in ASEAN for Business.
3. For the purposes of the Regional Guidelines, competition policy is defined as those governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets. Competition policy basically covers two elements, the first element involves putting in place a set of policies that promote competition, and the second element, known as competition law, refers to legal acts (in the form of legislation, judicial decisions and regulations) aimed at controlling or prohibiting anti-competitive practices.
4. The Regional Guidelines are based on country experiences and international best practices. They set out different policy and institutional options that serve as a reference guide for ASEAN Member States (AMSs) in their efforts to create a fair competition environment. They are not intended to be a full or binding statement on competition policy. The Regional Guidelines will help to increase AMSs' awareness of the importance of competition policy, with a view to stimulating the development of best practices and enhancing cooperation between AMSs.
5. The Regional Guidelines, which are a public document, will be a "living" reference, as the AEGC will update them, within the next 5 years, to reflect any changes and developments in ASEAN and in international best practices.

## Table of Contents

<b>Foreword Secretary-General</b>	<b>i</b>
<b>Preface</b>	<b>ii</b>
<b>Table of Contents</b>	<b>iii</b>
<hr/>	
<b>Chapter 1: Objectives of Regional Guidelines</b>	
1.1 Background	1
1.2 Purpose and Benefits of Regional Guidelines	1
1.3 Different Stages of Competition Policy Development in ASEAN	2
<hr/>	
<b>Chapter 2: Objectives and Benefits of Competition Policy</b>	
2.1 Definition of Competition Policy	3
2.2 Main Objectives of Competition Policy	3
2.3 Competition Regulatory Body	5
<hr/>	
<b>Chapter 3: Scope of Competition Policy and Law</b>	
3.1 Application of Competition Policy	6
3.2 Prohibition of Anti-competitive Agreements	6
3.3 Prohibition of Abuse of Dominant Position	9
3.4 Prohibition of Anti-competitive Mergers	10
3.5 Exemptions or exclusions from Application of Competition Law	12
3.6 Providing Guidance to Businesses	13
<hr/>	
<b>Chapter 4: Role and Responsibilities of Competition Regulatory Body / Institutional Structure / Sector Regulators</b>	
4.1 Role and Responsibilities of Competition Regulatory Body	15
4.2 Prioritisation	17
4.3 Institutional Structure of Competition Regulatory Body	18
4.4 Balancing Sectoral Regulation with National Competition Policy	19
<hr/>	
<b>Chapter 5: Legislation and Guidelines / Transitional Provisions</b>	
5.1 Relevant Legislation and Guidelines for Competition Policy	21
5.2 Review of Existing Legislation	22
5.3 Phased Implementation of Competition Law	23
5.4 Transitional Provisions	23
<hr/>	
<b>Chapter 6: Enforcement Powers</b>	
6.1 Different Enforcement Regimes	24
6.2 Investigation Powers	24
6.3 Safeguards	26
6.4 Confidentiality	26
6.5 Commitments	27
6.6 Interim Measures	28
6.7 Sanctions	28
6.8 Calculation of Fines	29
6.9 Leniency	30
6.10 Settlement	32
6.11 Private Enforcement and Action for Damages	33
<hr/>	
<b>Chapter 7: Due Process</b>	
7.1 Importance of Due Process	34
7.2 Guiding Principles of Institutional Framework and Process	35



<b>Chapter 8: Technical Assistance and Capacity Building</b>	
8.1 Definition of Technical Assistance and Capacity Building	38
8.2 Guiding Principles on Technical Assistance and Capacity Building	38
8.3 Different Needs that could be met through Technical Assistance and Capacity Building Programmes	39
<hr/>	
<b>Chapter 9: Advocacy / Outreach</b>	
9.1 Achieving the Objectives of Competition Policy	40
9.2 Resources required for Advocacy and Outreach	40
9.3 Compliance Programmes	41
<hr/>	
<b>Chapter 10: International Cooperation / Common Competition Related Provisions in Free Trade Agreements</b>	
10.1 Cooperation Objectives	42
10.2 Benefits of Cooperation	42
10.3 Cooperation between Competition Regulatory Bodies	43
10.4 Common Competition Related Provisions in Free Trade Agreements	44





## Chapter 1: Objectives of Regional Guidelines

### 1.1 Background

1.1.1 The ASEAN Leaders have agreed to the establishment of an ASEAN Economic Community by 2015 and to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.

1.1.2 In their Declaration on the ASEAN Economic Community Blueprint (AEC Blueprint) in Singapore in November 2007, the ASEAN Leaders adopted

“... the AEC Blueprint which each ASEAN Member Country shall abide by and implement the AEC by 2015. The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy...”

1.1.3 To fulfill the goal of a highly competitive economic region, one of the action tasks identified under the AEC Blueprint is to develop by 2010 regional guidelines on competition policy, which would be based on country experiences and international best practices with the view to creating a fair competition environment. As outlined in the AEC Blueprint, all AMSs will endeavour to introduce competition policy by 2015.

1.1.4 The AEGC is an official body comprising representatives from the competition authorities and agencies responsible for competition policy in AMSs. It coordinates competition policies in ASEAN. Implementation of the tasks and activities relating to competition policy, as targeted for delivery under the AEC Blueprint, will be overseen by AEGC. The Regional Guidelines, one of the deliverables in the AEC Blueprint, will be updated by the AEGC within 5 years to ensure its consistency with the developments in competition policy in AMSs and international best practices.

### 1.2 Purpose and Benefits of Regional Guidelines

1.2.1. The Regional Guidelines serve as a general framework guide for the AMSs as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each AMS.

1.2.2. The Regional Guidelines endeavour to help in the process of building stronger economic integration in the region, by acting as a common reference guide for future cooperation to enhance the competitive process in the AMSs. It is important to note that the Regional Guidelines serve only as a reference and are not binding on the AMSs.

### **1.3 Different Stages of Competition Policy Development in ASEAN**

- 1.3.1 The Regional Guidelines take into account the varying development stages of competition policy in the AMSs. For example, the Regional Guidelines set out different measures that an AMS can adopt or maintain to proscribe anti-competitive business conduct, depending on its own stage of competition policy development.

## **Chapter 2: Objectives and Benefits of Competition Policy**

### **2.1 Definition of Competition Policy**

2.1.1 Competition policy can be broadly defined as a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets. Competition policy basically covers two elements:

2.1.1.1 The first involves putting in place a set of policies that promote competition in local and national markets, such as introducing an enhanced trade policy, eliminating restrictive trade practices, favouring market entry and exit, reducing unnecessary governmental interventions and putting greater reliance on market forces.

2.1.1.2 The second, known as competition law, comprises legislation, judicial decisions and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers. It generally focuses on the control of restrictive trade (business) practices (such as anti-competitive agreements and abuse of a dominant position) and anti-competitive mergers and may also include provisions on unfair trade practices.

2.1.2 For the purposes of the Regional Guidelines, the term "competition policy" refers to public policies and general governmental directions aimed at introducing, increasing and/or maintaining competition. It does include, but it is not limited to, "competition law", which refers, more in particular, to legal acts (in the form of laws, regulation, guidelines, etc.), including the establishment and maintenance of a competition regulatory body, aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers. Hereinafter, the Regional Guidelines will use the general term "competition policy".

### **2.2 Main Objectives and Benefits of Competition Policy**

2.2.1 The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a "level-playing field" for all market players that will help markets to be competitive. The introduction of a competition law will provide the market with a set of "rules of the game" that protects the competition process itself, rather than competitors in the market. In this way, the pursuit of fair or effective competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare.

- 2.2.1.1 Economic efficiency: Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.
  - 2.2.1.2 Economic growth and development: Economic growth—the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.
  - 2.2.1.3 Consumer Welfare: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.
- 2.2.2 In addition, competition policy is also beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.
- 2.2.3 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.

In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.

- 2.2.4 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anti-competitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the benefits of foreign investment.
- 2.2.5 Each AMS may decide which of the objectives it wishes to pursue, taking into account its own national competition policy needs.

### **2.3 Competition Regulatory Body**

- 2.3.1 The objectives of competition policy can be achieved through the setting up of one or more competition regulatory bodies.
- 2.3.2 Each AMS may consider adopting a proactive stance to promote competition by taking action not only against infringements of competition law but also by undertaking a review of its institutional arrangements and public policies, identifying those that interfere with the appropriate functioning of the markets, and then adopting the appropriate policy changes.

## Chapter 3: Scope of Competition Policy and Law

### 3.1 Application of Competition Policy

3.1.1 The coverage of national competition policy may include:

3.1.1.1 The prohibition of anti-competitive (horizontal and vertical) agreements; abuse of dominant position (market power); anti-competitive mergers; and

3.1.1.2 The prohibition of other restrictive trade practices.

3.1.2 Competition policy should be an instrument of general application, *i.e.*, applying to all economic sectors and to all businesses engaged in commercial economic activities (production and supply of goods and services), including State-owned enterprises, having effect within the AMSs' territory, unless exempted by law. The concept of commercial economic activities refers to any activity that could be performed in return for payment and normally, but not necessarily, with the objective of making a profit. The exercise of sovereign powers is not a commercial economic activity.

3.1.3 Businesses engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality, transparency, consistency and non-discriminatory treatment under the law.

3.1.4 Competition policy applies to juridical or legal persons and may extend to cover all natural persons who authorise, engage in or facilitate restrictive practices prohibited by competition policy, whether acting in a private capacity as owners, or as managers or employees of the business. This will allow the law to sanction or penalise individuals as well as the businesses involved in the prohibited activities. Administrative, civil and criminal sanctions could be considered by AMSs in accordance with their legal/constitutional requirements.

### 3.2 Prohibition of Anti-competitive Agreements

3.2.1 AMSs should consider prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the AMSs' territory, unless otherwise exempted. In this chapter,

3.2.1.1 "Horizontal agreement" means an agreement entered into between two or more enterprises operating at the same level in the market (*e.g.*, an agreement by two manufacturers to fix the selling price of a product is a horizontal agreement).

- 3.2.1.2 “Vertical agreement” means an agreement entered into between two or more enterprises, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (e.g., distribution agreements, agency agreements and franchising agreements are vertical agreements).
- 3.2.1.3 “Agreement” has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it also includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls, or by any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.
- 3.2.1.4 “Undertaking” means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit making organisations, whatever their legal and ownership status (foreign or local, government or non-government), and the way in which they are financed.
- 3.2.1.5 The terms “prevent”, “distort” or “restrict” refer, respectively, to the elimination of existing or potential competitive activities, the artificial alteration of competitive conditions in favour of the parties of the agreement, and the reduction of competitive activities. They are meant to include all situations where competitive conditions are adversely affected by the existence of the anti-competitive agreement.
- 3.2.2 Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessary mean that the agreement is anti-competitive. Therefore, AMSs should evaluate the agreement by reference to its object and/or its effects where possible. AMSs may decide that an agreement infringes the law only if it has as its object or effect the appreciable prevention, distortion or restriction of competition. AMSs may consider identifying specific “hardcore restrictions”, which will always be considered as having an appreciable adverse effect on competition (e.g., price fixing, bid-rigging, market sharing, limiting or controlling production or investment), which need to be treated as *per se* illegal. In this chapter,

- 3.2.2.1 "Price fixing" involves fixing either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.
  - 3.2.2.2 "Bid-rigging" includes cover bidding to assist an undertaking in winning the tender. An essential feature of the tender system is that tenderers prepare and submit bids independently.
  - 3.2.2.3 "Market sharing" involves agreements to share markets, whether by territory, type or size of customer, or in some other ways.
  - 3.2.2.4 "Limiting or controlling production or investment" involves agreements which limit output or control production, by fixing production levels or setting quotas, or agreements which deal with structural overcapacity or coordinate future investment plans.
- 3.2.3 With the exclusion of the hardcore restrictions which are treated as *per se* illegal, AMSs may decide to analyse the agreements by "rule of reason" (*e.g.*, via market share thresholds and efficiency considerations) and safe harbours provisions (*e.g.*, appreciability test). For example, the AMSs may decide that an agreement by undertakings, which exceeds a certain percentage of any relevant market affected by the agreement, will have an appreciable effect on competition. In this chapter,
- 3.2.3.1 "Market share" refers to the quantity or value of the relevant products or services sold or purchased by one or more undertakings in the relevant market, as a percentage of the total quantity or value of those products or services in the relevant market.
  - 3.2.3.2 "Relevant market" refers to the product range and the geographic area where competition takes place between undertakings. Defining the relevant market is a key tool to identify the boundaries of competition between undertakings and to analyse the practical effects of their behaviour on the competitive environment. The relevant market is identified with reference to the particular product/service or class of products/services amongst which competition takes place in a given geographic area. The relevant market definition takes into account a number of factors, such as the reactions of economic operators to relative price movements, the socio-cultural characteristics of demand and the presence or absence of barriers to entry, such as transport costs.



- 3.2.3.3 “Relevant product market” (reference to product includes services) is the first element to take into account for determining the relevant market. It is defined by identifying the range of products or services which are regarded as interchangeable or substitutable by the customers, by reason of their characteristics, price and intended use.
- 3.2.3.4 “Relevant geographic market” is defined as the area in which the enterprises concerned are involved in the supply and demand of the relevant products or services, which customers view as interchangeable or substitutable, and in which the conditions of competition are sufficiently homogeneous and can be distinguished from those of neighbouring areas because the conditions of competition are appreciably different than in those areas. The relevant geographical market can be local, national, international or even global, depending on the particular product under examination, the nature of alternatives in the supply of the product, and the presence or absence of specific factors (*e.g.*, transport costs, tariffs or other regulatory barriers and measures) that prevent imports from counteracting the exercise of market power domestically.
- 3.2.4 The prohibition by AMSs of anti-competitive agreements may cover decisions by associations of undertakings. Trade associations are the most common form of association of undertakings. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, undertakings participating in such associations may in some instances collude and coordinate their actions which could infringe the law. The association itself may also make certain decisions or perform actions which could infringe the law. A decision by an association may include the constitution or rules of an association of undertakings or its recommendations.
- 3.2.5 AMSs may also apply the prohibition to concerted practices, which mean any form of coordination or implicit understanding or arrangement between undertakings, but which do not reach the stage where an agreement properly so called has been reached or concluded.

### **3.3 Prohibition of Abuse of a Dominant Position**

- 3.3.1 AMSs should consider prohibiting the abuse of a dominant position. In this chapter,

- 3.3.1.1 “Dominant position” refers to a situation of market power, where an undertaking, either individually or together with other undertakings, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), *e.g.*, able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. AMSs may consider whether the competition law should contain a market share threshold test, whether prescriptive or indicative.
  - 3.3.1.2 “Abuse” of a dominant position occurs where the dominant enterprise, either individually or together with other undertakings, exploits its dominant position in the relevant market or excludes competitors and harms the competition process. It is prudent to consider the actual or potential impact of the conduct on competition, instead of treating certain conducts by dominant enterprises as automatically abusive.
- 3.3.2 AMSs may provide an illustrative list of such conduct:
- 3.3.2.1 Exploitative behaviour towards consumers, customers and/or competitors (*e.g.*, excessive or unfair purchase or sales prices or other unfair trading conditions, tying).
  - 3.3.2.2 Exclusionary behaviour toward competitors (*e.g.*, predatory pricing by an undertaking which deliberately incurs losses in the short run by setting prices so low that it forces one or more undertakings out of the market, so as to be able to charge higher prices in the longer run; margin squeeze).
  - 3.3.2.3 Discriminatory behaviour (*e.g.*, applying dissimilar pricing or conditions to equivalent transactions and vice-versa).
  - 3.3.2.4 Limiting production, markets or technical development to the prejudice of consumers (*e.g.*, restricting output or illegitimate refusal to supply, restricting access to/use of/ development of a new technology).

### **3.4 Prohibition of Anti-competitive Mergers**

- 3.4.1 Mergers constitute, in principle, legitimate commercial transactions between economic operators. However, AMSs may consider prohibiting mergers that lead to a substantial lessening of competition or would significantly impede effective competition in the relevant market or in a substantial part of it, unless otherwise exempted. In this chapter,

- 3.4.1.1 “Mergers” refers to situations where two or more undertakings, previously independent of one another, join together. This definition includes transactions whereby two companies legally merge into one (“mergers”), one firm takes sole control of the whole or part of another (“acquisitions” or “takeovers”), two or more firms acquire joint control over another firm (“joint ventures”) and other transactions, whereby one or more undertakings acquire control over one or more undertakings, such as interlocking directorates.
- 3.4.2 A specific procedure may be established by which the competition regulatory body is tasked to assess mergers, following a (voluntary or mandatory) notification by the merging undertakings, or otherwise following a complaint or by their own motion. In this chapter,
- 3.4.2.1 “Mandatory notification” prevents the undertakings from implementing the transaction until they have received merger clearance from the competition regulatory body. This helps to avoid a situation where anti-competitive mergers have to subsequently be subject to difficult and costly de-concentration measures imposed by the competition regulatory body.
- 3.4.2.2 “Voluntary notification” allows businesses to do their own merger self-assessment, to decide if they should notify the competition regulatory body to clear the merger. It helps to reduce business costs while not impeding competition regulatory body's authority to investigate any merger which raises competition concerns.
- 3.4.3 In order to filter out mergers with no significant impact, AMSs may establish that only mergers above a given threshold shall (or may) be notified to – and approved by – the competition regulatory body. Thresholds may refer, for instance, to the (national and/or worldwide) turnover of the merging parties in the last completed financial year, market shares of the parties or a combination of both criteria. Thresholds may be adjusted when necessary to take account, for example, of increases in the GDP deflator index. AMSs may also consider introducing a standstill provision by which mergers, which are subject to the competition regulatory body evaluation, cannot be implemented before they are approved.
- 3.4.4 A specific procedure may be established by which the competition regulatory body is tasked to stop the merger; or, as part of the clearance, impose conditions on, or require commitments from, the merging enterprises to address any competition concerns arising from the merger.

- 3.4.5 The competition regulatory body may implement a simplified filing system for cases that, at first sight (based on turnover and/or market share thresholds) do not raise serious competition concerns. A simplified filing system generally requires a shorter waiting period and the submission of less information in the notification, thereby reducing time and costs for the undertakings filing the notification.

### **3.5 Exemptions or exclusions from Application of Competition Law**

- 3.5.1 The implementation of competition policy should not prevent AMSs from pursuing other legitimate policies that may require derogations from competition policy principles. AMSs may have exemptions or exclusions aimed at specific industries or activities. The key rationale for granting exemptions or exclusions from competition law provisions to specific industries or activities includes strategic and national interest, security, public, economic and/or social considerations. For example, AMSs legislation may provide that:
- 3.5.1.1 Prohibitions may not apply to any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking, such as guaranteeing universal access to various types of quality services at affordable prices.
  - 3.5.1.2 Prohibitions may not apply to agreements or conduct to the extent to which such agreements or conduct are made in order to comply with a legal requirement, *i.e.*, any requirement imposed by or under any written law or the judicial authority.
  - 3.5.1.3 Prohibitions may not apply to agreements or conduct, when their application may result in a conflict with international obligations.
  - 3.5.1.4 Prohibitions may not apply to agreements or conduct based on specific public policy grounds.
  - 3.5.1.5 Prohibitions may not apply to the collective bargaining of workers over wages and conditions.

- 3.5.2 A specific procedure may be established by which the competition regulatory body is tasked to assess these agreements, following a (voluntary or mandatory) notification by the parties, or otherwise following a complaint, or by its own motion. AMSs may also establish that these agreements may be implemented only following approval by the competition regulatory body.
- 3.5.3 AMSs may also set up a procedure to consider granting exemptions or exclusions to certain agreements and conduct which have significant countervailing benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The exemptions may be allowed only to the extent that is appropriate and indispensable to reach their intended aims, and should not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.
- 3.5.4 AMSs may decide that the intent of the competition law is to regulate the conduct of market players, and the prohibitions will not apply to the Government, statutory bodies or any person acting on their behalf. For example, Government officials and statutory bodies exercising prerogatives arising from their public powers or acting for the fulfilment of public service objectives, or any persons acting on their behalf, may be excluded from the prohibitions. These exemptions apply insofar as the Government activities are connected with the exercise of sovereign power.
- 3.5.5 AMSs may consider exempting small and medium-sized enterprises (SMEs) from the application of competition law, in order to enhance their competitiveness in the market and to improve their market opportunities when competing against large companies/enterprises.
- 3.5.6 In order to facilitate implementation of, and compliance with, competition law, AMSs may use block exemptions, (*i.e.*, general declarations, introduced by law or regulation that a prohibition does not apply to a certain category of agreements), to exempt specific sectors and/or types of economic activities from the application of competition law. Examples of common industries or activities which may be granted block exemptions include research and development cooperation, and intellectual property rights contracts.

### **3.6 Providing Guidance to Businesses**

- 3.6.1 To inspire a fair competition culture and promote compliance, AMSs should consider the development and publication of guidance to businesses to provide clarity, transparency and certainty to the market participants on how the prohibitions and exemptions in the competition law will be enforced. Guidance could be provided both in the form of "soft law" (*e.g.*, guidelines on the application of competition policy to specific sectors) and by means of handbooks or other similar publications, which do not constitute statements of law. The guidance to businesses should be regularly updated and be easily accessible to the public.

- 3.6.2 AMSs may promote specific competition law compliance programmes (see paragraph 9.3 below), in order to raise awareness amongst the business community about the role and responsibilities of diligent business-persons. These programmes would illustrate, in simple terms, the business risks and the opportunities of competition law enforcement, build capacity to deal with competition law issues and implement specific procedures within the company in order to minimise risks of anti-competitive behaviour.

## **Chapter 4: Role and Responsibilities of Competition Regulatory Body / Institutional Structure / Sector Regulators**

### **4.1 Role and Responsibilities of Competition Regulatory Body**

4.1.1 AMSs may want to give the competition regulatory body the mandate to:

4.1.1.1 Implement and enforce national competition policy and law.

4.1.1.2 Interpret and elaborate on competition policy and law.

4.1.1.3 Advocate competition policy and law.

4.1.1.4 Provide advice on competition policy and law to the legislator and the Government.

4.1.1.5. Act internationally as the national body representative of the country in international competition matters.

4.1.2 In fulfilling its mandate, the competition regulatory body may undertake responsibilities such as:

4.1.2.1 Establishing and issuing regulations and other implementing and/or interpretative measures.

4.1.2.2 Developing and disseminating plain language guidelines and publications to businesses and consumers on competition policy and law provisions.

4.1.2.3 Developing and publishing comprehensive guidelines on how the competition regulatory body will apply the law, such as how it will decide if there is an infringement of the anti-competitive prohibitions or assess and grant exemptions.

4.1.2.4 Carrying out competition advocacy and education activities or undertaking market competition studies and publishing regular reports, to create a culture of compliance across all sectors of the economy.

4.1.2.5 Carrying out investigations of prohibited anti-competitive activities on its own initiative, or acting on a complaint or information from third parties.

- 4.1.2.6 Carrying out investigation of suspected competition law violations across a whole sector of the economy (“sector inquiries”), where the rigidity of prices or other circumstances suggest that competition may be restricted or distorted.
  - 4.1.2.7 Enforcing competition law by imposing penalties and administrative sanctions, as well as issuing orders and interim measures, with reasoned decisions.
  - 4.1.2.8 Interpreting the competition law provisions or shaping the scope of competition policy and law through legal precedents.
  - 4.1.2.9 Establishing processes to receive and assess notifications for exemptions from competition policy and law or notifications for assessment of mergers.
  - 4.1.2.10 Establishing and maintaining public registers and databases of notifications received by the competition regulatory body and its decisions.
  - 4.1.2.11 Providing advice and opinions concerning any amendment to, or review of, competition legislation or other related areas of regulation and competition policy.
  - 4.1.2.12 Promoting exchange of non-confidential information with other competition regulatory bodies, and in the international fora.
  - 4.1.2.13 Promoting capacity building, best practices sharing, liaison, training and work updates with other competition regulatory bodies.
- 4.1.3 The competition regulatory body should be equipped with the necessary resources and legal powers, as well as having appropriate processes and procedures in place to carry out the responsibilities in paragraph 4.1.2. This includes the process for filing complaints, lodging applications to the competition regulatory body (*e.g.*, for exemptions, anonymity, confidentiality, or leniency), participation of interested parties and the handling of evidence, publication of decisions and the appeals process.
- 4.1.4 Where appropriate, the competition regulatory body may seek public feedback and launch consultations on general issues (*e.g.*, new or existing competition law and policy provisions or implementing measures), or specific cases (*e.g.*, notification for exemptions or merger notifications) before it makes a decision. This could be part of the due process.



## 4.2 Prioritisation

- 4.2.1 In order to make the best use of available resources, the competition regulatory body may introduce “prioritisation criteria” to determine in an objective and consistent manner which investigations are to be pursued with priority. The priorities may remain confidential to the competition regulatory body or made public through annual plans or the annual report of the competition regulatory body, specifying industries or sectors, as well as types of conduct that are of particular interest.
- 4.2.2 Prioritisation criteria should reflect the competition regulatory body's priorities, taking also into account the time, financial and human resources available to the competition regulatory body. Where appropriate, the competition regulatory body may also take into account other relevant factors such as:
- 4.2.2.1 The type of agreement, conduct and apparent seriousness of an infringement and its impact on the relevant market, *e.g.*, *per se* illegal infringements.
  - 4.2.2.2 The extent or complexity of the investigations required, *e.g.*, international cross-border cartel investigations requiring coordination with overseas competition regulatory bodies.
  - 4.2.2.3 The likelihood of establishing an infringement.
  - 4.2.2.4 The cessation or modification of the conduct complained of, *e.g.*, the undertaking has made commitments to the competition regulatory body to cease anti-competitive aspects of the conduct.
  - 4.2.2.5 The possibility of the complainant bringing the case before judicial authority, *e.g.*, the case can be the subject of private enforcement in a parallel right of private action.
  - 4.2.2.6 Whether the complaint concerns specific legal issues already in the process of being examined (or already examined by the competition regulatory body) in one or several other cases, and/or subject to proceedings before a judicial authority.
  - 4.2.2.7 The impact of the competition regulatory body's possible intervention, *e.g.*, on consumer welfare.
  - 4.2.2.8 Whether the resource requirements of the work are proportionate to the benefits from doing the work.
  - 4.2.2.9 Whether the work fits into the strategic significance of the competition regulatory body's plans.

- 4.2.3 Prioritisation should not allow for *de facto* exemptions. Even where prioritisation criteria have been established, the competition regulatory body should maintain its engagement on non-priority cases, within the limits of its resources.

### **4.3 Institutional Structure of Competition Regulatory Body**

- 4.3.1 In considering the establishment of a competition regulatory structure, AMSs should determine whether they would:
- 4.3.1.1 Establish a standalone independent statutory authority responsible for competition policy administration and enforcement;
  - 4.3.1.2 Create different statutory authorities respectively responsible for competition policy administration and enforcement within specific sectors; or
  - 4.3.1.3 Retain competition regulatory body functions within the relevant Government department or Ministry.
- 4.3.2 AMSs should also determine whether they would establish an administrative appeal body which is independent of the competition regulatory body and executive Government or leave appeals to the judicial authority.
- 4.3.3 AMSs may grant a competition regulatory body as much administrative independence as necessary and as possible, in order to avoid political influence. AMSs may appoint independent commission members to be in charge of the competition regulatory body. The competition regulatory body may also be required to submit an annual report on its policy and activities to the individual AMS' national legislative body.
- 4.3.4 AMSs may determine that the competition regulatory body's budget should be free from political considerations. One method is to separate the competition regulatory body's budget from that of other governmental functions and making it transparent to the public. Another method consists of making at least part of the budget dependent upon income that is generated by the competition regulatory body, *e.g.*, on fees charged for notification clearance or other proceedings and on fines imposed for anti-competitive conduct. A potential negative effect of this method is that it might create incentives for the competition regulatory body to use broader notification standards to increase notifications or bring in more cases and to impose higher penalties. Appropriate checks and balances should be put in place to curtail such potential negative effects.

- 4.3.5 AMSs may establish the competition regulatory body's internal structure and functioning and set up internal rules of procedure, or leave these to the competition regulatory body to determine itself.

#### **4.4 Balancing Sectoral Regulation with National Competition Policy**

- 4.4.1 AMSs may have highly regulated industries such as banking, insurance, energy, transport, telecommunications, which are fully subject to competition policy. Specific exemptions from national competition policy may be provided by law, *e.g.*, where such industries are subject to sectoral regulation.
- 4.4.2 In industries where there are no sector-specific regime(s), or where sector-specific regime(s) do not include competition-related provisions, AMSs could set up a competition regulatory body to administer all competition-related provisions and possibly consult with sector-specific technical and economic regulators, if any, to bridge any knowledge gap.
- 4.4.3 In industries already subjected to pre-existing sector-specific regulators with competition-related responsibilities, AMSs may rely only on sectoral regulation to meet competition policy objectives, where there is no established national competition policy as yet. AMSs introducing competition policy may be required to strike the right balance between sector-specific rules and competition policy, in order to avoid conflicts of laws. AMSs could introduce concurrent regulation, with the national competition policy dominating or providing the overarching template for pro-competitive regulation. Conversely, AMSs could entirely rely on sector-specific regulation to meet competition policy objectives in the regulated sectors. In this case, AMSs could impose or recommend consultation or coordination between sector-specific regulators and the competition regulatory body for purposes of consistent application of competition functions across all the sectors.
- 4.4.4 The AMSs may also establish a regular inter-agency forum or a platform with the relevant stakeholders to enable the competition regulatory body and sector-specific regulators to work together to help reduce the incidence of conflict between regulators as well as the costs of "forum shopping" by regulated parties. AMSs may also wish to consult and enter into arrangements with relevant stakeholders so as to engage them.
- 4.4.5 The inter-agency forum or platform can also serve to:
- 4.4.5.1 Ensure that best practices and expertise are shared between the competition regulatory body and the sector-specific regulators.

- 4.4.5.2 Create a programme of work to coordinate all concurrent functions of the competition regulatory body and sector-specific regulators with a view to ensuring that the application of all of these functions is consistent and reflects best practice (e.g., allocating responsibility for dealing with particular complaints).
- 4.4.5.3 Determine whether specific inquiries would be best conducted by a joint team in relevant cases.

## **Chapter 5: Legislation and Guidelines / Transitional Provisions**

### **5.1 Relevant Legislation and Guidelines for Competition Policy**

- 5.1.1 The AMSs should provide for clear and effective legislation when drafting their competition policy regimes. The AMSs may choose to adopt a basic legislation containing key broad provisions and introduce secondary legislation (*e.g.*, regulations and guidelines) to implement or clarify the more operational aspects of the policy, processes or procedural issues, and provide guidance on how the competition regulatory body will interpret the law.
- 5.1.2 Secondary legislation may be implemented by the Government or by the competition regulatory body. The legislation may require the competition regulatory body to seek public consultations on proposed regulations and guidelines, before the competition regulatory body issues the regulations and guidelines.
- 5.1.3 The legislation and guidelines may include provisions relating to:
  - 5.1.3.1 Definitions and interpretation.
  - 5.1.3.2 Extra-territorial application of competition law.
  - 5.1.3.3 Establishment and incorporation of the competition regulatory body.
  - 5.1.3.4 Functions, duties and powers of the competition regulatory body.
  - 5.1.3.5 Qualifications, terms of office of the main officials of the competition regulatory body.
  - 5.1.3.6 Administrative and financing matters of the competition regulatory body.
  - 5.1.3.7 Prohibition of anti-competitive agreements.
  - 5.1.3.8 Prohibition of abuse of dominant position.
  - 5.1.3.9 Prohibition of anti-competitive mergers.
  - 5.1.3.10 Exemptions/exclusions from the application of the national competition law.

- 5.1.3.11 Decision process for the prosecution of anti-competitive practices (anti-competitive agreements and abuse of dominant position and anti-competitive mergers) and exemption/authorisation of agreement or conduct or merger.
- 5.1.3.12 Provisions related to leniency and settlements.
- 5.1.3.13 Investigation powers of the competition regulatory body and power to issue interim measures.
- 5.1.3.14 The effect of an infringement decision by the competition regulatory body.
- 5.1.3.15 Enforcement powers of the competition regulatory body, (*e.g.*, the power to impose sanctions, and remedies).
- 5.1.3.16 Appeal process.
- 5.1.3.17 Procedural offences (*e.g.*, obstruction of investigations).
- 5.1.3.18 Rights of private action (*e.g.*, for an injured party to claim for compensation from the infringing undertakings).
- 5.1.3.19 Cooperation between the competition regulatory body and other local or overseas regulatory authorities (*e.g.*, sharing of information, best practices, significant work accomplishment and capacity building).
- 5.1.3.20 Preservation of secrecy (*e.g.*, protection of information provided to the competition regulatory body and of the identity of complainants who wish to remain anonymous).
- 5.1.3.21 Statutory time periods (*e.g.*, for the competition regulatory body to issue a decision or for affected parties to file an appeal).

## **5.2 Review of New or Existing Legislation**

- 5.2.1 The AMSs may consider whether the competition policy is compatible or consistent with new or existing legislations such as, but not limited to, intellectual property rights, fair trading, sectoral rules/regulations or consumer protection laws.
- 5.2.2 The AMSs may review any new or existing legislation that imposes significant restrictions on competition as an integral part of national competition policy.

- 5.2.3 The AMSs may consider a comprehensive review of competition-related legislation (*e.g.*, price control arrangements, if any) in order to determine whether competition concerns can be addressed by potentially less restrictive means (*e.g.* price monitoring).

### **5.3 Phased Implementation of Competition Law**

- 5.3.1 The AMSs may consider implementing competition law in phases. For example, the different prohibitions may be implemented in phases within a realistic time-frame, the prohibition of anti-competitive agreements may be introduced first, or together with the prohibition of abuse of dominant position, and the prohibition of anti-competitive mergers may be introduced last, because of the complexity in analysing merger cases.

### **5.4 Transitional Provisions**

- 5.4.1 AMSs may also consider including transitional provisions or sunset clauses. In this chapter,
- 5.4.1.1 “Transitional provisions” refers to the legislation provisions governing the application of the new law during a specified period of time, such as providing that the competition regulatory body will not impose any penalties for anti-competitive agreements that took place prior to or soon after the prohibition was introduced, within a specified period of time.
  - 5.4.1.2 “Sunset clauses” refers to the legislation provisions which may allow the anti-competitive agreement or conduct to enjoy immunity from penalties and sanctions by the competition regulatory body, up to a specified period of time.
- 5.4.2 This will give parties time to renegotiate agreements or restructure their business to comply with new laws insofar as they represent a departure from the laws that preceded them. This is particularly important where conduct that was once permitted or tolerated is to become prohibited or criminalised.

## Chapter 6: Enforcement Powers

### 6.1 Different Enforcement Regimes

- 6.1.1 The effective enforcement of competition law is an important factor in the establishment of competition policy in the territory of the AMSs. AMSs should provide the necessary human, financial, legal and other resources to the competition regulatory body or other authority tasked to enforce competition law.
- 6.1.2 AMSs may set up an enforcement regime, with the introduction of competition laws, to deter potential offenders through the detection of actual offences, the prosecution thereof as may be allowed by law, and the application of adequate penalties and remedies.
- 6.1.3 In setting up the enforcement regime, AMSs should decide if infringement of competition law amounts to a civil, administrative or criminal wrongdoing, or a combination of those. This would affect the types of investigative and enforcement powers and the agencies involved in the enforcement of competition law.
- 6.1.4 In the context of a civil or administrative wrongdoing, sanctions may be administered by a civil or administrative authority, such as the competition regulatory body, with the subsequent possibility of judicial remedies.
- 6.1.5 In the context of criminal law wrongdoing, sanctions should only be imposed by judicial authorities, or subject to judicial review. When competitive law empowers administrative authorities (such as the competition regulatory body) of competition law enforcement, these authorities may investigate and report the case to the judicial authority, which would then decide on the appropriate sanction to impose.

### 6.2 Investigation Powers

- 6.2.1 *Power to require the production of documents and information:* AMSs could provide a competition regulatory body or another law enforcement body with investigative powers, such as the power of requiring any natural or legal person to provide information, *e.g.*, documents, information, written answers to questions, or oral testimonies, that it considers related to any matter relevant to an investigation. This power may include:
- 6.2.1.1 The right to take original or copies of, or extracts of, documents, or make reproductions.
- 6.2.1.2 Requiring the person to provide an explanation of the document.



- 6.2.1.3 Requiring the person to state to the best of that person's knowledge or belief (whether under oath or affirmation or not), where the document can be found.
- 6.2.1.4 Requiring the person (whether under oath or affirmation or not), to provide specified information that is not already in a recorded form.
- 6.2.2 AMSs may grant competition regulatory body the power to enter and search premises, land and means of transport with or without warrant.
- 6.2.3 *Power to enter and search business premises without warrant:* The competition regulatory body or other law enforcement body may be empowered to enter premises for inspection without a Court warrant. The investigators may enter the premises without giving the occupier notice, if the premises are or have been occupied by an undertaking under investigation; or by giving a reasonable notice of entry to an undertaking that is not under investigation.
- 6.2.4 In addition to the powers to require a person to produce and explain the documents (*e.g.*, accounting records, diaries, minutes or notes of meetings, records and copies of correspondence, personal memoranda, electronic data and email records) that the competition regulatory body or other law enforcement body considers as relating to any matter relevant to the investigation, it may take steps which appear necessary in order to preserve the documents or prevent interference with them, such as sealing the premises, offices, files and cupboards for such time as is reasonably necessary to enable the inspection to be completed.
- 6.2.5 *Power to enter and search business and private premises, land and means of transport, under warrant:* The competition regulatory body or other law enforcement body may also be empowered to make an application to the judicial authority for a warrant to enter and search any personal premises, land and means of transport, where there is a reasonable suspicion that evidence related to the subject matter of the investigation is kept. The investigators can enter the premises, land and means of transport specified in the warrant using such force as is reasonably necessary and search any person on the spot, if there are reasonable grounds for believing that the person has in possession any document which has a bearing on the investigation, and search the premises, land and means of transport and take originals or copies of or extracts of documents, or remove from the places for examination any equipment or article which relates to any matter relevant to the investigation, *e.g.*, computers or any recording devices.

### 6.3 Safeguards

- 6.3.1 AMSs may make the investigative powers subject to procedural safeguards such as granting judicial redress to the parties concerned by an investigation and requiring the competition regulatory body to prove before the judicial authority that there is reasonable basis to commence the investigations. The competition law may allow aggrieved parties to seek redress where there is a failure to comply with the procedural safeguards.
- 6.3.2 There should also be safeguards to protect the confidentiality of information acquired during the course of a search or to protect the identity and interest of a company ("whistle blower" or "informant") that informs the competition regulatory body of the existence of an anti-competitive practice, such as a cartel.

### 6.4 Confidentiality

- 6.4.1 AMSs may recognise the importance of maintaining the confidentiality of commercially sensitive information and details of an individual's private affairs, by providing through legislation that all matters:
- 6.4.1.1 Relating to the business, commercial or official affairs of any person;
  - 6.4.1.2 Which have been identified as confidential; or
  - 6.4.1.3 Relating to the identity of persons furnishing information; coming to the knowledge of the competition regulatory body or other enforcement body in the course of performance of its functions and duties shall not be disclosed, unless disclosure is necessary for the performance of the function or duty or is lawfully required or permitted under any written law.
- 6.4.2 The protection of confidentiality will help persons providing information to the competition regulatory body or other law enforcement body to avoid the risk of harm to their legitimate business interests or individual interests, *e.g.*, through economic retaliation. The persons providing confidential information should identify and explain, to the competition regulatory body or other law enforcement body, the reasons why the information should be treated as confidential.
- 6.4.3 The confidential information may also be protected by other legislation, such as privileged communications on grounds of legal professional or litigation privilege (*e.g.*, attorney-client correspondence), or privacy laws.

## 6.5 Commitments

- 6.5.1 AMSs may consider that, in the course of proceedings which might lead to an agreement or conduct or merger being prohibited, undertakings may offer (behavioural or structural) commitments to meet the competition regulatory body's competition concerns as expressed in its preliminary assessment, and may empower the competition regulatory body to adopt decisions making those commitments binding on the undertakings concerned, without imposing a penalty. In this chapter,
- 6.5.1.1 "Behavioural commitments" means commitments to change the commercial behaviour, *e.g.*, to terminate existing exclusive agreements.
- 6.5.1.2 "Structural commitments" means commitments to divest business or to sell shares.
- 6.5.2 Such decisions may be adopted for a specified period and may conclude that subject to these commitments being in place, there are no longer grounds for action by the competition regulatory body, without issuing a formal prohibition decision.
- 6.5.3 The competition regulatory body may, upon request or on its own initiative, be allowed to reopen the proceedings where it has reasonable grounds to believe that:
- 6.5.3.1 There has been a material change in any of the facts on which the decision was based;
- 6.5.3.2 The undertakings concerned breached their commitments; or
- 6.5.3.3 The decision was based on incomplete, incorrect or misleading information provided by the undertakings.
- 6.5.4 The competition regulatory body may, at any time when a commitment is in force, accept a variation of the commitment or another commitment in substitution.
- 6.5.5 The competition regulatory body may release a commitment where it has reasonable grounds to believe that the commitment is no longer necessary or appropriate for the purpose.
- 6.5.6 Before accepting, varying, substituting or releasing a commitment, the competition regulatory body may consult with such persons as it thinks appropriate.

## 6.6 Interim Measures

- 6.6.1 AMSs may provide a competition regulatory body or other law enforcement body with the power to adopt interim measures or injunctions before it has completed its investigation when it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.
- 6.6.2 Interim measures may also be imposed for the purpose of preventing any action that may prejudice or obstruct the investigations or the competition regulatory body's ability to impose remedies (*e.g.*, a merger that is likely to infringe the law is carried into effect).
- 6.6.3 The interim measures may be in the form of prohibition orders that prohibit the continuation of the illegal conduct (*cease-and-desist orders*), or of orders that impose the elimination of the unlawful situation by way of positive act (*injunctions*).
- 6.6.4 AMSs may provide that the interim measures adopted by a competition regulatory body are subject to judicial review.

## 6.7 Sanctions

- 6.7.1 AMSs may provide a whole range of sanctions, punitive and non-punitive coercive measures, whether criminal, civil or administrative, to ensure compliance with the law. AMSs may provide that sanctions are subject to judicial review.
- 6.7.2 Sanctions may be imposed for substantive infringement of the law, such as infringements of the prohibition against anti-competitive agreements, the prohibition against abuse of a dominant position and the prohibition against anti-competitive mergers.
- 6.7.3 Sanctions may also be imposed for procedural infringements of the law, such as failure or refusal to provide information, destroying or falsifying documents, failure to comply with decisions or orders, or persuading or instructing others not to cooperate.
- 6.7.4 Examples of sanctions include administrative financial penalties, civil financial penalties, periodic penalty payments, criminal sanctions, corrective orders, and contempt orders. In this chapter,

- 6.7.4.1 “Administrative financial penalties” refers to financial penalties or fines imposed on a natural or legal person for breach of laws administered by an administrative agency. The power to impose administrative sanctions may be vested either in the competition regulatory body (or other law enforcement body); or the judicial authority; or it may be shared between them.
- 6.7.4.2 “Civil financial penalties” refers to financial penalties or fines imposed by a judicial authority during civil proceedings initiated by an administrative agency against a natural or legal person for breach of the laws administered by such administrative agency.
- 6.7.4.3 “Periodic penalty payments” refers to daily fines in order to compel an undertaking to put an end to an infringement, comply with an order, or to submit to investigative measures.
- 6.7.4.4 “Criminal sanctions” refers to fines or imprisonment as a result of application of criminal law by a judicial authority.
- 6.7.4.5 “Corrective orders” refers to corrective measures such as permanent or long term cease-and-desist orders or injunctions or divestiture, in the case of mergers completed in breach of merger control provisions. Other minor corrective orders include public disclosure orders or apology measures (*e.g.*, public announcement about the corrective order in major daily newspapers, to inform the business community and especially consumers about the unlawful behaviour).
- 6.7.4.6 “Contempt orders” in cases of wilful disobedience to any order or decision which may be issued by the competition regulatory body or the judicial authority or disrespectful conduct by any party as addressed to the competition regulatory body or the judicial authority.

## 6.8 Calculation of Fines

- 6.8.1 AMSs may establish, by law, the method of calculation and the amount of financial penalties (*i.e.*, fines) to be imposed. In this regard, AMSs may consider elaborating on the basic principles for setting the amount of fines, such as:
  - 6.8.1.1 The seriousness (gravity) and duration of the infringement and its impact on the relevant market.
  - 6.8.1.2 The turnover of the undertaking(s) involved.

- 6.8.1.3 Any aggravating circumstances (*e.g.*, repeated infringements, refusal to cooperate, role as leader or instigator of infringement, adoption of retaliatory measures or other coercive measures aimed at ensuring the continuation of the infringement).
- 6.8.1.4 Any mitigating factors (*e.g.*, passive role, acting under duress or pressure, non-implementation or partial implementation of the infringement, cooperation which enables the enforcement process to be concluded more effectively and/or speedily).
- 6.8.1.5 Restitution or disgorgement principles.
- 6.8.1.6 Possibility of imprisonment for individuals.
- 6.8.1.7 Other relevant factors (*e.g.*, deterrent value).
- 6.8.2 AMSs may consider introducing fines sufficiently high to discourage infringements, *e.g.*, up to a specified maximum amount or up to a certain percentage of the undertaking's annual turnover in the previous fiscal years.
- 6.8.3 Fines may also vary according to the type of the infringement, or depending on whether the infringement was committed wilfully/intentionally or negligently. Fines may be more severe, particularly in respect of cartel activities, *e.g.*, in price fixing, or bid-rigging (collusive tendering). AMSs may provide that the fines imposed are subject to judicial review.

## 6.9 Leniency

- 6.9.1 AMSs may introduce a leniency programme targeted at undertakings who have participated in cartel activities and therefore are liable for infringing the prohibition against anti-competitive agreements, but who would nevertheless like to come clean and provide the competition regulatory body or other law enforcement body with evidence of the cartel.
- 6.9.2 These undertakings may be deterred from coming forward and "blowing the whistle" for fear that they may expose themselves to hefty financial penalties for their own involvement in the cartel.
- 6.9.3 Due to the secret nature of cartels, undertakings participating or who have participated in them may be given an incentive to come forward and report on the cartel's activities.

- 6.9.4 AMSs may consider if the policy of granting lenient treatment to these undertakings who cooperate with the competition regulatory body or other law enforcement body (leniency programme) outweighs the policy objectives of imposing financial penalties on such cartel participants, and if a leniency programme should form part of their enforcement strategy.
- 6.9.5 AMSs can consider designing a leniency programme that contains the following features:
- 6.9.5.1 Makes leniency available both (a) where the competition regulatory body or other law enforcement body is unaware of the cartel and (b) where the competition regulatory body or other law enforcement body is aware of the cartel but does not have sufficient evidence to proceed to adjudicate or prosecute. Whether or not leniency is granted in such cases will depend on the quality of the information submitted by the applicant. As a minimum, the information provided by the undertaking must be such as to provide the competition regulatory body or other law enforcement body with a sufficient basis for taking forward a credible investigation or to add significant value to the competition regulatory body's or other law enforcement body's investigation.
  - 6.9.5.2 Grants leniency to the first eligible applicant who self-reports its involvement and
    - 6.9.5.2.1 Provides all the information, documents and evidence available to it regarding the cartel activity.
    - 6.9.5.2.2 Maintains continuous and complete co-operation throughout the investigation and until the conclusion of the investigation/enforcement action.
    - 6.9.5.2.3 Refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the competition regulatory body or other law enforcement body unless otherwise directed.
    - 6.9.5.2.4 Must not have been the one to initiate or to play a leading role in the cartel.
    - 6.9.5.2.5 Must not have taken any steps to coerce another undertaking to take part in the cartel activity.

- 6.9.5.3 Keeps the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the competition regulatory body or other law enforcement body is required by law to disclose the information. The waiver may be required to enable communication and coordination of investigations between investigation agencies.
- 6.9.6 AMSs may extend lenient treatment to second and subsequent applicants, provided that they submit evidence that adds significant value to the investigation. To encourage a “rush to the door” to contact the competition regulatory body or other law enforcement body, the first eligible applicant (before an investigation has begun) may be granted automatic and complete immunity from financial penalties and the other subsequent eligible applicants may be granted a reduction up to a certain percentage of the financial penalties imposed on the cartel. Any reduction must reflect the actual contribution of the company, in terms of quality and timing, to the establishment of the infringement.
- 6.9.7 AMSs can introduce a “marker” system or “reservation” system that protects an undertaking's place in the queue for a given period of time and allows it to gather the necessary information and evidence to perfect their application for leniency prior to the competition regulator body or other law enforcement body determining the first eligible applicant. This provides certainty and clarity for potential applicants and encourages a race to contact the agency.
- 6.9.8 In AMSs where different authorities are responsible for the investigation and prosecution of cartels, respectively, AMSs should make arrangements for authorities to have consistent leniency policies, shared philosophy about the seriousness of cartel conduct, shared priorities towards prosecuting cartel activity and open and constant communication.

## **6.10 Settlement**

- 6.10.1 AMSs may introduce a procedure that will enable parties under investigation to reach settlements with the competition regulatory body and thereby terminate their involvement in the investigation. By way of a settlement, proceedings are terminated or suspended when the agreement or conduct concerned is either terminated by the parties or amended in conformity with the competition rules.
- 6.10.2 Where settlements are allowed, AMSs should not preclude the possibility that proceedings are reopened where the parties do not comply with the terms of the settlement and the non-complying party or parties are subject to sanctions by the competition regulatory body.



## 6.11 Private Enforcement and Action for Damages

- 6.11.1 AMSs may entitle any applicant to bring a specific law suit before the appropriate judicial authorities for breaches of competition law, in order to recover the damages suffered (including costs and interests accrued).
- 6.11.2 By allowing damage claims for breaches of competition law, the AMSs not only strengthen the enforcement of competition law, but also make it easier for applicants who have suffered damages from an infringement of competition law to seek redress and recover their losses.
- 6.11.3 AMSs could include provisions specifying the calculation methods and the amount of damages that can be claimed by affected parties. The amount of damages awarded may:
- 6.11.3.1 Be designed and applied in a manner that ensures full compensation of the damage and of the reasonable expenses that the affected party incurred as a result of the infringement. Full compensation may include compensation for actual loss, loss of profit and payment of interests from the time the damage occurred to the time it has been compensated;
  - 6.11.3.2 Be designed as a deterrent such as a multiple of the actual losses suffered as compensation, plus legal costs; or
  - 6.11.3.3 Be independent from the actual imposed by the competition regulatory body or other law enforcement body or judicial authority.
- 6.11.4 *Evidence requirements.* AMSs may establish that, where an applicant(s) has presented reasonable evidence of the fact that they may have been harmed by an infringement of competition law and they are unable to produce further conclusive evidence, the competent judicial authority may order evidence to be disclosed by other parties, provided that disclosure is not disproportionate, taking into account the legitimate interests of the parties involved and the protection of confidentiality.
- 6.11.5 *Group action.* AMSs may establish that two or more injured parties, who suffered harm from the infringement of competition law, can bring a joint action for damages before the competent judicial authority. AMSs may also allow other injured parties, who suffered harm from the same infringement, to join the group action already lodged, provided that this is not impaired by the state of the proceedings and does not jeopardise the rights of the defendant(s).

## Chapter 7: Due Process

### 7.1 Importance of Due Process

- 7.1.1 Sound institutional framework and due process are fundamental in ensuring the effective application of competition law. In particular, procedures should be transparent, certain, accountable and not unduly burdensome or prohibitive. Transparency is also fundamental in order to support the credibility of the competition regulatory body (or other law enforcement authority).
- 7.1.2 AMSs should consider whether the judicial authority or competition regulatory body should be the arbiter in determining whether there is an infringement of competition law. The AMSs may consider whether there should be any specialised rules of evidence and procedures to be applied for such cases, as well as any procedures for interim redress to preserve the status quo pending the completion of investigations.
- 7.1.3 Where the competition regulatory body is, at the same time, the investigating, adjudicating and enforcing authority, AMSs may introduce greater transparency in the adjudication process by allowing the alleged infringing undertakings to have access to the investigation evidence gathered by the competition regulatory body, with the exception of documents or other information which are purely internal to the competition regulatory body or confidential.
- 7.1.4 AMSs should recognise the role of the judiciary in the enforcement of competition law, including both direct access to the judicial authority and review of administrative decisions.
- 7.1.4.1 *Appellate Body:* There should be recourse for infringing parties to at least one appellate body, independent from the competition regulatory body and the government. Ideally, this body should be both a legal and a competition expert body, whose members are highly qualified in competition law and economics. Where this cannot be achieved, the appellate body (*e.g.*, a court, tribunal or committee) that hears the appeals should have access to recognised experts on competition law and economics.
- 7.1.4.2 *Judicial review:* AMSs may make decisions of the competition regulatory body subject to judicial review, providing any natural or legal person with the possibility of appealing within a specified time-limit (*e.g.*, two months) to the appropriate judicial authority, against the whole or any part of the competition regulatory body's decision, on any substantive or procedural point of law.

- 7.1.4.3 *Specialised Courts:* AMSs may also consider setting up specialised courts (or specialised sections within courts) which are granted exclusive jurisdiction to hear competition cases. This will allow judges to develop specific experience and know-how in the application of competition law.
- 7.1.4.4 In the framework of judicial proceedings, AMSs may consider allowing the competition regulatory body to submit written comments or to appear in court (as "*amicus curiae*") in order to clarify technical issues that are important for the consistent and effective application of competition law.

## 7.2 Guiding Principles on Institutional Framework and Process

- 7.2.1 AMSs may consider the following guiding principles on the institutional framework and processes which the competition regulatory body could endeavour to follow:
- 7.2.1.1 *Accountability:* The competition regulatory body could have processes supporting the accountability of its activities, such as obligations to report on a regular basis to a Minister(s) and/or the national legislative body, and/or the Head of State; and to publish annual reports/plans that are available to the public.
- 7.2.1.2 *Administrative review:* AMSs may allow the competition regulatory body to review its own decisions, when circumstances prompting the decision have changed or have ceased to exist.
- 7.2.1.3 *Confidentiality:* The competition regulatory body should be required to maintain the confidentiality of information provided by third parties or identity of third parties where necessary, unless disclosure is required by the law. Adequate sanctions should be imposed on any member of the board and administrative staff of the competition regulatory body for violation of confidentiality of parties of the proceedings, complainants and any third parties providing information under competition law.
- 7.2.1.4 *Independence:* The independence of a competition regulatory body would enhance its credibility and efficiency in implementing competition policy. The appropriate level of independence of the competition regulatory body may differ from country to country. Some measures of independence include budgetary independence, administrative autonomy from the government and the existence of a fixed term of reasonable duration for the competition regulatory body's board of commissioners, without the possibility of being dismissed.

- 7.2.1.5 *Natural Justice*: The competition regulatory body should take into consideration the rules of natural justice, such as informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule), or a similar legal concept under the laws of the jurisdiction.
- 7.2.1.6 *Transparency and Consistency*: The transparency of the competition regulatory body's policies, practices and procedures may be strengthened by such a means as the publication of procedural and enforcement guidelines, guidelines on the competition regulatory body's policies and priorities in the application of the substantive rules, and competition regulatory body/judicial authority decisions. These means would help to promote consistency in the competition regulatory body's decision making and to encourage compliance with competition law.
- 7.2.1.6.1 The competition regulatory body can set up a website for the publication of the competition regulatory body's / judicial authority's decisions, guidelines, documents and other public statements on competition policy.
- 7.2.1.6.2 The competition regulatory body should provide, as far possible, transparency and certainty with respect to the requirements for notifications (*e.g.*, exemptions, mergers, leniency); and the application of policies, procedures and practices governing applications, the conditions for granting it and the roles, responsibilities and contact information for officials involved in the notification or decision making process.
- 7.2.1.6.3 Access to file constitutes a fundamental procedural guarantee intended to apply the principle of equality of arms and to protect the rights of the defence. The competition regulatory body should grant, as far as possible, to the natural and legal persons against whom it has started infringement proceedings, access to all documents, which have been obtained, produced and/or assembled by the competition regulatory body during the investigation, on which the accusation is based, with the exception of purely internal documents or drafts, confidential correspondence between the competition regulatory body and other public authorities and documents protected by secret or confidentiality (*e.g.*, complaints and confidential documents attached to them, where the complainants have applied for confidentiality, or documents

containing business or national security secrets). AMSs may provide that the decisions, by which the competition regulatory body denies access to file, should state the reasons for denial and may be subject to judicial review.

7.2.1.6.4 Where feasible, the competition regulatory body may also grant third parties interested in the proceedings (*i.e.*, complainants or other participants to the proceedings) access to specific documents of the files, further to a specific request, provided that these documents are not protected by secrecy or confidentiality.

7.2.1.7 *Timeliness*: The competition regulatory body could be required to comply with legislative pre-determined time periods for the handling of cases. The competition regulatory body should have internal procedures, such as timeline projections, in order to ensure that decisions are not unduly delayed, or consider having a set of case screening criteria. This would allow sieving out cases which are unlikely to raise competition concerns and allocate resources to more important cases.

7.2.1.8 *Check and balance*: Decisions made by the competition regulatory body should not be without recourse. Provisions should be made in the applicable competition laws that would allow reasonable appeal procedures to any aggrieved party.

## Chapter 8: Technical Assistance and Capacity Building

### 8.1 Definition of Technical Assistance and Capacity Building

- 8.1.1 Technical assistance refers to the sharing of skills, best practices and knowledge with a competition regulatory body (or other authority) by other competition regulatory bodies, donor agencies and international organisations.
- 8.1.2 Capacity building refers to a more indigenous process of putting in place sustainable competition policy frameworks and processes necessary for effective competition policy administration, enforcement, advocacy and the future development of the competition regulatory body.
- 8.1.3 Technical assistance is one way by which a competition regulatory body can improve its capacity to establish and enforce competition policy, while the competition regulatory body can also build capacity through direct recruitment, procurement and organisational learning.

### 8.2 Guiding Principles on Technical Assistance and Capacity Building

- 8.2.1 The following are guiding principles on technical assistance and capacity building programmes which the AMSs may adopt:
- 8.2.1.1 *Adherence to country-specific needs:* The design of effective technical assistance and capacity building programmes should begin with a detailed local needs' analysis and try to tackle the most pressing needs of the AMS.
- 8.2.1.2 *Proportionality to the capacity of countries:* Programmes tend to be most effective when they are designed based on the particular features of the recipient competition regulatory body.
- 8.2.1.3 *Involvement of other competition regulatory bodies, international and regional entities and fora on competition:* The inclusion will help improve the quality or effectiveness of technical assistance.
- 8.2.1.4 *Graduality:* Programmes should be tailored to (and proportionate to) the level of competition policy development of the beneficiaries, in order to facilitate the beneficiaries' capacity to assimilate new programmes and procedures.
- 8.2.1.5 *Continuity:* So as not to lose impetus, follow through programmes are essential.

### **8.3 Different Needs that could be met through Technical Assistance and Capacity Building Programmes**

8.3.1 The following are some of the different needs that AMSs could consider:

- 8.3.1.1 Improving the capacity to advocate to government officers and the general public on the benefits of competition policy and foster a culture of competition: For example, building capacity to conduct a detailed assessment of the net benefits that are likely to derive from a national competition policy regime in conjunction with other existing policy instruments; providing advice on how competition policy can help achieve other policy objectives and conducting effective outreach session targeting appropriate audience.
- 8.3.1.2 Building technical (legal and economic) skills necessary for the establishment and implementation of national competition policy: for example, technical assistance to build skills in legislative drafting, formulating guidelines and resources needed to promote a culture of compliance, investigative techniques, economics skills, building capacity of judiciary to handle competition cases.
- 8.3.1.3 Developing a sound institutional framework and due processes for the competition regulatory body *e.g.*, technical assistance in building a reputation of independence and in identifying enforcement priorities.
- 8.3.1.4 Improving the competition regulatory body's capacity to educate the public about the objectives and scope of competition policy.

## Chapter 9: Advocacy and Outreach

### 9.1 Achieving the Objectives of Competition Policy

- 9.1.1. AMSs may consider the use of advocacy and outreach as an effective means for achieving the objectives of competition policy by educating the businesses and hence, creating a culture of compliance. Effective use of such programmes can yield significant compliance and deterrence benefits and help competition regulatory bodies determine the degree of priority of cases, and manage its enforcement costs, *e.g.*, by confining litigation resources to the prosecution of *per se* illegal cartels.
- 9.1.2. The strategic use of publicity helps to reduce the competition regulatory body's future caseload and associated litigation costs, by encouraging businesses that might otherwise be in breach of competition-related provisions to voluntarily adopt a compliance policy, once they understand the economy-wide benefits of national competition policy and the importance of the role of the competition regulatory body.
- 9.1.3. Advocacy and outreach programmes can also engender support for the objectives of the competition policy from stakeholders, *e.g.*, judges and public prosecutors and other government agencies, academia, civil societies and consumers, and instill in the mind of the public a better understanding of the competition policy and contribute to the promotion of a culture of competition in the ASEAN region.
- 9.1.4. AMSs may entrust the competition regulatory body with the role of advising the Government or other public authorities on national needs and policies related to competition matters. In particular, regulatory barriers to competition resulting from economic and administrative regulation should be subjected to a transparent review process prior to its adoption, and assessed by the competition regulatory body from a competition perspective.

### 9.2 Resources required for Advocacy and Outreach

- 9.2.1 The AMSs could require the competition regulatory body to have communications and outreach capacity combining the talents of specialist legal and economic staff with communications, marketing and media relations specialists to assist in the writing of guidelines, media releases and decisions. Such documents should be made publicly available, *e.g.*, in pamphlets, websites, in order to garner maximum publicity and outreach.



### 9.3 Compliance Programmes

- 9.3.1 AMSs may consider encouraging businesses to establish competition compliance programmes, in order to promote a culture of compliance and to reduce the risk of engaging in anti-competitive conduct by preventing businesses (*i.e.*, management, officials and individual employees) from unintentionally violating competition law.
- 9.3.2 The compliance programme could be an integral part of the businesses' training programme and it may consist of a broad range of measures, including for example:
  - 9.3.2.1 Information to employees on competition law requirements in relation to the business' behaviour.
  - 9.3.2.2 Practical training of employees in complying with competition law.
  - 9.3.2.3 Measures ensuring that the business's management does not favour behaviour which amount to violations or anything that could be misconstrued as violations of competition law.
- 9.3.3 Compliance programmes may vary according to the structure of the companies concerned and the relevant markets where these operate. Common aspects which may be dealt with by compliance programmes include: relations with competitors (*e.g.*, prices and market sharing agreements, joint agreements, participation in trade associations, etc.), relations with customers and suppliers (*e.g.*, resale prices, distribution and purchasing agreements etc.), individual conduct on the market (*e.g.*, prices, pricing practices, rebates, tying practices, etc.).
- 9.3.4 A correctly implemented compliance programme may also be taken into account by competition regulatory bodies as a mitigating factor when determining the appropriate level of sanctions in non-cartel cases, *e.g.*, allowing for a reduction of fines.

## **Chapter 10: International Cooperation / Common Competition Related Provisions in Free Trade Agreements**

### **10.1 Cooperation Objectives**

10.1.1 The overarching or long term objectives of a cooperative competition policy arrangement for the AMSs are the promotion of market integration in the lead up to the establishment of a common market in 2015, and the promotion of economic efficiency and growth at a regional level.

### **10.2 Benefits of Cooperation**

10.2.1 The benefits of cooperation include:

- 10.2.1.1 Promoting a culture of competition in the ASEAN region;
- 10.2.1.2 Facilitating co-operation or at least a high degree of consistency in the implementation of competition policy in the ASEAN region, by allowing AMSs to share information on the benefits of introducing national competition policy and establishing a competition regulatory body and to promote best practices. This will assist those AMSs which are yet to introduce or implement competition policy, in making informed choices on how to establish an effective national competition policy regime;
- 10.2.1.3 Providing AMSs' competition regulatory bodies with an avenue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the ASEAN region;
- 10.2.1.4 Building an effective legal framework to enforce competition policy against businesses that engage in cross-border business practices which restrict competition;
- 10.2.1.5 Improving the efficiency and effectiveness of national competition regulatory bodies through the sharing and exchange of non-confidential information, knowledge and resources; and

- 10.2.1.6 Developing agreements on the basic elements of a common framework for national competition policy within the ASEAN region.

### **10.3 Cooperation between Competition Regulatory Bodies**

- 10.3.1 The AMSs will endeavour to develop a regional platform or understanding or arrangement or build on the AEGC to facilitate co-operation between competition regulatory bodies.
- 10.3.2 As more AMSs establish national competition policy and competition regulatory body, they could be invited to participate in this cooperative arrangement. AMSs may consider developing protocols for the exchange of information between competition regulatory bodies.
- 10.3.3 Within this regional platform, competition regulatory bodies will be able to discuss competition issues and promote a common approach. The regional platform will allow competition regulatory bodies to exchange their experiences, identify best practices and endeavour to implement cooperative competition policy and competition regulatory body arrangements that provide for harmonisation.
- 10.3.4 The regional platform may facilitate working groups to discuss general issues or issues relating to certain sectors. In the framework of this platform, working groups may be created between AMSs and AMSs' competition regulatory bodies in order to discuss general or specific issues related to the establishment and enforcement of competition policy. The working groups may work together by any agreed mode of communications (*e.g.*, meetings, Internet, and video conference). Annual conferences and workshops may also provide opportunities to discuss projects and their implications for competition policy enforcement.
- 10.3.5 The regional platform shall not exercise any rule-making function and no voting rules should be in place within the working groups, as the cooperation is based on consensus building. Where the platform reaches consensus on recommendations or "best practices", arising from the projects, each competition regulatory body may decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, where appropriate.

## **10.4 Common Competition Related Provisions in Free Trade Agreements**

10.4.1 AMSs will endeavour to take into consideration some common competition related provisions in a competition chapter of Free Trade Agreements (FTA) such as provisions that effectively address anti-competitive behaviours, based on principles of transparency, due process and non-discrimination on the basis of nationality and provisions on cooperation (*e.g.*, technical assistance and capacity building).

10.4.2 AMSs should have the flexibility to make proper judgement on the best approach for developing provisions in a competition chapter of FTA that is in line with the developmental goals of their economy and which is not in contradiction to any provisions/approaches already agreed for within the regional level. This is to ensure for a strong support towards the achievement of the ASEAN Economic Community 2015.

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