Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN

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The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The Member States of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. The ASEAN Secretariat is based in Jakarta, Indonesia.

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Catalogue-in-Publication Data

Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN
Jakarta: ASEAN Secretariat, December 2012

338. 6048059
Competition Law – Antitrust
Economics – Trade – ASEAN

ISBN 978-602-7643-34-5

With the Support of:

Federal Foreign Office

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN have been produced with the support of the project "Capacity Building for the ASEAN Secretariat", jointly agreed and implemented by the ASEAN Secretariat and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Germany, and funded by the Foreign Office of the Federal Republic of Germany.

More information on the project: www.giz.de/asec-project

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Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN

The ASEAN Secretariat
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List of Abbreviations

ACCC	Australian Competition & Consumer Commission
AEC	ASEAN Economic Community
AEC Blueprint	ASEAN Economic Community Blueprint
AEGC	ASEAN Experts Group on Competition
AMS(s)	ASEAN Member State(s)
ASEAN	Association of Southeast Asian Nations
ASEC	ASEAN Secretariat
CA(s)	Competition Authority(-ies)
CCS	Competition Commission of Singapore
CPL	Competition Policy and Law
DG COMP	European Commission's Directorate General for Competition
DoJ	US Federal Government's Department of Justice
EU	European Union
FTC	US Federal Government's Federal Trade Commission
Handbook	Handbook on Competition Policy and Law in ASEAN for Business
ICN	International Competition Network
JFTC	Japan Fair Trade Commission
KPPU	Komisi Pengawas Persaingan Usaha (Commission for the Supervision of Business Competition), Republic of Indonesia
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
RCC	Regional Core Competencies
RCC Guidelines	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN
Regional Guidelines	ASEAN Regional Guidelines on Competition Policy
SOE(s)	State-Owned Enterprise(s)
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WG-RCC	AEGC's Working Group on Developing Regional Core Competencies in Competition Policy and Law

Introduction

Preface: the ASEAN Regional Framework for CPL

The ASEAN Economic Community Blueprint

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

In their Declaration on the ASEAN Economic Community Blueprint (AEC Blueprint) in Singapore in November 2007, the ASEAN Leaders agreed that all AMSs will endeavour to introduce competition policy by 2015.

The ASEAN Experts Group on Competition (AEGC)

The AEGC was established in 2007 by the ASEAN Economic Ministers as a regional forum to discuss and cooperate in CPL. It is an official body composed of representatives from the CAs and agencies responsible for competition policy in AMSs. It oversees the implementation of the competition policy-related tasks and activities, as specified in the AEC Blueprint.

The Regional Guidelines and the Handbook on CPL

In 2010 the AEGC completed the *ASEAN Regional Guidelines on Competition Policy*. It serves as a non-binding 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. The Regional Guidelines are available on the ASEC website (*www.aseansec.org*) at the following link: *http://www.aseansec.org/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf*.

At the same time, the AEGC completed the *Handbook on Competition Policy and Law in ASEAN for Business*. The Handbook provides basic notions of substantive and procedural competition law applicable in AMSs for the benefit of regional and transnational businesses engaged in the ASEAN region. The Handbook is also available on the ASEC website at the following link: *http://www.aseansec.org/publications/HandbookonCompetition.zip*.

Competition law in the AMSs

During the last decade most AMSs have adopted or are in the process of enacting competition laws.

At the time of writing there are comprehensive competition laws and CAs in place in Indonesia, Singapore, Thailand and Vietnam. Malaysia's competition law and CA have started operating in 2012. Brunei Darussalam, Cambodia, Lao PDR and Myanmar are currently drafting a competition law. The Philippines established a CA to begin implementing competition-related laws using a sectoral approach. A draft competition law establishing an Office for Competition is for legislation.

Objectives of the RCC Guidelines

The RCC Guidelines aim to provide guidance to AMSs on their required core competencies in CPL, to define recommended practices and to advice on the options to develop these competencies. While the Regional Guidelines constitute an outline of what CPL is and should be, the RCC Guidelines describe the process of how to develop a competition enforcement system. The RCC Guidelines are structured in three main Parts. Each Part outlines the CA's attributes (i.e. powers and features) and competencies (i.e. know-how) required to establish a workable competition enforcement system.

The RCC Guidelines take into account the varying stages of CPL development in the AMSs and, where appropriate, distinguish between a range of competencies and tools which are relevant at subsequent stages of development of a competition enforcement system.

The RCC Guidelines are based on AMSs' experience and internationally-recommended practices. They provide advice and benchmarks that serve as a reference for AMSs in their efforts to increase their core competencies in CPL. The RCC Guidelines do not constitute legal advice nor they are intended to provide a full or binding statement on what CPL core competencies are and how these should be developed. It is generally understood that there are no "one-size-fits-all" solutions and AMSs should consider and choose what best suits their particular characteristics and needs.

The RCC Guidelines were one of the initiatives in support of AEC building under the AEGC medium-term work plan 2011-2012. The development of the RCC Guidelines is led by the AEGC's Working Group on Developing RCC (WG-RCC) with the support of the ASEAN Secretariat and the law firm FratiniVergano – European Lawyers. This initiative is supported by the German Federal Foreign Office implemented through Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

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Part I: Institutional Building

Overview

Creating a competition enforcement system requires a competition law establishing substantive rules and procedures and setting up a CA in charge of applying those rules.

Part I of the RCC Guidelines (Institutional Building) sets out how to introduce competition law and establish a CA. They explain what a competition law enforcement system is and how it can be established and improved.

Before introducing a competition enforcement system, an AMS should understand what is competition law, i.e. its objectives and principles. Also, an AMS should assess the implications of introducing competition law in its own particular national context. This assessment requires understanding the economic implications of such a process, its political and practical implications, as well as its legal and institutional implications. In this exercise, the AMS should appreciate the benefits of introducing competition law and be aware of all relevant sources of recommendations and best practice.

Drafting competition law requires customising the general features of competition law to the national context. During this process, an AMS should make appropriate use of national and international experts and consider engaging in public consultations. In practice, drafting competition law requires: selecting and formulating the appropriate substantive provisions; setting up enforcement procedures; and selecting and formulating adequate sanctions and remedies for violations.

A competition law principally establishes a system of public enforcement (i.e. enforcement by way of a public authority). Yet an AMS should consider introducing and facilitating a parallel system of private enforcement (i.e. enforcement by way of private actions in courts). Additionally, an AMS should consider whether some specific national situations (e.g. State-owned enterprises or specific features linked to small economies) need to be addressed through customised solutions.

It is generally assumed that competition law must be enforced by a specialised institution or agency (a CA). An AMS, when establishing a CA, should first decide the CA's institutional and organisational structure, in light of what best fits into the AMS's own constitutional and legal framework.

Regardless of the chosen structure, the CA should have certain attributes and competencies (i.e. legal powers) which make it a workable and fair institution. These attributes and competencies include: independence and accountability; fairness (in particular, respect of due process), transparency and confidentiality; effective powers and influence; adequate financial and human resources. The CA should consider implementing a system of regular training and be empowered to and competent in cooperating with other relevant national and international institutions (in particular, sector-specific regulators and foreign CAs).

A competition enforcement system must enable all affected parties to appeal the CA's decisions. An AMS should establish a workable system of judicial review. This system could include: the establishment of a specialised competition appeal tribunal; limiting the grounds for review; and guaranteeing a certain amount of deference to the CA's decisions, i.e. preventing a case from being entirely re-discussed in court and thus depriving the CA's decision of any practical significance.

Competition enforcement is an ongoing exercise and competition law should evolve with the evolution of market behaviour and society in general. After a few years of practice, each AMS should consider whether the legislative framework needs to be completed (e.g. by adopting additional implementing measures and guidance) or improved (e.g. by adding additional features which have not been introduced from the beginning). After a number of years after its introduction, the competition law should be reviewed and possibly amended. In the same way, an AMS should consider developing the institutional framework and in particular improving the CA's management and organisational structure and strengthening its human resources.

* * * * * * *

Each AMS should consider developing the following **core competencies**:

- Understanding what is competition law and what are its goals, with reference to foreign experience, international benchmarks and best practice;
- Assessing the implications of competition law in the national context, with reference to the country's economic and industrial structure and its political, legal and institutional framework;
- Making appropriate use of experts and public consultations;
- Selecting and formulating the appropriate substantive provisions, based on international best practice and the AMSs' specific needs;
- Establishing workable and fair procedures and remedies, which best fit in the national legal and institutional framework;
- Assessing and introducing a system of private enforcement and/or facilitating the functioning of this system;
- Analysing and deciding upon the CA's institutional and organisational structure, which best fits the national legal and institutional context;
- Implementing a workable system of judicial review, which does not jeopardise the CA's functions (e.g. by establishing a specialised competition appeal tribunal system; limiting the grounds for review and introducing a margin of deference upon the CA's decisions).

In turn, the CA should be equipped with the following **attributes**:

- Independence and accountability;
- Fairness (in particular, respect of due process), transparency and confidentiality;
- Effective powers and influence;
- Investigation, prosecution and adjudication skills (discussed in Part II of the RCC Guidelines);
- Power and competence to cooperate with other relevant national and international institutions (e.g. sector-specific regulators and foreign CAs).

- Adequate financial and human resources. The CA should also acquire, maintain and improve the above-noted skills by engaging in regular training.

The AMSs and their respective CAs, within the limit of the respective competencies, should consider **strengthening** and **consolidating** the CPL framework by:

- Completing and improving the legislative framework;
- Reviewing and amending the competition law;
- Developing the institutional framework by improving the CA's management and organisational structure and strengthening the CA's human resources.

1.1 Understanding and drafting competition law

1.1.1 Understanding the objectives and principles of competition law

With the goal of establishing the ASEAN Economic Community, all AMSs have committed to create a region which is highly competitive, equitable in economic development, and fully integrated into the global economy. It is thus a challenge for the AMSs to develop policies and institutions to enhance economic growth, strengthen competitiveness, increase domestic and foreign direct investments, expand the private sector and improve consumer interest and welfare while minimising substantial competitive risks from domestic and/or external business strategies and practices which, by design or in effect, prevent, restrict or distort competition on the merits in the relevant and/or related markets.

In the context of this commitment, competition law plays a fundamental role in protecting fair and efficient competition, by allowing market-oriented reforms to produce their expected benefits. It is not recommended opening national markets without introducing, for all market players, a "level-playing field" ensuring effective competition contributes to economic efficiency, development, growth and increased consumer welfare.

To create an effective institutional and enforcement competition law system, AMSs need to think intensively about their objectives and consider the following principles of competition law:

- Competition law is an expression of competition policy. Competition policy refers to public policies introducing, increasing and/or maintaining competition in markets, and includes all governmental measures directly affecting enterprises' behaviour and industry market structure.
- Competition law includes all legal acts (in the form of laws, regulations and guidelines) aimed at preventing anti-competitive business practices and which seek to establish and manage a CA and a system of competition law enforcement.
- Competition law promotes and protects the competitive process: it contributes to improvements in economic efficiency (effective use and allocation of the economy's resources), economic growth and development and consumer welfare. Importantly competition law protects the competition process itself rather than competitors in the market. Protecting the competition process is to the ultimate benefit of consumers

and of the wider population as it results in better choice (new products), quality and prices for goods and services.

- Competition law may have (and in some legal systems has) other objectives. However, it is generally understood that adding additional objectives to competition law can cause inconsistencies in its application. In most cases, further legitimate objectives are better pursued through distinct legal and policy instruments.

Further explanations can be found in the Regional Guidelines, §§ 2.1 and 2.2.

Understanding the benefits of competition law

AMSs should understand that a properly implemented competition enforcement system favours economic efficiency, growth and development and increases consumer welfare. This assumption is confirmed by the experience of those AMSs which have implemented such system.

The following cases concerning the development of competition in the Vietnamese telecommunication industry, in the Indonesian telecommunications and airline industries and in the ticketing industry in Singapore provide useful examples.

Box 1 – Telecommunications market in Vietnam

In the Vietnam mobile telecommunications market, Viet Nam Posts and Telecommunications Corporation (VNPT) was the first mobile services provider, owning 2 network operators: Mobiphone and Vinaphone.

Competition in the Vietnamese mobile market was initially very weak. VNPT held a 97% market share and the consumers found it very difficult to subscribe to mobile services. They were required to transfer a significant monthly sum as a deposit and to submit their permanent resident card to the provider. The calling tariff was very expensive (i.e. 3,000 VND (about 0.15USD/minute).

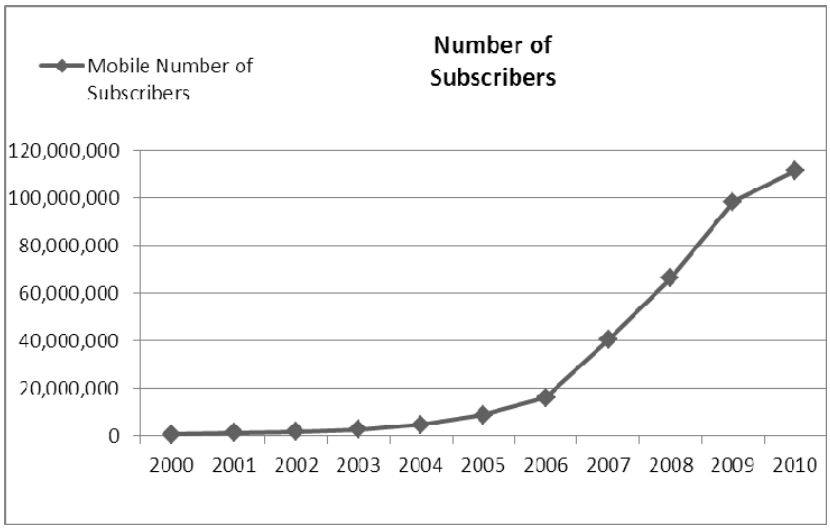
Effective competition was only introduced in 2003, when Viettel (a State-owned company owned by the Ministry of Defence) acquired a mobile license. Viettel's entry increased competition and produced immediate market growth to the benefit of consumers. In order to entry the mobile market, Viettel had to attract new customers by setting lower tariffs (2,600 VND (about 0.13 USD/minute) and offering more attractive services. The consumers appreciated and supported the increased competition.

Viettel mobile's success triggered other players' entry, intensifying competition in the mobile market. The market is currently composed of eight operators, including VNPT (with its 2 subsidiaries Mobiphone and Vinaphone), Viettel, EVN Telecom, SPT (S-phone), Vietnam Mobile (formerly HT Mobile), Beeline and Indochina Mobile (a newly licensed operator which is yet to launch its services).

Increased competition spurred new promotion strategies. Consumers could register to both post-paid and pre-paid services and deposits were not needed any more. The average revenue per user is constantly reducing, tariffs are decreasing (currently about 0,065 USD/minute) and tariffs' mechanisms are improving.

As a consequence, the number of subscribers is constantly increasing, as the following table shows:

Year	Subscribers
2000	788,500
2001	1,251,200
2002	1,902,200
2003	2,763,600
2004	4,774,130
2005	8,915,190
2006	16,047,342
2007	40,448,625
2008	66,300,000
2009	98,244,000
2010	111,570,000



Moreover, new value-added services are being introduced with the development of 3G infrastructures.

By fostering competition, the Vietnamese mobile market has quickly developed and it is driving developments in technology and additional services. As a result, Vietnamese consumers enjoy better choice of services, better quality and competitive prices.

Source: Vietnam contribution

Box 2 – Indonesian telecommunications market

The Indonesian telecommunications market initially included three major operators, Telkomsel, XL, and Indosat. Due to the robust sector's development, new enterprises started entering the market.

The market for short message services (SMS) raised competition concerns. During the period 1999-2004, SMS could only be sent to the same operator (no interconnection with other operators' networks was available) at a standard fixed rate of IDR 350 per message.

In 2004-2007, new competing operators entered the market and introduced different rates for SMS within the same network (on-net) and SMS to other networks (off-net), as well as lower promotional rates. In 2007 three new entrants (Three, Smart, and Axis) introduced free on-net SMS and very low promotional rates (IDR 100) for off-net SMS.

However, following a complaint, the KPPU found that, in their interconnection agreements, some operators had agreed upon retail off-net SMS tariffs, so entering in a price fixing agreement (price cartel) for the period 2004-2008. According to the agreement, the tariffs for off-net SMS shall not be lower than IDR 250 per message and of sales value set by the network provider. The KPPU condemned six operators for entering into a cartel and estimated that the cartel had caused damaged to consumer amounting to IDR 2.8 trillion.

As a result of the KPPU intervention, off-net SMS rates decreased significantly, up to IDR

100 – 150 per message.

A study conducted by the KPPU in 2010 through a questionnaire (with 300 respondents) and compensating variable methodology based on econometrics demonstrated that the decision had increased consumer welfare for the period 2007-2009 for an estimate of IDR 1.96 trillion (0.0009% of Indonesian Real Gross Domestic Product in 2009).

Source: Indonesian contribution

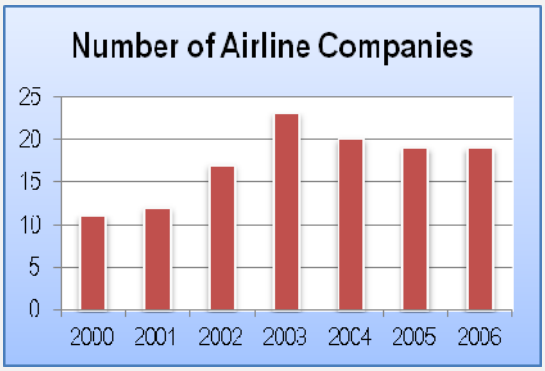
Box 3 – Indonesian airline sector

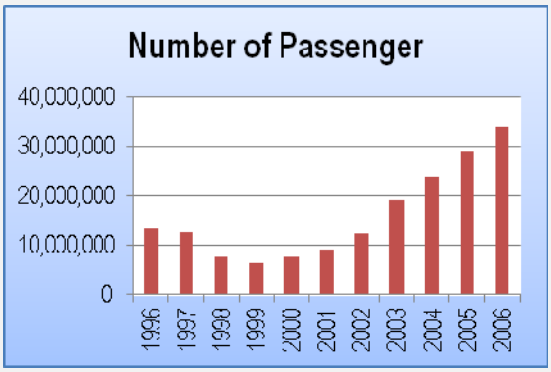
The Indonesian airline sector provides an example of successful industrial reform from a regulated oligopoly to competition.

Initially, market entry was restricted and the market was highly regulated. Only six airline companies were operating from the early 1990s to 1999, with relatively constant market share. Tariff setting (previously entrusted to the Government) was entrusted to a business association, the Indonesian National Air Carrier Association (INACA), which set maximum and minimum prices.

With the entry into force of competition law (Law No. 5/1999), the KPPU persuaded the Government, through effective advocacy action, to withdraw INACA's authority to set the tariffs and modify the price cap regulation, triggering a major regulatory reform in the Indonesian airline sector.

The sector became more open to new entry, which 19 airline companies currently operating in the market. Flight tariffs decreased up to 50% in all flight routes and flight routes continue to increase, including those routes previously subsidised by the Government. The number of passengers has increased up to 300%. Reverting the negative industry's average growth of the period 1997-2001 (-4%), the reform produced a significant average growth in the period 2002-2006 (34%). The passengers' load factor increased from 63% to 77% and the airplane, from an elite means of transportation, became a much more popular means. Increased competition in passenger's air transport also produced indirect positive effects on cargo transport, which increased from a 10% growth rate to 13%.





Source: Indonesian contribution

Box 4– Ticketing industry in Singapore

Overview

SISTIC.com Pte Ltd is a ticketing service provider based in Singapore. It acts as a middleman between two groups of customers – event promoters and ticket buyers – by providing a platform to buy and sell tickets. In June 2010, the Competition Commission of

Singapore ("CCS") issued an Infringement Decision against SISTIC for abusing its dominant position.

Background

SISTIC is the dominant ticketing service provider in Singapore with a persistent market share of 85-95%. There are a limited number of venues in Singapore which are able to host large scale events and performances. CCS found that SISTIC had abused its dominant position in requiring these key venues (such as the Esplanade and Singapore Indoor Stadium) to exclusively use its services. SISTIC also required a number of event promoters to engage it as the sole ticketing service provider for all their events. These exclusive agreements were harmful to competition in that they restrict the choices of venue operators, event promoters and ticket buyers. In fact, symptoms of harmful effects were observed in the market – for example, an increase in SISTIC's booking fee for ticket buyers in 2008.

In its infringement decision, CCS imposed financial penalties on SISTIC and directed that SISTIC modify the exclusive agreements to remove clauses requiring its partners to exclusively use its services.

Improvements to Competitive Landscape Arising from CCS' Intervention

As a result of CCS' infringement decision, increased competition in the ticketing industry was observed. In addition, the industry has seen a new entrant. Existing ticketing service providers are now able to ticket for events held at key venues such as The Esplanade. This was previously not possible as The Esplanade was previously locked in to using SISTIC for all events held there.

With the opening up of the ticketing services market, other ticketing service providers also introduced new and innovative services, including leveraging on new distribution channels, thereby differentiating themselves from SISTIC.

CCS' intervention in the market is an important first step towards restoring and allowing for greater competition to thrive in this market.

1.1.2 Engaging in the pre-drafting stage

The pre-drafting stage includes the period when an AMS consider the adoption of competition law and, upon deciding to do so, determine how to fit competition law into the AMS's legal system.

During the pre-drafting stage AMSs must understand: what competition law is; why it should be introduced; why and how competition law is different from other laws; and why that requires the law should be implemented by a peculiar type of institution. In turn, the need for a peculiar type of institution raises the issue of whether the AMS's constitutional and legal structure will allow for the creation of such a CA institution (discussed further). During the pre-drafting stage, each AMS's decision-makers must take the competition law objectives into account.

It is important that AMSs understand the basic nature of competition law and decide to accept all the implications of its adoption. In particular, these implications include:

- The *economic implications*: how will competition law work within the AMS's industrial/economic structure?

- The *political and practical implications*: are the country's constituencies ready to accept competition law? and

- The *legal implications*: how will the competition law and the CA fit in the AMS's constitutional/legal system?

Understanding the economic implications

It is advisable that each AMS acquires a clear understanding of how competition law fits within its own economic and industrial structure.

This aspect may be unintentionally overlooked in transitional economies, as such countries often adopt competition law following international commitments. It is desirable to conduct a proper analysis of the impact of a country's intended competition law to customise the law to that country's specific features.

Typically, basic competition law provisions are common to most jurisdictions. However competition laws are often integrated and supplemented by a multitude of accessory provisions (in particular, exemptions/exceptions), which take into account some (apparent or alleged) country-specific needs or characteristics. These provisions are sometimes justified by industrial policy objectives which conflict or may conflict with competition law objectives.

In principle, industrial policy does not necessarily conflict with competition policy: a sound industrial policy should include the promotion of competition. On the other hand, industrial policy considerations may also justify provisions which severely limit the application of competition law, e.g. by developing "national champions" or providing protection to the domestic sector ("infant industry" protection).

Each AMS should pursue its own industrial policy through striking the correct balance between its industrial and competition policies. So when assessing the likely impact of new competition law on the industrial structure of a country, each AMS should consider the impact of conflicting policies which may jeopardise the effectiveness of competition law. In particular the possible use of exemptions and exclusions and their effects should be carefully weighed against the objectives pursued and the likely effects of these restrictions on the overall effectiveness of the new competition law framework.

When introducing or reviewing competition law, AMSs could consider performing **market analysis and studies**, to have a better understanding of the economic implications of the new or modified competition law. Such activities should be aimed at:

- Assessing the competitiveness of the country's industry, both overall and in relation to key markets;

- Defining the scope of the competition law and introducing or withdrawing specific exceptions;

- Defining the boundaries between competition law and existing sector-specific market regulation (see below).

A specific topic of analysis should be the existence of **informal economy**, i.e. the part of the economy which is not officially recognised and visible to the public authorities, and its influence on the application of competition law.

In principle, competition law applies to nearly all economic activities, regardless of their status under administrative law (e.g. including those activities which escape licensing, fiscal or other administrative obligations). In practice, however, the existence of an informal economy may pose specific problems when applying competition law. In cases where part of a market is not visible to the public authorities, the CA's assessment is likely to be biased or distorted. This situation is particularly evident when defining the relevant market and the computation of market shares (e.g. a CA can assess a dominant position where the relevant company would not have any such market position taking into the account the informal segment of the market).

While there are no specific recommendations on this topic, it is recommended that AMSs and their CAs acquire knowledge of those markets where the informal sector is relevant (e.g. through the analysis and studies mentioned above) and take special care when applying competition law in those sectors.

Understanding the political and practical implications

Adopting an effective competition law has significant political and practical implications which may create difficulties in transitional economies.

Transitional economies are typically dominated by small, powerful, wealthy business constituencies or elites that are often closely connected to the government and/or the military. Is it realistic to assume that these groups would accept an effective competition law, which would almost inevitably disrupt the power of dominant firms and cartels controlling most of the economy? Unsettling the existing arrangements should result in a win-win outcome in a competitive economy; yet, in practice this outcome is far from self-evident as most people are by nature conservative and fear change. It is a challenge to initiate or raise support for the opportunity that arises from significant change.

Therefore it is important to establish a consensus amongst all the relevant stakeholders on the beneficial effects of introducing a competition law, illustrating that there are win-win outcomes that provide real benefits for consumers and society as a whole. Powerful interests groups should be reassured that change will be slow and ultimately beneficial to the unravelling cartels and declining monopolies, as old domestic economic structures and monopolies will be finally forced out of the market in a globalised market.

Such preparatory activity helps prevent decision makers avoiding or deciding against an effective competition law.

Understanding the legal and institutional implications

Introducing competition law evidently has legal implications, relating in particular to the impact of competition law on the AMS's legal and constitutional structure. Setting up a system of competition law enforcement requires particular structures and mechanisms which may not correspond to the AMS's existing legal structures.

Against this background, a careful review of the national and constitutional system of the country helps understand how competition law should be drafted, who should enforce it and what procedures should be established.

In particular a key decision concerns the establishment of a competent and effective CA under the AMS's constitution and laws. In principle, it is possible to pass competition laws

which are enforced by prosecutors in existing primary courts of general authority. That is how competition law started in the US. However, it took a long time for this competition law system to become effective. The DoJ now has a division with hundreds of lawyers and economists and brings cases before Federal District Courts that have decided a huge number of antitrust cases over the past 100 years. This structure may not be a feasible system for transitional economies. For competition laws to be effective within a reasonable time, transitional economies need to concentrate their competition law learning and institutional development in a single integrated enforcement programme. An administrative system in which a specialised CA enforces competition law appears to be more suitable (see Chapter 1.2 below).

A characteristic of competition law is that it is impossible to set up a comprehensive list of lawful and unlawful business actions. While the general concepts can be outlined and examples can be included in the law, business will always develop, due to innovation, the advance of new technologies, new products and new organisational frameworks. As a result, the conclusion as to whether specific business practices are prohibited will require a reasoned decision explaining why they are more like lawful business activities or more like unlawful business activities. The case law declaring which activities are lawful and which are unlawful ("jurisprudence" under the Civil Law system or "precedent" under the Common Law system) needs to be the product of a fairly large number of cases, decided by an organisation that is familiar with the prior decisions. The decisions must be public and persuasively reasoned, otherwise neither the business community, enforcers, consumers, academics nor the judges will know what the law is and how it is likely to be applied in the future.

In most countries, the need for a particular enforcement system raises the issue of the separation of powers, namely finding the right structure for a CA in the traditional partition between the legislative, administrative and judicial powers. In this context, two aspects are of particular relevance:

(i) Relation with the judiciary: As a CA performs quasi-judicial functions (investigation-prosecution-adjudication-sanction), the legitimacy of a governmental/independent agency to carry out those quasi-judicial functions may be contested; moreover, the possibility emerges that courts will re-litigate competition cases, and so remove the effect of the CA's decisions.

(ii) Existence of market regulation: To the extent that some sectors (such as for example telecommunications, transport, energy) are subject to specific market regulation, the relation between the CA and existing sector-specific regulators may raise concern.

As to the **relation with the judiciary**, in a number of countries, the courts have challenged the legitimacy of their respective CA on the grounds that it performs judicial functions but is not part of the judicial system. In India and Jamaica, for example, the respective national courts each once declared the legislative attempt to create a non-judicial, administrative authority with the right to decide whether businesses had violated competition law was unconstitutional on the ground that it violated the separation of powers established by each country's respective constitution. This issue has serious implications for the kind of powers a CA can have.

In other countries, such as Indonesia and Armenia, the judiciary took a less confrontational stance. Those respective judicial institutions once declared that the respective CAs could investigate, adjudicate and order remedies for violations of competition law. But those CA's orders were unenforceable until a court re-litigated the entire case and confirmed that the law had been infringed and that the remedy ordered by the CA was the appropriate remedy for

the infringement. Although this re-litigation approach allows the CA to continue to exist, it is clear that it makes its proceedings pointless, if the same issues are to be decided again by a court for the CA decision to be enforceable (see § 1.2.3 on judicial review systems).

As to the **existence of market regulation**, in many countries sector-specific regulators are mandated to promote competition and sometimes to formulate or apply competition laws or similar provisions. In this context, cooperation and coordination are needed to avoid the inconsistent enforcement of the two sets of policies and resource duplication. Different countries have adopted a large variety of solutions, ranging from informal cooperation, to the right to make submissions, to legally required consultation.

In principle, it is important that AMSs establish clear boundaries between competition law enforcement and regulatory functions, as discussed in § 1.2.1 below.

Nevertheless, a degree of interaction between CAs and national regulators is needed where there are overlaps between competition law enforcement and regulatory functions. In these cases, the following approaches to increase cooperation and coordination have been adopted:

- Consolidation of regulatory functions under the CA;
- Veto rights granted to the CA to veto the sector-specific regulator's actions;
- Interlocking or joint decision-making bodies;
- A mandatory competition impact statement, i.e. the analysis of the effects of regulation on competition prepared by the sector-specific regulator;
- Consultation mechanisms, i.e. requiring the sector-specific regulator to consult with the CA;
- Formal and informal coordination agreements, e.g. by way of memoranda of understanding aimed at deciding the order in which the different agencies decide matters in which they have overlapping jurisdiction or the conditions under which the agencies agree to share information in matters where both are involved;
- Formal or informal channels for consultation, advocacy and technical communications (often entered into spontaneously and with little formal notice);
- Information sharing, within the limits of the existing legal restrictions, or less formal communication directed at coordination;
- A consumer advocate inside the sector-specific regulator, creating an advocacy unit within the regulator that has the independent ability to bring issues to the attention of the regulator's decision-makers;
- Coordination through external intervention, e.g. through the review of agency decisions by the judiciary system;
- Purposeful overlapping jurisdictions, to increase the need for coordination.

Sources of recommendations and best practice

The ASEAN principles on CPL are enshrined in the Regional Guidelines.

Additionally, there are various international, recommended sources concerning competition law's basic principles and objectives. The most relevant are the various model laws on competition which have been developed by international institutions, in particular:

- UNCTAD (2007) Model Law on Competition;
- Commonwealth Secretariat (2002) Model Law on Competition;
- World Bank and OECD (1999) A Framework for the Design and Implementation of Competition Law and Policy.

1.1.3 Drafting competition law

Making appropriate use of experts and public consultation

Foreign experts have an important role in introducing competition law in transitional economies, and in particular in advising decision makers about the issues to be addressed, both in the pre-drafting and drafting phases.

It is crucial that such foreign experts work closely with national legal experts who can together counsel decision-makers on what competition institutions and procedures are most appropriate for their national legal system and can advise on the meaning of competition law concepts in the context of existing national law.

To have a broader view of all the issues raised, it is advisable to have a team of experts responsible for drafting the competition law. This practice is preferred to a process with one drafter and a panel of reviewers, as often there is more difficulty in obtaining a consensus and determining accountability.

Once a draft law is proposed, it is recommended that it undergoes public consultation. This step improves regulatory quality by increasing the information available to the legislator on which policy decisions can be based. It enables obtaining useful comments and suggestions from other expert stakeholders, benefiting from different expertise, perspectives, and ideas, in particular from those parties who are directly affected. It helps the legislator balance opposing interests and identify unintended effects and practical problems.

Public consultation also increases the level of transparency, contributing to awareness and consensus building amongst the relevant constituencies about the forthcoming competition law. In this respect, public consultation is an instrument of advocacy as it enhances voluntary compliance. Public consultation allows announcing changes in a timely manner and provides time for affected parties to adjust to the changes, and gives a sense of legitimacy and shared ownership that motivates affected parties to comply.

In general terms, the OECD has identified the following instruments for public consultation, depending on who is to be consulted, how formal the process is, and the communication means used:

- *Informal consultation*: It includes all forms of discretionary contacts between regulators and interest groups and takes many forms, from phone-calls to letters to informal meetings, and occurs at all stages of the regulatory process. This approach can be less cumbersome and more flexible than more standardised forms of consultation; although it offers limited transparency and accountability;

- *Circulation of regulatory proposals for public comment*: It is among the most widely used form of consultation, as it is relatively inexpensive and fairly flexible in terms of the timing, scope and form of responses. It differs from informal consultation as it is generally more systematic and structured and may have an appropriate legal basis. Responses are usually in written form but regulators may also accept oral statements and may supplement those by inviting interested groups to hearings;

- *Public notice-and-comment*: It is more open and inclusive than the circulation-for-comment process, and it is usually more structured and formal. It allows all interested parties to have the opportunity to become aware of the regulatory proposal and to comment. It is usually based on a standard set of background information (e.g. a draft of the law discussion of the policy objectives and the problem being addressed and often an impact assessment of the proposal);

- *Public hearings*: This form of consultation allows interested parties and groups to comment in person or submit written information and data at the meeting. A hearing often supplements other consultation procedures. Hearings are, in principle, open to the general public, although accessibility is often a critical issue (in view of the circulation of invitations, logistics and timing of the hearing).

- *Advisory bodies*: Besides informal consultation and circulation-for-comment, the use of advisory bodies is the most widespread approach to public consultation among the OECD countries. Some 21 countries use advisory bodies in some form during the regulatory process. Advisory bodies are involved at all stages of the regulatory process, but are most commonly used quite early in the process to assist in defining positions and options.

Depending on their status, authority, and position in the decision process, advisory bodies can give participating parties great influence on final decisions, or they can be one of many information sources. Regulatory development – drafting and reviewing proposals, or evaluating existing regulations – is rarely the only, or even the primary, task of advisory bodies. Some permanent bodies, for instance, may have broad mandates related to policy planning in areas such as social welfare or health care. There are many different types of advisory bodies under many titles – councils, committees, commissions, and working parties. Their common features are that they have a defined mandate or task within the regulatory process (either providing expertise or seeking consensus) and that they include members from outside the government administration.

Often when introducing competition law, the formal public “notice-and-comment” is the most common form of consultation. Consultation of key stakeholders by way of circulating the proposal to a selected group of experts and public hearing to gather specialised expertise and attract the interest of the media and the public are additional consultation forms used.

Selecting the appropriate substantive provisions

When selecting the most appropriate competition law provisions, an AMS must address the question: what is in the competition law? Or, in more practical terms, what action should be prohibited under competition law?

Essentially, competition law has two primary objectives, to ensure that businesses: 1) compete for customers based on price, quality, service, convenience and other desirable qualities; and 2) do not take actions – other than producing cheaper, better products and services – intended to eliminate competitors or prevent new businesses from becoming competitors.

These two objectives are the basis of competition law and constitute the aspects that decision makers must first take into account when introducing competition law for the first time.

Collusive practices: cartels

The first objective is met by laws that prohibit sellers from making agreements that allow them to raise prices to consumers above the level that would exist were sellers competing for customers. Price-fixing by competitors is the classic example of this kind of anticompetitive agreement; sellers of a product agree on the price they will charge for a product that they all sell. There are probably hundreds of other kinds of agreements that would make it possible for competitors to divide up markets or customers so they do not face competition from sellers who offer lower prices or more attractive products. These kinds of prohibited agreements are generally referred to as cartels.

As anti-competitive business practices can take many forms, it may be useful to clarify the scope of such basic provisions with reference to specific practices. For instance, in connection with collusive practices it may be useful to distinguish between horizontal agreements (i.e. agreements between competitors, such as cartels) and vertical agreements (i.e. agreements between producers and distributors).

See Regional Guidelines, § 3.2.

Unilateral practices: abuse of a dominant position, monopolisation

The second objective is met by implementing laws that forbid firms with market power (i.e. “dominant operators”) from making it impossible for other businesses to compete with them. One classic example is for a business to get exclusive contracts with all suppliers of a key material or component necessary to make the product that the business makes. Another classic example is for a business to acquire all of its competitors. These kinds of prohibited activities are generally referred to as unlawful monopolization activities or abuses of dominant position.

Unilateral anticompetitive practices by dominant operators can take many forms. It may be useful to further distinguish them into two general categories: exploitative practices and exclusionary practices.

See Regional Guidelines, § 3.3.

Merger control

As clarified in the Regional Guidelines, merger control (i.e. the preventive prohibition of anti-competitive mergers or acquisitions) is generally considered the "third pillar" of competition law.

Anti-competitive mergers are not a "third type" of anti-competitive business practice. Merger control deals with the structure of the market place (i.e. the number of competing sellers of a given product or service) rather than the behaviour of a seller or sellers in the market place at any particular time. Mergers are illegal if they harm competition either because they reinforce cartel agreements or because they contribute to the creation of a monopoly. In other words, it is probably illegal to make an anticompetitive merger under anti-cartel laws or anti-monopolisation laws. This fact is demonstrated by not all countries establishing a merger control system when introducing of competition law. The EU, for instance, did not have merger control for a long time and dealt with anti-competitive mergers under the two basic prohibitions of anti-competitive agreements and abuse of dominance. It later introduced merger control without a specific legal basis in the EU Treaties, with reference to its Treaty Articles on anti-competitive agreements and abuse of dominance.

Furthermore, a preliminary merger control system is very costly and labour intensive. It involves technical economic analysis of the likelihood of what will happen in the future market place. Therefore careful consideration should be given as to the appropriateness of introducing merger control together with the establishment of a competition law relating to collusive and unilateral practices.

Such an approach was adopted by the EU (as described above) and Indonesia, which established a merger review programme after over ten years from first introducing competition law.

Additional provisions on restrictive/unfair trade practices

Competition law may also define and prohibit restrictive/unfair practices which neither, strictly speaking, belong to the basic competition law provisions discussed above, nor are a specific application of the prohibitions described above.

The terms restrictive and unfair trade (or business) practices are defined in the Reference Document Annex to the Regional Guidelines (pages 25-27).

Typically unfair trade practices (i.e. business-to-consumer deceptive, fraudulent or otherwise injurious practices and business-to-business unfair practices) are subject to specific legislation (e.g. consumer protection law, trademark law, civil law unfair business practice provisions).

Restrictive trade practices include both anticompetitive practices, which fall under competition law and possible additional practices as specified by each AMS's legislation. Introducing, within competition law, provisions other than the basic prohibitions described above may create uncertainties and/or inconsistencies. For example, the same practices may be covered by both basic competition law provisions and other specific provisions on restrictive trade. In such a case, providing an explanatory list of practices which fall under the basic competition law prohibitions (as explained below) may be more appropriate than establishing a separate prohibition for a specific practice.

Further explanations can be found in the Regional Guidelines, Chapter 3.

Formulating substantive competition law provisions

A multitude of competition laws and competition law models exist worldwide. An ASEAN-specific reference is provided for in the Regional Guidelines, which constitute the primary reference for all AMSs.

In general, existing competition laws tend to be very complex. In the US, these include the Sherman Act of 1890, the Clayton Act and the FTC Act of 1914, the Robinson Patman Act of the 1930s, the Celler-Kefauver Act of 1950, the Hart Scott Rodino Act of 1976 and many other Acts that comprise US antitrust law. These laws use different words and there is little if any attempt to reconcile the differences in the language of the laws. The EU, in turn, bases its substantive competition law on a few basic provisions (now Articles 101 and 102 of the Treaty on the Functioning of the EU). However, the EU uses a language which is not immediately understandable to non-experts. For instance, the prohibition on collusive practices (e.g. cartels) applies if an agreement creates a "distortion of competition" – a technical concept not immediately comprehensible to a non-specialist. Confirmation of this complexity comes from the fact that the primary provisions have been subsequently implemented by a large number of provisions of secondary law or so-called "soft law".

Other legal systems, mostly in transitional economies, have taken a somewhat different approach, i.e. writing a single law in describing:

- What is unlawful;
- What agency decides the lawfulness of business practices; and
- What investigative and enforcement powers that agency has.

However, these laws, which are written by experts and for experts, are difficult to understand, especially in transitional economies that have no specific/long-established background in competition law or economics.

Often when introducing competition law in a transitional economy it is advisable to use a one-law model with simplified language, so that any literate person can understand the prohibitions introduced by the new law.

Box 5 – How to draft understandable competition law

The competition law could include the following aspects, with respect to both agreements and dominant firms or monopolies:

Competitive dynamic: a brief description of how the competitive dynamic normally works. For example, if a business in a competitive market place tries to unilaterally raise its prices, it is likely to fail because some other business will be selling the product or service at a lower price. This aspect should include a reference to problems created by a monopoly or a cartel that prevents other businesses from offering the product or service for less;

Normal rights of a business: this description includes the right to choose what a business will make, how much it will produce, what it will charge, as well as a brief summary of the normal rights of business in a market economy, such as the right to own and sell property, the right to enter into contracts and enforce them;

Unlawful practices: a list of the most common and obvious examples of unlawful practices, such as price fixing, bid rigging and customer allocations, including a general provision stating that other actions having the purpose or effect of a cartel or leading to monopoly power are also unlawful. The description of unlawful practices may include specific instances that are considered of particular relevance for the country. It could include, for example, a rule prohibiting manufacturers from setting the retail price, i.e. the price at which its customer, who is a retailer, may sell its product to final customers;

Lawful activities: a list of common and well-accepted instances of coordinated activities that are considered lawful, such as agreements entered into by industry groups that set-out voluntary standards, or non-compete agreements by which sellers are allowed to accept payment for not competing in the same business for a period of time. More complex and lengthy statements on lawful activities may be left to "soft law"; for example, along the lines of the EU Horizontal Guidelines. A listing of important and common lawful coordinated activities in the competition law itself will help businesses, enforcement agencies and competition decision makers to have an idea of the framework used to judge whether unlisted activities are likely to be lawful or not.

Source: elaboration from experts' presentations and discussions in the AEGC.

Typically, a competition law is of general application and applies equally across all markets and sectors (except for those sectors which are possibly excluded by law). It must also be sufficiently general so as to cover possible development in markets and business behaviour.

As a consequence, a CA has to interpret the generally applicable competition law provision to particular markets and behaviours. In this context, it is recommendable that a CA develops a set of interpretative measures or guidelines. These guidelines will clarify how the CA has applied and/or intends to apply the basic provisions of competition law to specific markets and situations. This will help:

- Binding the CA to respect enforcement criteria established in advance, guaranteeing consistent application of competition law;

- Providing businesses with a better understanding of how the law has been and will be applied in specific instances, thus facilitating self-compliance.

While there are no internationally-recognised recommendations as to what instances should be addressed by guidelines and how guidelines should be drafted, the experience of the more developed jurisdictions provide some useful indications.

Sectors which are generally made subject to specific guidelines include, for instance: agriculture; network industries (such as telecommunications, energy, transport); financial, banking and insurance services.

Typically, examples of instances covered by guidelines include:

- Procedural aspects, such as the notification of mergers or agreements; the handling of complaints; the conduct of proceedings; leniency programmes; application of fines and other remedies;

- Vertical restriction of competition (i.e. different type of distribution contracts and clauses);

- Specific forms of abuses of dominance / monopolisation (e.g. exclusionary practices, such as refusal to deal; predatory pricing; tying);

- Different aspects of merger control (such as jurisdiction and scope of application; application of remedies).

As to the structure, most competition law guidelines include the following substantive aspects:

- A general explanation of the object and scope of the main competition law provisions;

- A list of practices which are likely to fall within the scope of the application of the relevant provisions;

- A list of practices which are likely to fall outside the scope of the application of the relevant provisions;

- An explanation of how the CA has interpreted and/or will interpret the relevant provisions in specific cases. This part will generally refer to the competition concerns and the possible benefits deriving from the anti-competitive practices.

Setting up enforcement procedures

Competition law enforcement requires specific enforcement procedures. However, as explained above, the establishment of such procedures is set in the context of the specific national legal framework: competition enforcement works efficiently if it is tailored to the particular features of the national legal system. The structure of the enforcement procedure will necessarily depend on the kind of enforcement system which is selected, namely: civil, criminal or administrative.

Competition law enforcement can be based on one or a mixture of these enforcement systems.

Further explanations can be found in the Regional Guidelines, § 6.1.

Existing examples of enforcement systems are:

- **Criminal law system**: in the US, the Antitrust Division of the Department of Justice prosecutes the most serious antitrust violations (e.g. cartels) before the criminal courts.

- **Administrative law system**: in the EU, the European Commission prosecutes anticompetitive violations and imposes sanctions, based on its public powers. Similarly, in the US, the Federal Trade Commission prosecutes antitrust violations which fall under its competence.

- **Civil law system**: antitrust enforcement within the framework of civil law systems and procedures is referred to as “private enforcement” (see below). Private enforcement supplements and does not substitute public enforcement (in the form of criminal and/or administrative enforcement).

NB: The description above is based on an approximation and serves an illustrative purpose.

Competition law enforcement in ASEAN is mainly based on administrative systems (e.g., Indonesia, Malaysia, Singapore, Vietnam) or a mix of administrative and criminal systems (e.g., Thailand).

A general description of the AMSs' competition laws can be found in the Handbook.

Selecting and formulating sanctions and remedies

A CA's primary task, upon discovering anti-competitive practices is to restore or maintain competition by imposing an effective remedy. A competition law should include:

- Sanctions (punishment), i.e. penalising past anti-competitive behaviour (the punitive objective);
- Remedies, i.e. re-establishing competition, bringing the infringement to an end (the injunctive objective), and
- Compensation, i.e. the obligation to pay-back "profits" gained from the anti-competitive activity (the compensatory objective).

These aims are generally pursued by way of fines, (structural and behavioural) remedies and pay-back of unlawful gains (referred to as to "compensation" or "disgorgement"). It is crucial that, in applying the remedies, the CA pursues the right balance between punishing past anticompetitive conduct and deterring future violations.

Sanctions (punishment)

Fines are the most-used tool to punish anti-competitive behaviour, although they may not always be an effective remedy for re-establishing competition (*e.g.*, in a cartel, fines do not ensure that cartel members will lower their prices to the competitive level as a result of the decision, even if they no longer meet to set prices). In practice, fines can be based on a percentage of the annual turnover of the company concerned or be set by a maximum monetary amount. While fines should be significant for the firm in question, there is a danger that if the fines are too high, the consequence may be bankruptcy and, paradoxically, less competition in the market place.

Fines are paid to the CA and enter into the general budget of the institution (in the EU, fines paid to the Commission contribute to the EU general budget). In more limited cases, fines are used to contribute (in part) to the CA's budget.

Remedies

Two different forms of remedies are normally employed to re-establish competition on the market.

- *Structural remedies* (*i.e.* imposing a mandated change in the market structure, such as breaking up companies), when feasible, constitute a privileged form of remedy as they produce an immediate and durable change to the market structure. However, they have a cost for the company concerned which should be taken into account and,

in any case, it is essential to examine which factors facilitated the infringement and how a remedy order might make the re-establishment of competition more likely;

- *Behavioural remedies* (*i.e.* the imposition of affirmative or negative duties, such as "cease-and–desist" orders or obligations to provide access to a network) are also widely employed. In fact, cease-and-desist orders constitute the most widely employed means to stop an ongoing antitrust violation. Behavioural remedies have a cost for the CA, as they require monitoring the violating company's behaviour.

Compensation

In addition, the CA ought, at the very least, attempt to make the violators (e.g. the cartel members) return their unlawful anticompetitive profits by way of *disgorgement*. The amount of anticompetitive profits (i.e. the amount charged in excess of the amount that would have been charged in a competitive market) may be hard to calculate, due to the difficulty of determining what the competitive price would be. Yet it is still possible to make reasonable estimates of anticompetitive profits based on the costs and profits of the cartel members and comparisons with other companies in the same or another comparable country. While the process of setting appropriate or effective fines is very uncertain, greater efforts should be made to recover unlawful anti-competitive profits because they are more closely related to the harm caused by the infringement.

In many competition enforcement systems, compensation is sought and granted by way of private enforcement (see below).

Negotiated solutions

Furthermore, in formulating remedies and sanctions, AMSs should consider the use of negotiated solutions, i.e. settlements and commitments:

- *Settlements* enable the parties under investigation to reach an agreement with the CA which allows terminating their involvement in the investigation;

- *Commitments* allow the CA to reach an agreement with the violating company on how the latter should comply with the competition rules by way of *structural remedies* (e.g. divesting assets) or *behavioural remedies* or engagements (e.g. terminating exclusive agreements or committing to provide a specific input/service to third parties).

Leniency programmes

Finally, AMSs should also consider the introduction of *leniency programmes*. These programmes do not relate to punishment but rather to discounts on fines when the infringing company contributes to the discovery and proving of the infringement which provide a substantial help to the CA (see § 2.2.2 below).

Further explanations can be found in the Regional Guidelines, §§ 6.5 (commitments), 6.8 (calculation of fines), 6.9 (leniency) and 6.10 (settlements).

Considering introducing and strengthening private enforcement

The substantive and institutional framework discussed in the RCC Guidelines concerns "public enforcement" of competition law, i.e. competition law enforcement by a public authority making use of its public (administrative and/or criminal) powers.

In parallel to establishing a public enforcement system, AMSs may also consider "private enforcement". Private enforcement enables private applicants (i.e. non-public authorities, such as private individuals and organisations) who are aggrieved by anti-competitive conduct to seek compensation for the loss suffered through the appropriate (judicial or other) public authorities.

The right to bringing private actions makes competition law instantly more relevant for citizens, increasing both public awareness of competition law itself and the likelihood of discovery and punishment of competition law infringements. Furthermore, the liability for damages incentivises businesses to comply with competition law and creates a strong deterrent effect (in addition to the threat of punishment imposed by CAs).

In principle most legal systems allow private parties to bring actions for damages caused by the violation of a provision of law. Therefore private enforcement of competition law does not constitute an exception to the general rules on damages claims. It is based on private law and does not require the establishment of a specific enforcement framework.

However damages claims for competition law violations raise specific difficulties. In particular, experience shows that it is often very difficult to reach the level of evidence required for a damage order, as the assessment of competition law violations is based on complex economic evidence, which is most of the time unavailable to the claimant. Additionally, the small extent of the damage in most cases does not justify the costs involved in private litigation. For instance very serious cartels, which bring huge amounts of illegal profit to the cartel members, may produce a relatively small damage (e.g. a small increase in the final price of a product) to a multitude of consumers who will not have sufficient interest to act individually.

In guaranteeing the private enforcement of competition law, AMSs could consider the following options to make it easier for private applicants to bring an action:

- Reducing the evidence requirements, e.g. the amount of evidence needed to prove the damage;

- In case of follow-on actions (i.e. when the violation has already been established by a CA), relying on the CA's fact-finding or reversing the burden of proof by placing it upon the antitrust violator;

- Reducing fault requirements, e.g. presuming fault if an action is illegal under competition law, so releasing the plaintiff from the burden of proving that the behaviour, beyond being anticompetitive, is also characterised by fault;

- Establishing standard rules for calculating the damage arising, e.g. through clear and transparent use of presumptions indicating the likely damage which has occurred;

- Introducing an "evidential discovery" procedural step, i.e. an obligation for the defendant to produce the relevant documentation; such a step could only be used under certain conditions to prevent a "fishing expeditions";

- Introducing and facilitating so-called “class” or “group” actions, e.g. by a number of consumers or their representative associations.

Further explanations can be found in the Regional Guidelines, § 6.1.

Adding customised solutions for specific situations: State-owned enterprises and small economies

AMSs may currently consider there are peculiar situations in their own economy structure which justify specific customised modifications to generally applicable competition law.

One aspect relates to the application of competition law in relation to *State-Owned Enterprises* and a second concerns the effect of competition law in *small economies*.

State-Owned Enterprises (SOEs)

AMSs may question to what extent competition law should be applied not only to private but also to SOEs. In particular, they may consider whether certain aspects of SOEs business activities should be exempt from competition law or should SOEs, on the contrary, be scrutinised more carefully than private companies.

SOEs may have strong incentives not to behave according to market objectives (profit-maximising) or to engage in anticompetitive activities that serve to expand the scale and scope of their operations.

Ideally SOEs should be treated according to the principle of “competitive neutrality”. That means government-owned businesses and private businesses compete on an equal level. So any SOEs involved in commercial activities must have any unfair competitive advantages over privately-owned competitors removed. The resulting increase in competition should lead to an increase in consumer welfare by bringing about greater efficiencies and better quality products and services at lower prices. It should also result in greater efficiencies in the public sector and ultimately mean a more effective use of public resources.

This is the solution the EU has adopted: EU competition law applies just as well to State-owned companies as to private companies and also includes a special obligation on its Member States to refrain from adopting legislative measures which could impair competition to the benefit of the SOE or other companies to which the State has given “exclusive or special rights” (such as restricted licences or legal monopolies on a specific market). EU law only provides for a narrow exception to the application of competition law, when competition law enforcement would make it impossible to provide public services, although this exemption is not necessarily linked to the public control of the company providing the public service.

By contrast, in the US generally Federal government agencies are not subject to antitrust law liability under Federal antitrust law even when engaging in commercial activity. The same goes for State enterprises of a different kind that might be defined as SOEs, according to the so-called “State action doctrine”. However, the US example is limited, as it has hardly embraced the idea of government ownership of enterprises and most public utilities and network industries are privately-owned.

While the choice whether to privatise or not SOEs remains the sole competence of each AMS and is uninfluenced by competition law, it is preferable that SOEs are subject to competition law on the same basis as their privately-owned competitors.

This approach is in line with the OECD's and ICN's recommendations.

The OECD also recommends that:

- Any public service responsibilities assigned to an SOE should be clearly and transparently mandated by laws or regulations; and

- A clear separation is guaranteed between the State's ownership function and other State functions that influence market conditions (in particular market regulation).

The ICN further recommends that each CA should, where such enforcement is not exempted:

- Protect and promote competition by taking appropriate enforcement action against anticompetitive unilateral conduct by State-created monopolies;

- Treat State-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power regardless of State ownership or the organisation's legal status;

- Possess effective instruments, including effective investigative powers and the ability to seek or impose effective remedies, to carry out successful enforcement of unilateral conduct rules regarding State-created monopolies, recognising that the instruments might vary according to the legal environment in which each CA is operating;

- Apply sound antitrust analysis and remedies when investigating potentially anticompetitive unilateral conduct of State-created monopolies and deciding whether enforcement action is appropriate.

The effect of competition law in small economies

AMSs may question whether and to what extent an economy's small size implies a need for a competition law enforcement regime that has substantive or institutional differences from those used by larger economies.

It is worth noting the "small economies" concept is, in itself, controversial. A country's size may be measured in terms of its population, its land area, its GDP or a combination of these factors, but there is no generally accepted definition of what constitutes a "small economy".

Sometimes small economies are characterised by a tendency to have high levels of business concentration (or monopolies) with domestic firms operating at less than their minimum efficient scale of production. Moreover, competition law enforcement has specific implications and problems. For example:

- Preventing collusion among the members of a small business elite;

- Evidence-gathering;

- Difficulties in tackling anticompetitive violations by firms in other jurisdictions (which make it particularly important for small economies to take advantage of supranational organisations);

- The higher relative costs of creating and maintaining a CA and the scarcity of qualified personnel.

The issue is not whether small economies have a need for a general competition law. It is clear that such economies face a similar risk of cartels and anticompetitive practices and need tools to deal with such practices. Arguments for having a sectoral approach rather than having a general competition law approach have recently been dismissed, particularly in light of the specialised knowledge and powers that are required (for instance Malaysia recently shifted from a sectoral approach to a comprehensive competition law approach).

The discussion rather concerns how the size of an economy affects the application of competition law in relation to its basic aspects, namely anticompetitive agreements, abuse of dominance and merger control.

As to *anticompetitive agreements*, there are no significant differences with respect to cartel activity in highly concentrated markets and it is uncertain whether there is evidence of more oligopolies. On the contrary, a stronger presence and the role of business or trade associations is often observed. Conversely, it remains controversial whether small economies justify a different analysis of vertical restraints (especially resale price maintenance and parallel import bans). Singapore, for instance, has excluded vertical agreements from the scope of its competition law.

As to the *abuse of a dominant position*, it is widely believed that the analytical assessment framework is not altered by the economy's relative size, and this situation holds true also for the approach to joint dominance.

Finally, as to *merger control*, there is no specific evidence that it should deviate from the substantive rules which apply in a large-sized economy; yet, the size of the economy may ultimately affect the economic realities surrounding the merger and, in turn, the final outcome of the analysis. Furthermore, the size of the economy may also shape procedural elements of the merger control regime, such as the pre-merger notification thresholds. In particular, the costs of establishing a preliminary merger control system (as discussed earlier) when introducing competition law.

1.2 Establishing a Competition Authority (CA) and setting up an enforcement system

1.2.1 A CA's institutional and organisational structure

The institutional structure

AMSs need to decide on the CA's desired institutional and organisational structure in terms of the CA's status and scope:

- *Status*: should competition enforcement powers be granted to an independent ("stand-alone") public agency or to a government department or to a combination of the two?

- *Scope*: should these powers be granted to a CA that is competent for the whole economy or to sector-specific authorities/regulators?

The choice of the CA's institutional structure influences the way the CA's basic functions (investigation, prosecution and adjudication) are attributed.

There is no internationally agreed template for a CA's institutional design and set-up. AMSs must design an organisational structure which is in line with the legal system of their own country. So the constitutional principles on the separation of powers and the establishment and functioning of public institutions, as well as the appropriate procedural laws (civil, criminal and/or administrative) are particularly relevant in such consideration.

CA's status: stand-alone public agency or government department?

AMSs must first determine whether competition enforcement powers should be entrusted to the government or to an entirely separate stand-alone agency or to a mixed institution, which is linked to the government while enjoying a certain degree of independence from it.

There is no universally-recognised solution to this issue: each AMS should determine the effectiveness of its CA's status according to its constitutional/legal structure and political and cultural traditions.

As a general observation, a CA should be as independent from formal or informal political control as possible. Such independence gives the institution's enforcement activities credibility with non-government stakeholders. In that respect, a stand-alone CA is probably the preferred approach.

Yet in some political/legal contexts a new stand-alone agency may be hard to establish or may lack constitutional legitimacy and/or have the necessary authority and standing towards the government, the public administration and the business world.

This aspect is further developed in the Regional Guidelines, § 4.3.

CA's scope: general or sector-specific authority(ies)?

A further issue arises in those countries where there are sector-specific authorities/regulators.

Competition enforcement powers may be granted to a "general" CA responsible for competition law enforcement in all industrial sectors, or to the sector-specific authorities, which are also responsible for the application of sector-specific regulation. The enforcement system may include a mix of the two, i.e. a CA responsible for competition law enforcement in all sectors and some instances where competition enforcement powers are entrusted to sector-specific regulators.

Generally, it is preferable that a single CA is responsible for the whole economy: such coverage guarantees the development of competencies and more coherent competition law enforcement across all sectors. Within the ASEAN framework, this general approach seems particularly attractive. Those AMSs which have set up their own system of competition law have granted competition enforcement across all sectors to a single CAs, with the exception of Malaysia. While those AMSs without a competition enforcement system in place do not seem to have an advanced system of sector-specific authorities with specific expertise in market regulation.

Yet there is no one-size-fits-all answer and the optimal solution must be coherent with the country's general legal framework and regulatory history. The solution can vary from country-to-country and even across industries within the same country.

AMSs should carefully consider two competing aspects:

- Introducing competition in sectors previously dominated by regulated State owned or vertically-integrated firms, in particular in network industries, is a difficult task: it requires a very broad range of expertise and experience. Granting sectoral regulators' jurisdiction over competition law enforcement ensures coherence between regulatory activities and the enforcement of competition law;

- There is a risk of inconsistent competition law enforcement when competition enforcement is split between various authorities, and the regulatory approach and "culture" of a regulator may unduly influence the application of competition law.

In any case, where sector-specific authorities exist, AMSs should establish a workable framework for cooperation between the CA and the regulators (see below).

This aspect is further developed in the Regional Guidelines, § 4.4. For more information on the AMSs enforcement frameworks, see the Handbook.

The institutional model for investigation, prosecution and adjudication

Competition enforcement's basic elements are: investigating (i.e. finding out) anti-competitive practices; prosecuting the violator(s), based on the available evidence; deciding, sanctioning the violator(s) and ordering any remedies.

These activities can be entrusted, in all or in part, to either an existing or new agency or to the judiciary.

The three basic models are:

- The adversarial judicial model;

- The adversarial agency model and

- The inquisitorial model.

The **adversarial judicial model** requires the separation of the investigative and enforcement functions (entrusted to a specialised agency) and the adjudicating powers (entrusted to the law courts).

The Canadian and the US competition law systems started in this way and it is currently the model followed by the DoJ's Antitrust Division. When initiating enforcement proceedings, the DoJ may proceed in Federal court by way of criminal indictment or an application for civil relief. The case is brought forward according to the general rules of procedure and the decision is subject to judicial appeal.

This model is particularly suitable for criminal offences, as it guarantees adequate standards of due process. However, the model is complex and it is likely to take time before it becomes effective. It requires an effectively functioning judicial system and the development of

sufficient expertise by judges who regularly deal with many competition law cases. It is worth noting that in the US, where this system is in operation, it is accompanied by an integrated agency model lead by the US Federal Trade Commission (see below) and complemented by an established system of private enforcement, i.e. of private antitrust action before civil courts, which account for the vast majority of antitrust cases in the US.

This model may not be feasible for transitional economies. For competition law to be effective within a reasonable time, transitional economies need to concentrate their learning and institutional development in a single integrated competition law enforcement programme. It may be preferable for all competition cases to be decided centrally by working exclusively on such cases. Such step would allow the CA to develop a thorough understanding of the law and deepen its institutional expertise. A specialised agency has a better chance of developing and disseminating a consistent understanding of the requirements of the law within a reasonable time.

Under the **adversarial agency model**, investigative and enforcement functions are also separated from adjudicating powers. Specialised investigative and enforcement agencies bring complaints before separate specialised adjudicative agencies. While the adversarial judicial model relies on the judicial system, the adversarial agency model is built upon a "bifurcated" agency.

In Canada this model is in place for non-criminal antitrust violations. The Canadian Competition Bureau performs investigative and enforcement functions, and the Competition Tribunal, comprised of a mix of judges and competition law experts, performs the adjudicative functions, subject to appeal to the Federal Court of Appeal.

This model is designed to reach a fair balance between the different values and interests involved, e.g. independence, accountability, expertise, transparency and due process. However, it has not worked as expected. In over twenty years of experience, the Competition Tribunal has heard very few cases. The costs, delays and uncertainty of the proceedings have induced the Competition Bureau and the parties to settle cases before reaching the Competition Tribunal. The Competition Bureau has become, *de facto*, an integrated competition agency.

Under the **inquisitorial model** (also called the "integrated agency model"), a single specialised agency undertakes investigative, enforcement and adjudicative functions.

The best known examples of this model are by the EU and, to some extent, the FTC in the US. In the EU system, DG COMP investigates, enforces and adjudicates cases, subject to approval from the European Commission's full board of Commissioners. Even then a legal decision is subject to judicial review by the EU's Court of Justice. Under the FTC model, cases are taken to an administrative law judge within the FTC from whom appeals lie to a panel of Commissioners (although some matters are taken directly to the general courts).

This model guarantees, in particular, better administrative efficiency (in particular in terms of expeditious decision-making) and a higher level of expertise. Conversely, the risks of bias (due to the fact that the same agency investigates, enforces and adjudicates cases) requires adequate "checks and balances". In the EU, for instance, a Hearing Officer has been introduced to guarantee the due process and the judicial review of appealed decisions is very intense.

In principle, this model seems to be suitable for new CAs, as it is relatively easy to set up and develops an adequate level of specialisation and expertise within a reasonable time-frame. In

practice, this model has been chosen by most of the AMSs that have established a competition enforcement system.

For more information on AMSs' enforcement models, see the Handbook.

The organisational structure

A CA's internal organisation depends on its institutional structure.

If competition enforcement powers are given to a government department, the internal organisation of the latter will be structured according to the general administrative organisation of other similar departments. When some competition law provisions deal with criminal matters, they will be enforced by a public prosecutor whose office is organised according to the standard structure established by national criminal law.

Conversely, if a new stand-alone public agency is in charge of competition enforcement, its structure may be organised according to a different model.

The need for detailed internal organisation-related rules and procedures emerges when the CA reaches a certain level of development. In most cases, very small CAs require each officer performs all (or most of) the main functions of competition enforcement. Once the CA grows in size and experience, a more complex internal organisational structure will be needed.

While there are no common rules for a detailed CA model the experience of the most established CAs shows the following elements should be taken into account.

CA's Head: A CA could be a collegiate body (e.g. a Board of Commissioners) or have a single head and decision-maker. Generally, it is not required that such commissioners are technical experts in competition law or economics. They can be independent personalities, chosen for their reputation, or members of a governmental organisation with proven experience and judgment. There is no preferred choice as to the commissioners' status or background, provided that each is a distinguished individual with a clear reputation and that their independence is guaranteed (see below). AMSs should choose the option which best fits their institutional legal framework and political culture.

In most cases Commissioners are employed full-time. However, when suitable candidates are not available, or the CA lacks sufficient resources, the Board could include part-time professionals or experts. This option could be particularly attractive for AMSs initially establishing their CAs.

Internal divisions or tasks: In those cases where the CA manages both competition-related policies and other policies (e.g. consumer protection, price regulation), it is good practice to allocate the different policies to different departments or units.

Special units for non-enforcement activities: In the (likely) case that the CA, in addition to competition law enforcement, runs other activities which require specific skills (e.g. communication and advocacy), these activities are generally performed by distinct units.

It is nevertheless important that communications and cooperation mechanisms are in place to guarantee a link between these units and competition enforcement, which is the CA's "core business". For instance, it is advisable that enforcers are involved in the drafting of case-related information (press releases) or in the design of advocacy activities.

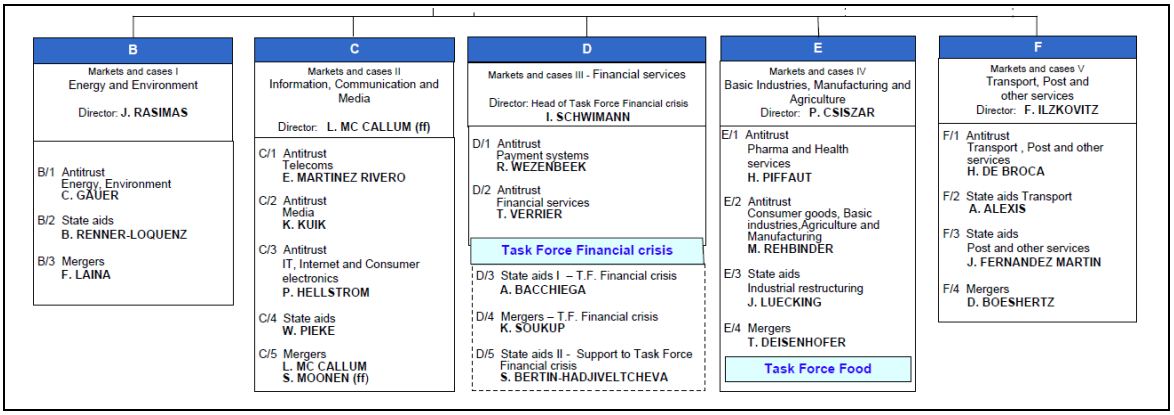
Division between (pure) antitrust enforcement and (preliminary) merger control: Pure antitrust enforcement (e.g. the enforcement of the basic prohibitions, such as those against cartels and abuse of dominance) is different from preliminary merger control. While antitrust enforcement intervenes *ex post* (i.e. after a violation has occurred) and constitutes a quasi-judicial function, merger control is based, in most cases, on an *ex ante* (i.e. preventative) approach and constitutes a quasi-regulatory function. The two procedures are often dissimilar and, what is more important, the tools used are different.

For this reason, those CAs with an adequate number of staff dedicate part of their officials' time exclusively to merger control in specialised units (so-called "task forces").

Division by industries/sectors: Established CAs generally operate a further staff sub-division according to the industries concerned, as such practice develops industry-specific know-how.

DG COMP is an example of such a case: the different departments are kept separate, based on sector/industry/market, and special task forces are set up in the most sensitive sectors.

Box 6 – Excerpt from DG COMP Organigram (Departments)



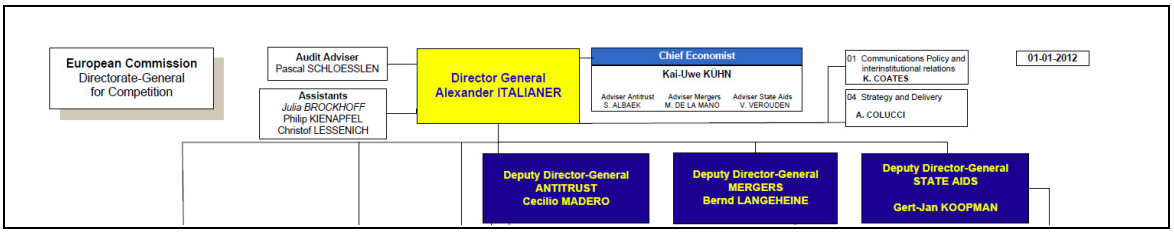
Source: DG COMP website (http://ec.europa.eu/dgs/competition/directory/organi_en.pdf), Last accessed on 21/3/2012.

Conversely, the DoJ and the FTC share federal responsibility for antitrust enforcement (with the exception of criminal antitrust enforcement, which is the exclusive responsibility of the DoJ). This division is based on a clearance protocol which determines which CA will investigate a particular matter (largely dependent upon which CA has the greater expertise in the market as a result of recent antitrust investigations conducted by that CA).

Specialist units for economic analysis: Developed CAs include economists in their case teams whose research and advice support legal staff's case analysis. Furthermore, developed CAs tend to set up specialised departments with economic expertise to guarantee all decisions are based on solid economic grounds.

In the EU, DG COMP has established a specific *Chief Economist's Team*, which reports directly to the CA's Head (the Director General). This structure aims to guarantee its independence from the CA's departments and units dealing with competition cases, as shown below.

Box 7 – Excerpt from DG COMP Organigram (Chief Economist)



Source: DG COMP website (http://ec.europa.eu/dgs/competition/directory/organi_en.pdf), Last accessed on 21/3/2012.

In the US, each CA has a specialised economic unit: the DoJ's Antitrust Division includes an *Economic Analysis Group*, which cooperates with the Division Attorneys analysing business practices and provides the economic analysis underpinning the Antitrust Division's decisions. The FTC includes a *Bureau of Economics*, which is responsible for providing its own recommendations to the Commission (the FTC's key decision-making body) on most matters.

In addition, many CAs outsource economic analysis or studies to specialist firms on a case-by-case basis. The two US CAs generally resort to outsourcing for litigation work, while in the EU DG COMP outsources economic studies for general economic investigations or particularly complex cases.

1.2.2. A CA's attributes and competencies

Tasks, tools, attributes and competencies *of a CA*

A CA is established to perform specific "**tasks**", which are explained in detail in Part II – Enforcement.

The primary task of a CA is to investigate and prosecute possible infringements of competition law. Many CAs also take decisions in individual cases (often by way of a specific collegiate body), perform additional enforcement-related activities, such as general sector investigations or economic studies, and engage in competition advocacy activities.

In some cases, CAs undertake tasks outside the core CPL area, the most common of which are: consumer protection; sectoral regulation (in particular in the telecommunications and energy sectors); price control; State aid control; and public procurement control. These activities are outside the scope of the RCC Guidelines.

To perform its tasks, the CA is equipped with a set of "**tools**", which are also discussed in Part II.

A CA must be designed in such a way that it can perform its tasks and use its tools in a fair and efficient way. Therefore it should be granted the right attributes and acquire the necessary competencies. The RCC Guidelines refer to "**attributes**" as those objective qualities that a CA should have to enforce competition law, while referring more specifically to "**competencies**" as those subjective capabilities (i.e. know how) which are critical for a CA to effectively enforce competition law. However, a clear-cut distinction between the two concepts is not necessary for the purpose of the RCC Guidelines.

The following attributes and competencies are widely understood to be fundamental for a CA:

- Independence and accountability;
- Fairness, transparency and confidentiality;
- Effective powers, influence and resources;
- Cooperation skills.

Independence and accountability

To be effective, a CA should be independent. Especially it should be free from both political and business influence.

An independent CA should be subject to public oversight through a system of "checks-and–balances". It should be accountable (i.e. responsible for the decisions it takes) towards the government and/or the legislator, the public (in particular, through the oversight of the media) and the business community. All relevant stakeholders should be able to provide their input to the CA's decisions (e.g. through appropriate consultation processes) and able to obtain redress if the CA acts illegally.

To achieve the right balance between independence and accountability, the following safeguards are normally employed.

For the CA's independence:

- The CA should be a distinct statutory authority, free from day-to-day ministerial control;
- There should be an appointment according to well-defined professional criteria and with the involvement of both the executive and the legislative branches of the government;
- Any Head (or equivalent) and members of the adjudicating body should be appointed for a fixed-term, with a prohibition on their removal except for clearly pre-defined due causes with the appropriate judicial review;
- The term periods of the members of the (collegiate) adjudicating body should be staggered (i.e. arranged in alternating or overlapping time periods);
- The CA should have an adequate and reliable source of funding;
- There should be adequate salary levels (e.g. through an exemption from civil service salary limits);
- The executive should be prevented from overturning the CA's decisions, or limiting the CA's power, unless as set out in clearly pre-defined exceptional instances.

For the CA's accountability:

- The competition law and CA's statutes should be published, clearly specifying the CA's duties, responsibilities, rights and obligations;

- Judicial review of the CA's decisions should be ensured (although some minimum "thresholds" could be established to deter frivolous challenges designed to delay the implementation of the CA's decisions);

- The CA should be requested to publish annual reports on its activities and establish a formal review of its performance by independent auditors, and/or an oversight committee of the legislature;

- Rules should be established for the removal of board members if they show evidence of misconduct or incompetence;

- All interested parties should be allowed to make submissions to the CA on matters under review;

- The CA should be mandated to publish its reasoned decisions.

Fairness (due process), transparency and confidentiality

AMSs should ensure that the CA's enforcement procedures are **fair** to the parties concerned. The CA should be bound by the "due process" principles which are discussed in Sections 1.2.3 and 2.2.3. These principles require:

- The CA must formally inform the parties under investigation about what are the suspected violations are;

- The parties under investigation should have the right to be represented and advised by independent legal advisors and have the right to access the CA's file;

- The CA should be required to justify its decisions solely on evidence presented at a hearing either open to the public or limited to stakeholders with a relevant interest.

AMSs should also ensure that the CA's enforcement procedures are **transparent** to the parties under investigation and open and accessible to the public. However sometimes there are reasons not to make investigations public: the fact of an investigation could harm a business and the investigation often concerns confidential business information that should not be made public.

Furthermore, each AMS should ensure that the CA is capable of keeping information **confidential**. Sometimes public knowledge of such information could harm the parties under investigation and in such cases, confidentiality is key for the CA's reputation and effectiveness.

These principles are often obscured in practice by CAs, especially in transitional economies employing largely untrained staff. This problem can be avoided by establishing rigid procedural rules for the conduct of investigations and the conduct of hearings: such rules require the relevant enforcement authorities to specify from the outset which provisions have been allegedly violated and what evidence must be presented to prove the violations. Those rules would also require the accused parties to formally admit or deny facts alleged by the CA. Such rules can narrow the presentation in hearings to relevant evidence and eliminate

what often seems like aimless speculation about tangential issues. Due process rules are further illustrated in Part II, § 2.2.3.

This aspect is further developed in the Regional Guidelines, Chapter 7

Effective powers and influence

A CA should have the powers needed to investigate effectively, such as the power to gather information in a timely manner and the power to impose, or sue to impose, sanctions for non-compliance. A CA needs the power either to order certain conduct to restore competition and to impose sanctions, or to sue in court for the court to order certain conduct or impose sanctions. A CA should also have the power to not automatically impose sanctions, which is important both for implementing leniency programmes that could provide incentives for cartel reporting and for settling cases or negotiating commitments that could help terminate cases earlier and limit the use of the CA's resources.

AMSs should provide a clear and formal delineation of such enforcement powers in the competition law and ensure the CA is willing and able to exercise its authority and enforce its decisions.

AMSs should also consider granting the CA formal or informal instruments to influence legislation, such as the right to submit proposals and objections, consultation or other forms of intervention in the decision-making process. It is especially recommended that a CA is granted the right to be consulted in relation to all proposed legislation which has an effect on CPL, as well as in relation to all decisions of sector-specific regulators and other bodies which have an effect in the market (e.g. price regulation).

The powers of a CA are further discussed in Part II – Enforcement.

Relevant for the effectiveness and accountability of the CA is the selection/appointment process of the CA's Head (e.g. the Chairman or an equivalent function). It is common that s/he is appointed by the head of State and/or the Parliament. In other cases, the decision is taken by the Government or a Ministry. It is recommended that the CA's Head is chosen based on his/her competencies and abilities. The appointment should be politically-neutral and the office term should not be linked to the tenure of the government in power.

Financial resources

Many new CAs suffer from limited financial resources. How to finance the CA is one of the most urgent issue AMSs confront when establishing a CA.

The CA budget can come from different sources.

The CA budget generally comes from the State budget. The most widespread solution is to leave the decision over the CA's budget to the Parliament, or in other cases to the Government or to a single Ministry. Reliance on subventions from a ministerial budget can raise questions of independence from ministerial direction. In some cases, the CA also draws from an independent source of financing. It can be done, for example, by introducing procedural fees, such as filing fees for notifications (e.g. for merger clearance or exemptions). Fees should be set at a level corresponding to the average costs of the authority handling a particular category of matter, in order to minimise the risks of distorting effects on the CA's priorities.

Additionally, the CA could be granted a share of the fines imposed. The latter case, however, may create a conflict of interest whereby the CA may have an incentive to impose higher fines not in the interest of justice but rather to increase its own budget.

Human resources (staffing)

A CA faces a major constraint, particularly during its start-up phase, when hiring staff.

A CA's effectiveness can be affected, in particular, by skills shortages (such as where case handlers have limited or no experience of competition law economics), low public-sector pay and risks of corruption and regulatory capture. These issues are of particular relevance for new, smaller CAs, as they are especially vulnerable to losing qualified staff to the private sector (as initially there are only a small number of qualified professionals available) and high employee turnover can create serious issues for institutional continuity.

AMSs should adopt the following measures to balance the above-mentioned risks and increase staff competencies, integrity and motivation:

- *Long term staff*: maintaining long-term careers within the CA (by avoiding short-term staff rotation with other governmental agencies) contributes to developing internal competences and know-how. This step avoids experience being lost through staff turnover and/or rotation. By contrast, some internal staff rotation (i.e. within a department) helps share knowledge within the organisation and ensures that regulatory "capture" is restricted to the minimum. In this respect, it is particularly appropriate that adjudicators are changed through a staggered office-tenure system;

- *Targeted training* (described further below) and, in the longer run, strong relationships with academic institutions such as universities;

- *Adequate salaries*: to recruit and retain highly qualified personnel and, to some extent, decrease the incentives to move to the private sector or for corruption;

- *Clear rules on staff conflicts of interest*: in particular where a CA includes part-time board members drawn from leading private sector companies;

- *Team building*: competition law case work is handled through team work and staff should be prepared and trained to work in teams. To minimise unhealthy rivalry between staff, tasks should be assigned in a clear and fair way by taking into account each staff member's skills and experience. It is important that the priorities of the organisation are perceived as the individual staff member's priorities. In this context, it is useful to design a career review system, which takes account of each staff member's contribution to common objectives, as well as to cases assigned to each case handler;

- *Developing staff ethics and integrity*: competition law case work is a sensitive task. The daily management of competition enforcement activities has inherent risks related to information leaks and conflicts of interest. Rules and checks should be developed on staff ethics and integrity. The following aspects are of particular relevance:

    - Ethics should be perceived as a basic organisational value;

    - The CA needs to establish an easily accessible code of ethics;

- Staff –particularly those more involved with potential conflicts of interest and/or dealing with sensitive and confidential information – should receive adequate and regular training;

- Staff ethics should be assessed as part of each member's annual review, as well as part of the daily communication within the organisation;

- A recording system should be established in which case handlers taking up any new file or duty fill in specific standard forms;

- Clear rules on confidentiality should be established for staff leaving the organisation.

Recommended training

Regular staff training is an important issue, particularly for new CAs, due to the lack of an established competition culture. While most CAs engage in staff training programmes, these programmes differ in duration and content.

Training should be conducted both in the form of general and practical training.

General training should involve:

- The basic legal principles of the AMS's competition law;

- The economic (in particular microeconomic) concepts underlying the application of the competition law framework;

- The procedural framework for competition enforcement (e.g. the CA's powers and obligations; the parties' rights).

Practical training might take the form of case-studies or specific role-playing/problem-solving exercises based on common competition issues.

For a new CA, training resources are scarce. AMSs should exploit technical assistance programmes from developed countries and cooperation programmes with other developing countries or transitional economies.

Recommended examples of general training at the international level are:

- The *ICN's Web Seminars*, blog and Curriculum Project: The seminars are dedicated to topical competition advocacy issues and are available online; the blog collects updated background material (in particular news, case updates and workshops); the Curriculum Project aims to create a comprehensive curriculum of training materials to serve as a virtual university on competition law and practice for CAs' officials (training modules include video lectures and accompanying materials). This material is generally available online:

  - ICN teleseminars:

  - http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/seminars.aspx;

  - ICN blog:

- http://www.icnblog.org/;
- ICN Curriculum Project:
- (http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx

- The *OECD-Korea Policy Centre, Competition Programme*: the Programme helps competition authorities in the Asian region develop and implement effective CPL. It provides a hub for competition officials from Asian countries to meet regularly to exchange experiences and deepen their capacities in competition law and policy through workshops, seminars and other events. Its main tools are capacity-building workshops directed at front-line enforcers in CAs.
  - OECD-Korea Policy Centre material is available at: http://www.oecdkorea.org/
- The *FTC and DoJ Training Programs*: The FTC and the DOJ Antitrust Division provide competition technical assistance to countries undergoing the transition to market economies and establishing new competition regimes. The FTC programs focus primarily on long-term advisors, which are considered particularly appropriate for CAs with some enforcement experience. They also run short-term projects, including seminars and other short-term missions (e.g. short-term advisors).

Cooperation skills

Internal cooperation

Competition enforcement often overlaps with other public policies, in particular market regulation. This overlap may raise public policy conflicts.

It is recommended that AMSs grant their CAs sufficient powers and tools to engage in formal or informal cooperation and coordinate with other government departments or agencies, especially sector-specific regulators and institutions involved in competition-related policies.

In some instances, this issue has been dealt with through specific memoranda of understanding between the CA and other overlapping institutions/agencies. Such memoranda outline each organisation's respective role and responsibilities.

It is also advisable for AMSs to address the challenges relating to the interface between the CA and the judiciary, both where the latter is part of the enforcement system (like in the adversarial judicial model illustrated earlier) and where the judiciary intervenes in competition enforcement in a later phase (e.g. in appeals against a CA's decisions) or in a parallel phase (e.g. in private actions for damages due to antitrust violations).

International cooperation

A CA, particularly in small or developing countries, faces major obstacles in dealing with cross-border anti-competitive practices. It is thus advisable that a CA is equipped with the necessary power to engage in international CPL cooperation.

International cooperation is dealt with under Part II – Enforcement.

1.2.3 The system of judicial review

AMSs should establish a system of judicial review of the CA's decisions, in line with the national judicial review system, through the regular courts or through specific tribunals.

It is recommended that such judicial review is careful, comprehensive and independent to ensure the fairness and integrity of the decision-making process.

Specialised competition appeal tribunals

AMSs should guarantee that judicial review of a CA's decision is carried out by judges with a high degree of understanding of the subject matter. To this purpose, they could establish a specialised competition tribunal or specialist judges trained in competition law.

The establishment of competition appeal bodies (or similar) is advisable. However, the setting up of a specialist judicial body, requires time and specialised resources and must be permitted under the national legal system. A less demanding option may be to attribute the judicial review of competition enforcement decisions to one or a few selected courts, which will thus develop a specific expertise in the subject.

Limited grounds for review and deference to the CA's decisions

AMSs should carefully consider limiting the scope of judicial review. The scope of review has a significant influence on the effectiveness of enforcement. As mentioned earlier, the effectiveness of a CA's decision is diminished where cases are re-litigated in court.

It is crucial to introduce some limits to judicial review, allowing a certain degree of deference to the CA's decision and preventing all elements of a decision being re-examined in court. The importance of the appeal system must be balanced with the need to avoid re-litigating cases from the start and potentially rendering the CA's investigation and decision meaningless.

For this reason, many jurisdictions favour a judicial review of competition cases whereby the appeal body confines itself to a consideration of the law, including a review of the procedures adopted by the CA in the exercise of its investigative and decision-making functions, rather than a new consideration of both the evidence and legal arguments. The intention is not for the courts to substitute their own appreciation but rather to ascertain whether the CA has abused its discretionary powers. Grounds for review often include: lack of jurisdiction; procedural failure and error of law; defective reasons; manifest error of appreciation and error of fact.

Similarly, judicial review of decisions or acts adopted in the course of the procedure (e.g. interim measures concerning investigative acts) should be limited to well defined instances where there is a *prima facie* case (i.e. the application in the main proceedings must have a reasonable chance of succeeding) and the measures adopted are urgent (i.e. are necessary to avoid irreparable damage). Where possible, investigation should not be discontinued and possible violations in the course of the procedure should be addressed when reviewing the final decision.

The issue of the scope of an appeal has been addressed, in particular, in the US and in the EU.

Box 8 - Limited judicial review in the US and the EU

The US Federal Trade Commission Act in 1914 established that the FTC's findings of fact are final and cannot be re-examined by courts (unless the FTC's factual findings are totally without support in the evidence introduced at trial). That legislation was intended to limit courts to reviewing only the legal standard applied by the FTC. This Act was expected to make review of FTC decisions simple and quick because most competition law cases are decided on the basis of facts (meaning the purpose and effects of business actions). This attempt has not been fully successful because courts have interpreted their role in reviewing FTC decisions to include deciding whether the facts introduced into evidence are sufficient to constitute evidence of a competition law violation. Still, this limit implies that the reviewing court does not start by taking testimony or examining witnesses and must accept the facts as found by the FTC. So the courts review the reasoning of the FTC in its decisions and not its fact findings. The most a reviewing court can do is to refer the case back to the FTC if it believes the FTC should have allowed presentation of evidence that it excluded in the proceedings before the FTC.

In the EU, all the Commission decisions which affect individuals (including those in the competition law field) can be appealed to the EU General Court and further on to the EU Court of Justice. However, the EU applies the so-called "judicial deference" doctrine, which require the EU Courts respect the Commission's margin of appreciation (in particular in competition cases). In more detail, the EU Courts apply two different standards of review:

The "*comprehensive review*" (which follows the general rule) entails that the judiciary undertakes a comprehensive review of the conditions for applying competition law, i.e. whether the Commission has proven all relevant facts and taken the most reasonable solution;

The "*limited review*" – which applies to policy choices and complex economic and technical appraisals – is "limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers" (EU Court of Justice, case C-194/99 P, Thyssen Stahl vs. Commission).

1.2.4 Start-up challenges

A newly-established CA needs to overcome various challenges to create an effective competition law system. Some of these challenges are peculiar to a CA in a developing country, and in particular in ASEAN. The main challenges CAs are confronted with and the possible measures AMSs could take to overcome them are:

- Perceived conflicts with other policy objectives (e.g. employment, promotion of "national champions") and resistance from "vested interests": AMSs should build a strong competition culture by way of appropriate advocacy actions.

- Lack of good governance, in particular due to the strong links between the worlds of politics and business. Such actual or perceived contact gives the public and the

business community little faith that the law will be applied free of corruption and in accordance with the rule of law: AMSs should guarantee that hearings are as open as possible and enforcement decisions are factually detailed and easily available.

- Tension with sector-specific regulators: AMSs should introduce the clear-cut demarcation of authorities' boundaries and responsibilities.

- Resources and capacity constraints and limited indigenous expertise in CPL. The CA's staff and the judiciary have very limited training in competition law and economics (in particular, few staff and fewer judges have any competition-specific university training). Also the CA's staff and the judiciary have a rigid, literal approach to interpreting and applying the law, divorced from the law's goals. Investigators, managers, commissioners with no legal training or inexperienced lawyers lack a sense of the dynamic nature of the law. Judges avoid the substantive issues and stick to the procedural issues only. AMSs should build workable CAs, with a small number of skilled staff. They should also invest in education and publicity.

- Lack of political will and independence: AMSs should concentrate on a modest enforcement agenda, favouring quality over number of cases and publicising the results achieved.

- An under-developed judicial system: as mentioned earlier, AMSs could set up specialised judicial bodies or attribute the judicial review of the CA's decisions to one or few selected courts.

1.3 Strengthening and consolidating the competition law framework

1.3.1 The evolution of a competition enforcement system

Based upon experience, institutional building is not a one-off activity. It takes place in stages that extend over years, starting with a policy commitment to open markets to competition. That is, to a large extent, a political decision. At first, competition law establishes a CA, providing it with as many skills and resources as possible to start operating. The CA then acquires basic survival skills and tries to make the best possible use of its limited resources. Later, more experience and knowledge make it possible to better organise its priorities and tackle more complex issues. Finally, the competition law goes through a period of significant statutory revisions, based on the experience acquired, to overcome its limits and shortcomings.

While there are no internationally-recognised benchmarks or best practices as to how a competition enforcement system should evolve, a three-phase structure can be envisaged for convenience. The first phase includes introducing a competition law (Chapter 1.1), establishing a CA and setting up an enforcement system (Chapter 1.2). The second and third phases (Chapter 1.3) relate to strengthening the CAs' core competencies and reviewing and consolidating the system.

With specific reference to ASEAN, AMSs are in different stages of CPL development and these stages do not necessarily fit into one of the three phases above.

It may well be that one or more AMSs are somewhere in-between. It is also worth stressing that these phases develop somehow in cycle and all AMSs are, or may be in the future, interested in all aspects of the three phases. For instance, a country which has developed enough skills and competencies may consider reviewing its legal and institutional framework in light of those skills and competencies. It will be thus interested in reviewing the objectives and principles and in reconsidering the scope and content of its competition law, in light of the principles illustrated under the first phase below.

AMSs should reflect on their state of CPL development and set out priorities corresponding to that development stage. AMSs should also consider developing core competencies for regional cooperation and, in turn, exploit regional cooperation for CPL development and enforcement. These issues are addressed in more detail in Part II (section 2.3) and for advocacy in Part III (section 3.4).

1.3.2 Completing and improving the legislative framework

Generally in the start-up phase the competition law is introduced together with the most urgently-needed implementing provisions.

Once the CA has developed familiarity with the basic provisions of the law and with competition enforcement and if the national legal system allows then more specific or specialised implementing provisions may be introduced later.

There is no recommended practice as to which aspects of competition law should be introduced immediately and which should be postponed to a later stage. For instance it may be useful to create merger notification procedures in the second phase of development of competition law enforcement. Section 1.1.above recommends how the establishment of a merger control system is resource intensive and could be postponed when first introducing a competition law.

AMSs should grant their CAs the power of adopting implementing provisions. The adoption of such provisions facilitates the application of the legislative framework by way of “secondary” or “soft” law.

These provisions could include guidelines on practical (substantial or procedural) aspects of the law, such as thresholds and evaluation tests for mergers and rules on the notification of agreements for exemptions.

Also these provisions could include guidance on how the CA intends to apply competition law to specific instances such as:

- Vertical (i.e. distribution) agreements, such as agency agreements; exclusive or selective distribution; single branding; exclusive customer allocation; franchising; exclusive supply;

- Horizontal agreements or collusion, including the exchange of commercially sensitive information; research and development; joint production, purchasing or commercialisation; standardisation;

- Exclusionary or exploitative anti-competitive behaviour of dominant companies, including price abuses; refusal to deal; exclusive dealing; tying;

- Anti-competitive behaviour in specific industries or type of industries (e.g. agriculture, telecommunications, transport or network industries in general).

1.3.3 Reviewing and amending the competition law

After a period of practice, each AMS should review its competition law to analyse the law's effects and consider possible amendments. Similarly each AMS should review its institutional model and possibly reorganise its CA in view of the experience gained.

Competition law should be adjusted to:

- Eliminate repetitions and contradictions;
- Refine the language;
- Fill in possible gaps in enforcement; and
- Adapt it to new economic circumstances.

Competition law always evolves over time, to reflect new economic learning, face new problems, enhance enforcement capabilities and remedies, fix procedural problems and match international standards and best practice.

Aspects that an AMS should consider at this stage are included in the following box.

Box 9 – Legislative reform checklist

Clarity of the law

In the first stage of development, the competition law should be clear and simple so as to be as easily understandable as possible. In a more advanced phase of development, the AMSs should clarify concepts that have been difficult to apply and were perceived as ambiguous. Possibly more advanced concepts and instruments can be introduced.

Objectives of the law

The competition law's objectives should be reviewed to verify whether they are clear to enforcers and interested parties; whether those objectives have made it easier to understand and apply the law; and whether conflicts have arisen amongst those objectives.

Completeness of the legal framework

In the first stage of development, competition law should cover the basics. In a later, more advanced phase, additional elements should be developed such as preliminary merger control and leniency programmes.

At the same time, more detailed provisions could be introduced to provide guidance on how the CA enforces the law in specific markets or in particular instances.

Powers of the CA

A revision of the competition law should consider whether the CA has adequate powers to perform its functions, in particular in terms of its investigation and prosecution powers and ordering effective sanctions and remedies. A CA should also have the discretion not to sanction but instead to allow negotiated solutions of violations where such a mechanism is preferable in terms of the use of resources and outcomes.

Due process

As the CA takes effective measures and tackles more advanced competition issues, the need increases for adequate guarantees of the prosecuted parties' rights. A revision of the competition procedure should ensure that adequate "checks-and–balances" are introduced to guarantee both effective enforcement and the fundamental rights of the companies and individuals concerned.

Source: benchmarking of major jurisdictions' reforms.

1.3.4 Developing the institutional framework

In a more advanced stage of development the CA should engage in more advanced cases and tackle more sophisticated practices (such as distribution agreements, access to essential facilities, deregulated sectors, joint ventures) or issues (such as market definition, market power, the (anti-)competitive effects of a particular type of conduct, efficiencies).

Such advance cases require AMSs to improve their CAs' management and organisational structures and human resources, as illustrated below.

Improving the CA's management and organisational structure

To improve their respective CA's institutional capacities, AMSs should review and strengthen the CA's management and organisational structure. The following divisions (illustrated under § 1.2.1) should be considered between:

- Competition-related activity and other activities;
- Special units for (competition-related) non-enforcement activities and for economic analysis;
- Antitrust enforcement and merger control activities;
- Industry or sector.

Also, a more experienced and structured CA should be able to set up enforcement priorities according to a pre-defined strategy (based on the criteria defined under § 2.2.1 below). The development of priorities will help the CA make the best use of its resources and increase the effectiveness of its action.

Furthermore, AMSs in a more advanced phase of development should assess the effectiveness of their CAs, measuring the impact of competition enforcement on the functioning of the markets and on consumer's welfare (see Chapter 2.4 below).

Strengthening human resources

For a CA to perform its role and engage in more advanced cases, each AMS must strengthen its human resources. The following elements are particularly important:

- *Assessing and fostering the strengths of the staff/organisation*: A growing CA is confronted with the challenges of an increasing workload and a rising number of staff. It is crucial to evaluate staff expertise to find the right balance between senior and junior staff, and permanent staff and contractual agents. Also the right balance is needed between people with different types of expertise (lawyers, economists and other skilled staff). A further step is to understand the actual resources currently available in terms of people and experience (e.g. how many experienced case handlers are available? How busy are they?). This step requires the development of adequate time/workload measurement tools. It is useful to develop a database with skills and experience, for allocating upcoming work in the most efficient way. Also, it is recommendable that a CA engages in team building activities: such activities should be aimed at creating team spirit, in particular within a single department/unit, preventing and fighting unhealthy rivalry between staff, and promoting the organisation's priorities as individual priorities. In this context, the design of a career review system, which takes into account the contribution to common objectives and not only to cases assigned to each individual, helps foster team spirit.

- *Knowledge manaing*: In the context of staff turnover, it is important that as much individual staff expertise (such as know-how and experience) is turned into an accessible, institutional asset now and in the future. Expertise acquired in previous cases should be available to other current and future staff. This institutional knowledge management requires developing tools facilitating easy access to precedents (in particular by junior staff), while ensuring confidentiality of information where necessary. Knowledge management systems designed to support sharing knowledge between employees include: an Intranet; electronic document management and document-flow systems (all the case documents are entered and registered); specific applications to facilitate storing, retrieving and sharing large volumes of data (e.g. in the framework of an investigation or for merger control purposes);and the use of shared folders. Most CAs have a central unit or contact person(s) in charge of knowledge management.

- *Advanced training*: In a more advanced stage of competition enforcement development, training activities should focus on selected advanced issues (such as "natural" monopolies, intellectual property and vertical agreements). Such training should mainly target the CA's commissioners, staff and judges. It should be provided based on the specific recipient's needs and requests;

- *Ethical principles*: A CA should ensure that its staff meets the highest possible professional and ethical standards and becomes familiar with the applicable rules regarding ethics and integrity. To provide guidance and to assist staff in identifying and resolving ethical issues, a CA could produce a code of conduct that sets out and clarifies the rules concerning ethics and integrity that are applicable in the CA. Such a code could include the following aspects:

    - The proper use of resources and assets, such as computers, email and internet access systems, telephones, faxes, copy machines;

    - Conduct to prevent insider-dealing, i.e. making a profit or assisting others make a profit on the sale or purchase of shares (or derived financial products) by using

confidential or unpublished information acquired in the performance of professional duties;

- Anti-corruption principle, i.e. preventing acceptance of gifts, favours or payments from any source that could prejudice the professional performance of the CA;

- The proper use of the freedom of expression, i.e. the conditions applicable when expressing personal opinions, producing publications and speeches or dealing with the media;

- Rules applicable in the relation with citizens and interest groups (lobbies);

- Conduct in case of engagement in political activities;

- Conduct in case of missions or representation of the CA;

- Obligations applicable to staff on leave or to former staff.

It is useful to establish an ethics and compliance unit, in charge of advising CA staff when needed, and who does not exercise hierarchical control and instead operates based on an open dialogue.

Part II: Enforcement

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Part III: Advocacy

Overview

Part III of the RCC Guidelines deals with advocacy. Advocacy means the range of non-enforcement activities which promote a competitive environment within an AMS. AMSs acknowledge that advocacy is a fundamental tool to develop a workable competition law system.

Advocacy may be conducted by different institutional "actors". The most important is the AMS's CA, which should be empowered to engage in advocacy as a necessary complement to its enforcement activities. Advocacy requires:

- Identifying *challenges and opportunities* and setting out *objectives*: Both the AMS and its CA should understand what advocacy requires, such as: passing a new competition law; encouraging business' self-compliance; developing public consensus and developing a competition culture; improving the CA's or the judiciary's enforcement skills;

- Identifying the *stakeholders*: Advocacy activities may involve a number of different stakeholders. An AMS and its CA should verify which stakeholders are most relevant for their advocacy objectives. Relevant stakeholders include: the CA's staff and its management (so-called "internal" stakeholders); all branches of government, and public authorities (especially sector-specific regulators); the judiciary (judges and prosecutors); the business community and their lawyers and associations; consumers and civil society; academia; and the media;

- Identifying *tools*: Advocacy may be performed through a variety of instruments. An AMS and its CA could use different country-appropriate tools for different advocacy action;

- Developing an accurate *strategy*: An AMS and its CAs should set out in clear terms what they want to obtain from a specific advocacy activity, whom they want to reach and how they want to reach their goal (i.e. through which actions and instruments);

- Assessing the *results* of advocacy activity.

The number of potential stakeholders is large, each may be affected by competition law in a variety of ways. An AMS and its CA should be aware of what different stakeholders may need in terms of advocacy. They need to understand which advocacy initiatives may be targeted towards which stakeholders.

An AMS and its CA should also be aware of all ASEAN-specific advocacy programmes and of relevant best practice experiences. They must understand what the key elements for effective advocacy are and how to strengthen and review their advocacy activity.

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In view of establishing an effective advocacy framework, an AMS should consider conferring the following **attributes**:

- An advocacy mandate and related powers to the CA;
- Competition advocacy roles and powers between different parts of government, in particular before the introduction of competition law and the establishment of a CA.

In turn, the CA should, where resources allow, establish a competent unit for advocacy and create links with the CA's communication and enforcement units and develop the following **core competencies**:

- Analyse and identify the AMS's advocacy objectives and needs; set out an overall advocacy strategy (e.g. a one-to-three year strategy); establish work priorities (e.g. identifying priority actions, sectors or stakeholders);
- Identify and liaise with all relevant stakeholders (beneficiaries and partners of advocacy initiatives), establishing regular communication channels;
- Elaborate specific action plans based on: the overall strategy; the specific AMS's advocacy needs; relevant national and international best practice and experience;
- Regularly assess the impact of advocacy undertaken to date.

3.1 Understanding advocacy

3.1.1 Understanding advocacy in general

Rationale

There is no single **definition** of competition advocacy. The ICN defines advocacy as those activities conducted by the CA related to the promotion of a competitive environment by means of non-enforcement mechanisms. Such mechanisms are implemented mainly through the CA's relationships with other governmental entities and through increasing the public's awareness of the benefits of competition. UNCTAD refers to advocacy as those activities which seek to influence restrictive structures, costly regulation enactments and business models which restrict competition in the market.

In principle, advocacy has a wider scope than awareness raising (or so-called "outreach"). It actively promotes a competitive environment through activities aimed at influencing public and private behaviour.

Before engaging in advocacy's activities, AMSs and their CAs should understand and define advocacy's basic **objectives** by asking themselves the question: *advocating to what end?*

These are:

- Creating a competition culture by: building consensus amongst stakeholders; discouraging anti-competitive practices; favouring self-compliance in the business community; and building up the CA's reputation;

- Supporting competition policy and in particular addressing publicly-approved restrictions of competition (for instance, persuading public authorities not to adopt unnecessarily anti-competitive measures or to withdraw such measures). This objective is crucial for those sectors which are not specifically covered by (or are exempted from) competition law prohibitions and also for those public policies excluded from the scope of competition law.

A clear identification of the objective will help determine stakeholders, processes and appropriate tools and evaluate advocacy's impact. The objective could be *broad* (e.g. training judges in competition law and economics) or *issue-specific* (e.g. reforming the regulation of professional services).

When engaging in advocacy's activities, AMSs should convey a clear message highlighting the **benefits** of competition and the need for CPL: basically, ensuring markets work better, so that citizens have access to newer, better quality and cheaper goods and services (§ 1.1.1 in Part I).

Advocacy **activities** are varied (including information, advice, training, promotion) and target different types of stakeholders (such as government, businesses, consumers). Advocacy **tools** are numerous and vary (or may be used differently) according to the activity and recipients. For example advocacy tools include announcements and press-releases, conferences, various kinds of publications (from thought-provoking comic-book tools to complex market analysis) (see § 3.2 below).

Advocacy is distinct from enforcement. Nonetheless each AMS and its CA must understand advocacy should not be separated from enforcement as competition enforcement and advocacy are complementary activities for the CA.

Advocacy favours awareness of competition law and self-compliance, which facilitates enforcement. In turn, advocacy actions are effective only where the CA has built a reputation through a credible enforcement record: such a reputation "*will be built largely upon its record in enforcing the competition law, and this reputation will significantly affect its influence as an advocate in other forums*" (OECD 2004). Once a CA has a credible enforcement record, the mere fact of making the CA's enforcement activities public significantly raises public awareness and support.

Balancing enforcement and advocacy is fundamental for an optimal use of the CA's resources.

Advocacy mandate and powers

Advocacy should primarily be entrusted to the CA. The CA is a specialised agency and is best-placed to identify and design solutions to competition problems. It is also less subject to regulatory "capture". However, other public or private entities can be tasked with advocacy functions or activities where appropriate. For example, such a situation arises:

- Before a CA has been established, as is currently the case with a few AMSs. Advocacy functions are mainly performed by the government or governmental entities. It is recommended that the competition advocacy mandate and powers are clearly attributed to identified government departments;

- Where a CA performs advocacy activities in partnership with other public or private entities, such as public authorities (the government, sectoral regulators, judicial

authorities); private entities (consumer and business associations, law Bar associations) or academia;

- Where the law attributes advocacy roles to specific entities. For instance in India a National Competition Committee (separate from the CA) has been established to instruct ministries and review laws under a competition assessment framework. In certain circumstances the government may be more willing to follow advice from an advocate independent of the CA.

The RCC Guidelines refer to the CA as the main “advocate”. Nevertheless, AMSs should be aware that advocacy activities can be performed by other institutional "actors", in cooperation with, or independently from, the CA.

Advocacy is a crucial task for a CA. Advocacy competencies (powers) should be clearly attributed to the CA through a strong **mandate** codified (entirely or in part) in the competition law or set out as the CA’s general mission. A CA should be granted formal **powers** in connection with its advocacy activities. For example, these powers could include the ability to: compel documents, information or data; conduct sector inquiries; advise legislators in the law making process; act as *amicus curiae* in administrative and judicial proceedings. However, it is recommended that such formal powers are used sparingly. Such a step avoids unnecessarily burdening business. It also enables each AMS and CA to voluntarily cooperate and act as much as possible on the basis of persuasion rather than wide-ranging legal powers.

When attributing an advocacy mandate and related powers, AMSs should consider a number of challenges, including:

- Finite resources: resource constraints means the CA must prioritise and focus its attention on high impact issues. It must assess the likelihood of success before engaging in resource-consuming activities (see § 3.1.2 below);

- Establishing credibility: to achieve successful advocacy, a CA needs to appear effective and impartial and assume a multi-faceted role. It must demonstrate success in both law enforcement and advocacy efforts;

- Technical expertise: effective advocacy actions require a track record of sound competition analysis, insightful advice and a good understanding of sectoral specificities;

- Appropriate balance between enforcement and advocacy roles.

Each AMS and CA should understand advocacy opportunities may arise from different sources, including:

- Its own initiative, for instance through desk-top research (also conducted through the Internet) and inputs from government ministries and agencies, non-governmental organisations, international organisations and companies, research communities, on-line and off-line databases and journals;

- As a consequence of enforcement activities. This opportunity requires effective coordination between the CA’s enforcement and advocacy units;

- Through feedback/complaints from those (public or private) interested parties who bring competition issues to the CA’s attention.

In general, when conducting advocacy actions, each AMS and CA should:

- Develop *expertise*, by training its staff and engaging in a wide range of advocacy activities; grow a *reputation* for accuracy; consistently follow its advocacy targets; maintain (and show) impartiality and objectivity;

- Promote active *stakeholder participation* (for instance, inviting stakeholders to give their advice increases advocacy's effectiveness) and engage in *partnerships* with academic institutions, think tanks, regional/international organisations, other agencies. In particular, the academic world (including students) may be an accessible and efficient partner in the running of some types of advocacy activities;

- Tailor its *communications*: the CA should customise its message to each stakeholder: the "benefits of competition" message differs according to the stakeholder. Possible messages to convey to the most common stakeholders are the following: (a) achieving the best value-for-money (addressed to government procurers); (b) preventing competitors from colluding and access to suppliers being on fair terms (addressed to businesses); (c) lower prices and improved choice (addressed to consumers);

- Tailor *engagement methods*, making the best use of the available tools. Engagement methods depend on stakeholders and include: one-to-one meetings; written reports/recommendations; joint working on key issues; presentations to staff/senior boards/chambers of commerce; hearings; websites; promotional and informative material (e.g. magazines, posters, comics, videos) (see § 3.2 below);

- Act in a *timely* manner: the CA should endeavour to intervene (e.g. in providing advice) at the earliest possible stage. Such action increases the effectiveness of any advocacy activity;

- Employ a full range of *instruments*, also combining advocacy with other tools (in particular enforcement tools) and using a variety of communication channels. It is crucial that a CA ties-in advocacy with institutional strategy and enforcement activities and engages in partnerships with interested academic or other relevant organisations;

- Provide *added value*, i.e. provide new information, analysis or insight (which is compelling and/or newsworthy): advocacy is most effective when the CA engages in issues upon which it has expertise.

Using advocacy sources and materials

Advocacy is dealt with in Chapter 9 of the Regional Guidelines. Other internationally-recognised sources of information and best practices include:

- The OECD Competition Assessment Framework and additional material (www.oecd.org/);

- The ICN Advocacy toolkit and additional material in the ICN Advocacy Work Group (http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx);

- The websites of the competition law jurisdictions, such as:

- The CCS: http://www.ccs.gov.sg/content/ccs/en/Education-and-Compliance.html;
- DG COMP: http://ec.europa.eu/competition/consumers/index_en.html;
- The FTC: http://www.ftc.gov/opp/advocacy_date.shtm;
- The JFTC: http://www.jftc.go.jp/en/index.html;
- The ACCC: www.accc.gov.au/;

3.1.2 Advocacy in the AMSs' context

Identifying advocacy objectives and strategic issues

It is recommended that each CA sets out a clear advocacy plan, which sets out: the objective of its advocacy, the recipient stakeholders of advocacy actions, the processes and tools required to implement these actions and the challenges involved.

When defining advocacy's objectives, a CA should pay attention to:

- Selecting those suitable matters which are: (a) economically important and politically visible (focusing on a few big issues that really matter); (b) not resource-intensive (i.e. "quick wins"); and (c) likely to deliver real outcomes and successes;
- Being proactive: identifying and addressing policy issues at the earliest stage.

Based on the identified objectives, an advocacy plan should:

- Identify the key *stakeholder* (the recipients of advocacy action);
- Understand the underlying *processes and challenges* (what each stakeholder needs in terms of the advocacy activity). In particular, the CA has to set up a clear *engagement strategy* (including specific action items and timelines). This strategy will help reach the selected stakeholder target and address the underlying challenges; and
- Identify the most appropriate *tools* (i.e. the instruments to be employed towards the selected categories of stakeholders).

The CCS provides a good example of an *action plan template*. It identifies stakeholders, strategies, actions, the timeline and lead division/unit involved, and it is illustrated in the following example (based upon an elaboration from experts' presentations to the AEGC's WG-RCC):

Stakeholder Group	**Engagement Strategies**	**Actions/Programmes**	**Timeline**	**Lead Division/Unit**
Consumers and consumer associations	Promote a new competition law	Developing material (e.g. a brochure) on the benefits of competition law;	6 months	Advocacy unit

In principle, a well-defined strategy needs to target the local culture and legal environment and be politically achievable. It should promote effective interaction between the CA,

institutional organisations, the public (e.g. business and consumers) and the media. It should be based on an effective communication strategy and make best use of the resources available.

The New Zealand Commerce Commission (NZCC) has sketched a Guide to Engagement Planning including a concrete example of an advocacy strategy, which was presented at the 2nd AANZFTA-AEGC Workshop (see Annex II to the RCC Guidelines).

When establishing and strengthening advocacy activities, AMSs and their CAs should consider how resources (particularly budget and staff allocation) should be dedicated to advocacy.

In most cases it is difficult, for a variety of reasons, to provide a fair estimate of the amount of resources which are dedicated to advocacy. Advocacy activities and related expenditure are not always tracked as a separate category and resources dedicated to advocacy may vary over time. As a very general indication, advocacy activities do not exceed, in most cases, 10% of the available human resources or budget.

As a general indication, when allocating the budget, AMSs and their CAs should consider:

- Prioritising advocacy actions, focusing on high impact issues with significant likelihood of success;

- Engaging in partnerships with those stakeholders who are interested in developing teaching, compliance or other advocacy activities, such as academia, consumer and business associations, the Bar association, judicial constituencies (national organisations of judges or similar).

AMSs and their CAs should understand that advocacy activities should not be delegated and/or confined to a single unit within the CA. Instead these activities should be supported by the CA's management and shared, to a certain extent, by all staff members. This aspect is even more evident in a small CA, which will be unable to allocate dedicated resources to a separate advocacy unit or officer(s) and requires all staff devote part of their time and effort to advocacy tasks.

Identifying key stakeholders and appropriate tools

Advocacy targets different types of stakeholders. The CA should identify at the outset of its advocacy projects those stakeholders who are worth addressing. The CA should enter into a dialogue with them to understand their respective advocacy needs. The CA should seek to understand concerns, interests and channels of access for each stakeholder group and explore the most appropriate means to reach them.

The most relevant stakeholders include:

- “Internal” stakeholders: CA Board/Commission members and staff;

- The government and other public authorities;

- The judiciary;

- The businesses, their associations and private lawyers/legal experts;

- Consumers and civil society (e.g. consumer organisations; the general public; schools);

- The academic community;

- The media.

A CA should consider addressing all stakeholders, depending upon its objectives and resources, regardless of the stage of CPL development (see § 3.3.1 below). A CA should keep regular contact with its stakeholders to be aware of their perspectives and advocacy needs.

When mapping and prioritising stakeholders, AMSs and their CAs should consider the following factors:

- The object of advocacy and its specific needs, for instance: advocacy could be aimed at passing a competition law, creating a competition culture, increasing the effectiveness of enforcement, or favouring self-compliance. Each of these activities involves different stakeholders;

- The available resources: e.g. the need to concentrate on high-impact cases or easy wins, or the possibility to engage in partnerships with appropriate organisations.

Advocacy tools are numerous and include a range of diverse activities. A CA can innovate and experiment by using new ways to reach its target stakeholders at any given time.

Typically, different tools are applied to different categories of stakeholders. Most relevant tools can be listed within the following categories, together with the relevant stakeholders:

- Public campaigns in the media, through the Internet or via public events (e.g. conferences). These tools are particularly suitable for consumers, businesses and the media;

- Informative and promotional material (paper, electronic, audiovisual, gadgets). These tools are particularly suitable for consumers and media;

- Consultancy, advice, meetings and *amicus curiae* interventions. These are particularly suitable for institutional stakeholders, such as the legislature, the executive and sectoral regulators;

- Training and university courses. These tools are particularly suitable for creating and maintaining a network of experts (CA's staff, judges, business lawyers);

- Studies, research, reports, articles and publications. These are suitable for competition law experts and the media;

- Compliance programmes for businesses and their lawyers;

- Dedicated websites and databases, particularly suitable for consumers, CA's staff, judges and prosecutors, business lawyers and the media.

Given not every tool suits every stakeholder, the choice of a tool's appropriateness in a specific advocacy action depends primarily on the target stakeholder.

Similar tools can also be customised according to the intended stakeholder target. For instance, consultancy and advice to a legislator would focus on different aspects than consultancy and advice to the government or to a sector-specific regulator. Similarly, a consumer-dedicated website (or part of a website) would include different material to that of an expert-oriented website or database.

Section 3.2 below explains how to select proper tools for each stakeholder category.

3.2 Selecting targeted tools for each stakeholder

3.2.1 The CA as a stakeholder

The first advocacy stakeholder is the CA itself; both its board members and its entire staff. Part of advocacy activities should be dedicated to strengthening the CA's own institutional resources.

Internal advocacy activities consist mainly of:

- **Training programmes**: Such programmes are both general and practical, depending upon the recipient. General training activities are suitable for new staff and members (e.g. Commissioners). Practical training is more suitable for officers (in particular case handlers). These actions consist of training on: specific investigation/prosecution tools (raids, inspections, hearings, etc.); case studies; and case simulation;

- Activities aimed at developing **staff ethics and integrity** and **team building** activities. These activities are illustrated in § 1.3.4 above.

Strengthening the CA's resources is not a pure advocacy activity as it concerns the developing of the CA's overall skills and competences (as discussed in § 1.3.4 above).

3.2.2 The government and other public authorities

Public authorities, including the executive, the legislature and sectoral regulators are key actors in the development of CPL. Their importance arises from their influence on legislative reform and the implementation of competition-related legislation.

Advocacy activity towards the government and other public authorities should primarily be aimed at tackling unnecessary "public" restrictions of competition: such activity includes persuading public authorities not to adopt anti-competitive measures. Such advocacy is crucial for those sectors which are not specifically covered by (or are exempted from) competition law prohibitions and also for those public policies that are excluded from the scope of competition law. In providing advocacy to the government, a CA should highlight the least competition-distorting policy options and propose a careful balance between competition objectives and other policy objectives. At the same time, relevant, non-competition law public policy objectives other than competition should be recognised and may justify competition restrictions where necessary.

In principle, when engaging in intra-governmental advocacy, CAs should identify a competition objective that is politically and economically acceptable and map the political landscape, identifying allies and sceptics. Advocacy activities which are aimed at public authorities include:

- Providing **comments or advice to the executive or legislature** on current or proposed legislation or on current or proposed public policy and/or regulatory initiatives, including all competition-related and general laws and regulations with a market-impact. Advice and input could be provided with: (a) comments in public hearings; (b) reasoned opinions; (c) advice to government ministries and sector regulators; (d) competition assessments, to explain the costs and benefits of regulation; (e) reports, e.g. *ad hoc* (specific) reports on draft laws and regulations and/or general reports, such as an annual report (where the CA provides a wider overview of the existing legal framework and advises on possible or desired legislative changes);

- Engaging in **communication campaigns** informing the public about policy proposals (e.g. through press releases). It is important that such communication is linked to "competition culture" advocacy and builds public support (particularly by avoiding "naming and shaming"). Such communication should highlight the cost to consumers of the anticompetitive restriction. The lack of benefit to consumers of the anticompetitive restrictions could also be shown. When the likely costs and benefits of an anticompetitive restriction are known, policy makers (within the legislature and the executive) are more likely to act in consumers' best interest);

- **Educating institutional actors**, and in particular: (a) public officials by way of presentations, interactive training sessions, articles, information booklets, websites; (b) legislature (Members of Parliament) and judiciary, by way of targeted training;

- Producing **market studies**, which analyse the competition structure of the national economy or specific markets (selected on the basis of their relevance in the national economy). These studies should investigate and illustrate the functioning of the relevant markets, with reference to the products, the structure of the supply (actual and potential competition) and of demand, the characteristics of the industry, in view of identifying and proposing specific legislative or regulatory action (or inaction);

- Participating in **cross-government councils**, task forces, or groups and in **meetings, discussions, or consultations** with other government entities; and developing a relationship with institutional stakeholders (regulators, government ministries, state authorities, consumer authorities), to build political consensus. It could be useful to create an "**interface**" between the CA and the government/public authorities through regular meetings or liaison points;

- Providing **advice to sectoral regulators** on an *ad hoc* or permanent basis, based on laws or memoranda of understanding (as an example, see DoJ Manual – Chapter V Competition Advocacy, http://www.justice.gov/atr/public/divisionmanual/chapter5.pdf).

It is recommended that advocacy activities towards the executive and the legislature are established within a "**Competition Assessment Framework**" (the OECD Competition Assessment Toolkit offers an appropriate methodology).

In principle, a Competitive Assessment Framework involves the following activities:

- Selecting sectors for assessment (based upon their impact in the national economy);

- Analysing the competitiveness of those selected sectors by: (i) identifying the relevant markets and the competitors; (ii) examining the market structure, with reference to barriers to entry (natural, strategic, regulatory and policy, and gender-based barriers);

- Determining if government policies or institutions limit competition, particularly in State-owned enterprises, public procurement, regulated sectors, trade and industrial policies, unequal enforcement of laws and regulations, vested interests;

- Identifying anti-competitive conduct by firms in proposed or existing legislation, with relation to both horizontal and vertical issues and other market structure problems;

- Drawing conclusions and suggesting appropriate actions.

A briefing paper on the concept of a Competition Assessment Framework in the context of ASEAN's regional economic integration has been developed for AEGC with the support of the German Federal Foreign Office and GIZ. The paper was presented to AEGC on 17 November 2011.

3.2.3 The judiciary

Judges have a key role in applying and enforcing competition law. So specific advocacy activities targeted at the judiciary are recommended. Typically judges do not have much expertise or experience with the technicalities of competition law. The exception to this situation is where competition tribunals or equivalent sections are established.

Advocacy towards an independent judiciary has a limited influence. It is recommended that advocacy activities towards the judiciary are conducted with the support of, or in partnership with, the concerned judicial constituencies, such as national judges associations and similar organisations.

There are two types of advocacy activities that could be devoted to the judiciary:

- **Teaching activities**, i.e. training the judges on the principles and practice elements of competition law, including:

    - *Training programmes* on the principles, substance and procedures of competition law. The CA could implement such training with the help of academic institutions. It is important that training is conducted primarily by other judges (more experienced judges from the same or another jurisdiction) and it may be useful to keep a list of experts available for such training;

    - *Conferences and seminars* on various aspects of competition law. The CA could conduct such activities with other experts (including academics and practitioners) and with judges with competition law experience.

- **Support activities**, i.e. helping judges in the application of competition law on a regular basis, including:

    - *Amicus curiae* briefs or interventions: AMSs should consider granting their CAs the power to submit written observations to courts or (with the permission of the court and within the limit of national procedural law) oral observations in cases concerning the application of competition law. Established CAs maintain records of their intervention as *amicus curiae*: see, for instance, DG COMP (*http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html*) or the FTC (*http://www.ftc.gov/ogc/briefs.shtm*);

- *Collection of information* related to competition law and its application. Such information could include: legislative acts (including implementing measures; "soft" law and guidelines; and relevant international material); precedents (the CA's decisions) and case law. It could be collected and made available to the judiciary through dedicated databases, websites or similarly accessible platforms. The availability of information on competition law and its application would be of significant practical help for judges in adopting reasoned decisions in competition law matters.

Similar advocacy activities should be addressed to Public Prosecutors who are involved in applying competition law.

Contrary to the judges, who are necessarily involved in the application of competition law (as adjudicators in an adversarial judicial model or in any case in the framework of appeal proceedings against the CA's decision), Public Prosecutors are involved in the application of competition law only in specific instances. For example where the CA is based on an adversarial judicial model (see § 1.2.1 above) or in those instances where competition law foresees criminal sanctions should be applied by criminal courts according to the national criminal procedural rules.

Additional advocacy activities suitable for prosecutors include:

- Training on issues such as investigative tools, due process principles, rules on evidence;

- Cooperation with the CA when national competition law grants the CA a role of cooperation or support to the prosecutor or when the CA investigates a case to be brought to the prosecutor's attention.

3.2.4 The business community and the legal community

The business community

The business community (businesspeople, their businesses and trade associations) is the primary target of competition law prohibitions and is a privileged target of advocacy activities. Advocacy activities for the business community should favour **self-compliance**. A competition enforcement system is effective only where most of the stakeholders voluntarily comply with the law.

The CA should communicate to the business community that competition law not only imposes constraints and threatens punishment but also enables fair competition as a means of redress against competitors' anticompetitive practices, and so increases business opportunities.

Business community advocacy necessarily depends on the stage of development of the competition enforcement system.

In the initial phase, **awareness-raising campaigns** can help provide a basic understanding of the (new) competition law and its implications. Awareness-raising campaigns may also help inform businesses of new law-related developments during a more advanced phase (e.g. with the introduction of merger control or a leniency programme).

While all business sectors should be subject to appropriate advocacy campaigns, the CA could consider prioritising its efforts towards those industries where the most serious competition problems are likely to emerge. In particular, specific focus should be given to businesses in newly liberalised sectors, e.g. in those industries which were protected from competition as a legal or *de facto* monopoly and have recently been or are about to be liberalised and face competition.

Once an effective enforcement system is in place, it is in each business's own best interests to develop an appropriate **compliance programme**. Such a programme establishes the specific framework, internal to each company, for dealing with competition law in daily business management and in specific situations (such as CA investigations). Such programmes should favour self-assessment (i.e. the companies, their executives, staff and lawyers evaluating their actions under competition law) and seek self-compliance. Once the CA has achieved a significant enforcement record and presents a credible threat against competition law infringements, businesses are likely to autonomously develop compliance programmes (internally or with the help of their lawyers or business associations).

A significant incentive for self-compliance in all stages of competition law development is the **transparency and publicity** of the CA's enforcement activity. The CA should publicise all relevant information about its activities and in particular:

- All relevant *legal acts*, as well as any guidelines and interpretative documents: this information includes the national competition law and implementing legislation, as well as the provisions applicable at the international level (such as bilateral and multi-lateral cooperation agreements and Free Trade Agreements (FTAs), in particular within the framework of the ASEAN);

- Its *decisions* and (within the bounds of confidentiality) any other information about *pending cases*.

The legal community

Businesses' own **lawyers** (both those in private practice and in-house) should also be recipients of advocacy activities. Lawyers have a key role in advising business and should be aware of the risks and opportunities of competition law. Advocacy activities towards such lawyers should be aimed in particular at:

- Recommending the introduction of specific courses in competition law and procedures in appropriate University and Master's degree programmes;

- Recommending legal constituencies (in particular, the national or local Bars) dedicate resources to practical training: developing such lawyers' ability to advise upon compliance and run compliance programmes for their clients;

- Developing cooperative platforms between the CA and the national or local Bars. More generally, it is advisable that lawyer-focused advocacy activities are conducted with the support of, or in partnership with, the relevant constituencies, such as the national or local Bars or other lawyers' associations.

3.2.5 Consumers and civil society

Consumers – and more generally civil society – are, by definition, the main beneficiaries of competition law enforcement. Therefore, a CA should be interested in consumer education.

In principle, when engaging in advocacy towards the public, a CA should:

- Target the *audience*: identifying relevant stakeholders or groups;
- Develop *educational programmes*: illustrating the benefits of competitive markets (possibly by way of local examples) and the role of competition law;
- Be *open* to the public: make the CA and the law accessible, for instance through: telephone "hot lines"; brochures published in laymen's language; annual reports; regular communication with the media; speeches and similar activities. It is also important that the CA balances openness to the public with *confidentiality* (in particular guaranteeing business secrets and the reputation of the companies involved in such investigations).

More specifically, there are a significant number of possible consumer-oriented advocacy actions.

Advocacy towards consumers should be aimed at informing them about what CPL is and what benefits it brings: in short, newer, better quality and cheaper products. Understanding such benefit is indispensable in creating public support favouring the CA's intervention and spreading a competition culture throughout the country.

It is also important to inform consumers of the rights and opportunities a competition enforcement system offers and to motivate them to enforce their rights both by way of complaints to the CA (which is better informed about anti-competitive practices) and through private enforcement of competition law (which complements the CA's public enforcement).

At the same time, consumers should be made aware that their active behaviour (e.g. comparing prices and reacting to price differences; changing suppliers when more convenient) influences competition and helps competitive markets produce the expected benefits.

The tools used for consumer-oriented advocacy activities are varied. The most widespread include:

- The publication of **promotional and informative materials** (brochures, magazines, audiovisual content, or other items);
- The organisation of **media campaigns** through TV, newspapers and the Internet;
- The organisation of **informative meetings and discussions** such as in schools or in public events. An example of such an event is the National Competition Day introduced in various countries and, as from 2012, in the Philippines;
- The establishment of a dedicated **website**, or a part of the CA website for the general public, which is easily accessible and user-friendly. It should inform consumers of both the benefits and opportunities of competition law and the CA's activity. It will facilitate contacts with the CA to provide general feedback or to lodge an antitrust complaint.

Advocacy activities could be conveniently organised through other relevant public or private institutions (such as schools, consumer protection agencies and consumer organisations) and also within the framework of more general public education campaigns.

Advocacy campaigns are a particularly widely-used tool in this respect. Advocacy campaigns vary considerably according to their objectives and national legal context. In principle, a CA needs to go through the following steps to implement an advocacy campaign:

- Identify the issues to be addressed by understanding the problem;
- Identify the stakeholders and define a clear message to be conveyed (i.e. what the campaign is about) based upon the campaign's objectives and intended outcomes (i.e. what the expected results are);
- Identify possible partners, likely allies and opponents and figure out how they will support/reject the effort;
- Design a workable and flexible campaign strategy by identifying responsibilities and timeline (who does what and when), resources and assets (people involved, financial resources, facilities and other assets, the tools to be employed);
- Define the evaluation criteria by identifying indicators and measures of success (e.g., review records; interviews) and indicating how the results will be analysed;
- Implement and evaluate the campaign.

3.2.6 Academia

AMSs should recognise academia is a privileged channel for building up specialised competition law knowledge. Such expertise is beneficial as it helps build a constituency of experts who can support the system of competition law and make it work more effectively at all levels.

As well as being a *target* of advocacy activities, academia could potentially be a privileged *partner* of the CA in developing advocacy activities for other stakeholders (e.g. the judiciary, the business community, lawyers and consumers).

Academic-oriented advocacy activities include:

- Developing *co-operative platforms* between academics and the CA;
- Designing and implementing specific *university courses* on competition law, policy and economics (in Japan, the FTC also provides antitrust courses for junior and senior high school students);
- The promotion of *articles and publications* on competition matters;
- The organisation of *conferences* and specialised events.

In particular AMSs should favour establishing *departments dedicated to competition law and economics* (e.g. in the law faculty and in the faculties of economics and political science or as an inter-disciplinary faculty). Such departments could run graduate and post-graduate courses and additional educational programmes in CPL for the benefit of all stakeholders.

3.2.7 The media

The media has a clear role in spreading the CA's outreach programmes to key groups, and publicising laws, regulations, case law and practices. It also plays an important role in creating a competition culture by ensuring the goal of adequate competition enforcement is perceived as a relevant outcome for society. Competition enforcement should be seen as compatible with the AMS's culture and perceptions and not as having been imposed or imported.

Establishing productive relations with the media is recommendable. It is helpful if the CA establishes its own specialised *communication unit*.

A specialised unit would acquire the necessary expertise and competence to deal with the media and to promote the CA's messages to the general public in a professional and effective manner. A communication unit is generally responsible for the CA's relations with the external world and it is not necessarily integrated with the units or department dealing with advocacy in general.

All major jurisdictions, as well as the longest-established ASEAN's CAs (e.g. Indonesia and Singapore) have an established communication department or unit.

When establishing a communication unit it is important:

- To employ journalists and/or communication or media experts;
- To ensure close cooperation between the communication unit, the enforcement units (in particular the case handlers) and the advocacy unit.

Together with a communication unit, a CA should establish a *communication strategy*. It is particularly helpful establishing "defensive" and "promotional" communication practices (i.e. justifying its punitive interventions and informing of the benefits of its action) by way of news releases, press conferences and speeches.

It is recommended practice to introduce any new piece of legislation (including "soft" law and guidelines) by way of a **press release** explaining the content and substance of the development and setting the right tone for the media. For the same reason, it is equally important to issue a press release of all (or at least the main) enforcement decisions and possibly also the opening of important cases. Such a step serves both the purpose of explaining the meaning of the CA's action and, from a "defensive" perspective, justifies the CA's action towards the business community.

An effective press release should be written in simple and media-friendly language and should:

- Highlight the object of the action (new legislation, decision, etc.), its main content, its justification, and
- Provide information about the general context in which the action takes place and the contact points for further information.

3.3 Strengthening advocacy

3.3.1 Matching advocacy with CPL development stage

As mentioned (in § 3.1.2 above), a CA should address all stakeholders, within the limits of its objectives and resources, regardless of the stage of CPL development.

It is true that during certain development stages some stakeholders are of crucial importance for CPL development. For instance:

- When first introducing or reviewing the law, adequate resources should be spent in advocating the benefits of competition law with the legislature;

- When implementing the law, it is crucial that businesses are subject to adequate advocacy action to become aware of the law and responsive to the CA's enforcement action. At the same time, it is crucial that all actors involved in implementing the law (e.g. CA's internal stakeholders, judges, business lawyers) are made aware of, and trained in, the law and its procedures;

- When the CA has reached a good level of enforcement and a competition culture is sufficiently widespread throughout the AMS, advocacy activities should preferably target government-induced distortion of competition, in the context of a competition assessment framework.

AMSs and their CAs should be ready to address these challenges with effective advocacy activities.

However, these initiatives do not limit the range of advocacy actions which could be applied in such circumstances. In particular, during all stages and processes adequate resources should be spent in gaining public support and involvement.

In general, it is often not feasible to prioritise stakeholders in principle by the different stages of development. It is the responsibility of the AMS and its CA to identify the specific objective and needs of advocacy action and establish the priorities, with reference to the national institutional and legal framework, the AMS's economic and industrial structure, it's CPL framework and the available advocacy resources.

3.3.2 Best practices on matching advocacy

Advocacy activities need to be planned and customised according to the specific needs of a country and have to pursue their object consistently over time. The following paragraphs provide a summary of best practice experiences discussed by the AEGC's WG-RCC and the experts in the course of the project.

Japan: Long-term advocacy strategy

Japan is an interesting example of the implementation of a persistent long term advocacy plan. The main features of this plan were as follows:

- Identifying the problem: while the Antimonopoly Act had been introduced already in 1947, a significant number of exemptions (up to 1079) were introduced during the

1950s and the 1960s. The JFTC had very limited scope to make competition work in Japan;

- Envisaging advocacy action: following an OECD recommendation on the need to reform government regulation and antitrust exemptions, the JFTC produced reports on the country's regulated sectors, recommending abolishing antitrust exemptions and government sector-specific regulations. The government introduced a "Deregulation Action Plan", stating that most antitrust exemptions should be repealed;

- Selecting and employing adequate tools: the JFTC established a number of advocacy channels towards the government, including:

  - A sector study on regulated and antitrust-exempted industries, based on fact-finding surveys;

  - An Expert Council "Study Group on Regulation and Competition Policy";

  - Joint guidelines for liberalised industries with sector regulators;

  - Consultation with sectoral regulators to adopt more pro-competitive regulation in the process of drafting policies.

- Producing pro-competitive outcomes and follow-up actions: the outcome of was successful, as the number of exemptions decreased dramatically (down to 28 in 2011) and, where exemptions were maintained, a prior consultation system with the JFTC was introduced. Also, the government introduced competition assessment on a trial basis, granting the JFTC the role of assessing the competition evaluation carried out by other ministries.

Brazil: building public consensus

Brazil provides an example of advocacy action aimed at winning consensus through the public. The main features of this action were the following:

- Identifying the problem: competition law was of little use due to an economic model based on price controls and import substitution. There was a perception amongst the public (consumers in particular) that controlled prices were fair prices and would be better than prices under a competitive environment;

- Implementing parallel actions towards different stakeholders, in particular:

  - Media: two out of the three Brazilian CAs began writing several articles in the largest newspapers (the CAs were also frequently quoted by journalists) and all CAs started to issue newsletters and holding press conferences to announce important decisions on relevant cases (which increased journalists' knowledge and in turn improved the quality of reporting to the public);

  - Business and public: a multidimensional campaign was launched in 2010 against bid rigging in anticipation of public tenders relating to the 2014 football world cup and 2016 Olympic Games. The campaign highlighted the negative effects of cartels on consumers; anti-cartel advertisements were placed in four of Brazil's major airports; an annual "Anti-Cartel Day" was established;

- Academia: Antitrust was included as an undergraduate course in economics degrees and several graduate courses on antitrust were introduced. A new National School for Competition Defence will be established from 2013: the School will train government personnel involved in competition cases (federal and state public prosecution offices, judiciary, federal and state police);

- Government: as from 2012 a new competition law underlines the Secretary for Economic Monitoring's government advocacy role: s/he will have an active role in studying and issuing opinions to regulatory agencies on the competitive impact of their policies.

Zambia: advocacy towards the legislature

Zambia is an example of successful advocacy towards the legislature aimed at improving the quality of CPL. In the case at issue, the CA acted by:

- Identifying the problem: the legislature had very little awareness of the existence and the benefits of the Competition Act and the CA;

- Implementing a strategy of active engagement: following a seminar for the Members of Parliament on the Competition Act, the CA engaged in a resource-intense advocacy activity, aimed at raising awareness on CPL within the Parliament, by way of meetings, seminars, letters;

- Producing pro-competitive outcomes: by contrast to what had happened with the introduction of the Competition Act, the CA had more interaction with the legislator during the revision of the law. The CA was engaged at an early stage of the review process and could share information on competition principles and refer to international and regional material. This engagement improved the quality of the revised legislation.

United Kingdom: informal advocacy

The United Kingdom provides an example of informal advocacy in a specific sector. In brief the CA:

- Identified a specific competition problem: the government's proposal for a voluntary industry agreement concerning energy efficient light-bulb raised concerns about potential co-ordinated behaviour;

- Set out a specific strategy: informal advice was directed to Ministry officials through face-to-face meetings and emails. The officials were advised about the process of brokering voluntary agreements. The meetings held with industry representatives started with statements about not breaching competition rules;

- Produced pro-competitive results: the CA published a report analysing the potential competition impact of environmental standards, whose usefulness went beyond the specific case, providing a basis of analysis to support future advocacy efforts in the area of product standards.

South Africa: prioritisation of advocacy activities

South Africa provides an example of prioritising advocacy activities without significant prior enforcement experience. The CA:

- Identified the problem: the CA, since its creation, had mainly focused on merger cases, and so its enforcement action had been slow;
- Engaged in a strategic planning exercise by proactively prioritising sectors and cases;
- Selected the appropriate tools to identify priority sectors, by way of consultation with stakeholders. The CA identified the following sectors: (i) food and agro-processing, subject to possible cartels in the bread and milk markets; (ii) infrastructure and construction, subject to bid-rigging; (iii) intermediate industrial products, subject to abuse of dominance in the fertiliser market; (iv) financial services, through a banking enquiry;
- Achieved significant results: the CA's activity shifted from reactive merger control to proactive enforcement and advocacy. Advocacy and awareness campaigns reached a high impact, in particular by training procurement officials in uncovering and preventing bid rigging, and resulted in positive inputs to draft legislation.

3.3.3 Reviewing the effectiveness of advocacy actions

Evaluation of previous actions is crucial to strengthening the CA's advocacy competencies. A CA should conduct a regular evaluation of its advocacy activities.

The success of a CA's advocacy activity can be measured on the basis of various quantitative or qualitative **indicators**, including:

- Stakeholders' feedback, such as government officials, businesses and interested consumers;
- The number of accepted recommendations and/or relative number of accepted recommendations relative to submitted recommendations;
- Detectable changes in markets or market behaviour resulting from advocacy activities;
- Media coverage and Internet exposure; and
- Knowledge assessment awareness of CPL issues by the general public or relevant stakeholders.

In general, there are no preferred sources of evaluation. It is for the CA to choose the most suitable form, in view of its competencies and resources. As a rule of thumb, it is not necessary to follow strict "scientific" methods of assessment: close contact with stakeholders is helpful in most cases. For instance, the weight policy-makers place on the CA's analysis and advice is in itself a measure of the quality of the CA's advocacy activity towards the executive and legislature, and other public authorities. Similarly, an increased level of self-compliance is a measure of success of the CA's advocacy activity towards business.

There are different **tools to conduct an evaluation**, including:

- *Self-evaluation*: Evaluation may be conducted by the CA alone, using its internal resources. While it is resource-consuming and not always suitable for less equipped CAs, it improves the CA's awareness of the effects of its advocacy action and can help better target future activity;

- *Stakeholders' evaluation/feedback*: Evaluation through stakeholders' feedback may be conducted by way of evaluation forms or formal or informal dialogue. Feedback from stakeholders may be not entirely reliable, as it reflects the interests and preferences of the various categories of stakeholders. However, this method is extremely important, as it allows the CA to better understand stakeholders' perceptions and needs and helps build trust and cooperation between the CA and its stakeholders. Also it increases the public's awareness of competition law and creates public support for the CA's activity;

- *Experts' evaluation*: Evaluation may also be contracted out to experts, such as communication experts and economists. This form of evaluation may be useful in more complex activities, where the results of advocacy are difficult to measure. Yet, it requires a certain amount of financial resources;

- *Surveys or public opinion polls*: this is a relatively inexpensive tool, although the quality of the feedback is not always satisfactory.

The effect of advocacy activity is often measured through a questionnaire. There are no recommended standard forms for questionnaires, as they vary considerably according to the evaluation's object. Some examples of questionnaires or surveys about advocacy activities can be found in the following documents:

- ICN (2009) *Report on Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy*;

- DG COMP (2010) *Stakeholder Survey*;

- OECD (2005), *Evaluation of the Actions and Resources of the Competition Authorities*;

- OECD (2007), *Roundtable on Evaluation of the Actions and Resources of Competition Authorities -- United States*.

3.4 Engaging in regional advocacy

The AEGC has set up a Working Group (WG) on Developing Strategy and Tools for Regional Advocacy. The WG on Regional Advocacy is responsible for (i) the promotion of awareness on the need for competition policy, the contribution of effective CPL to economic trade, investment, competitiveness, and development; (ii) the exchange of information among AMSs on advocacy; and (iii) the identification and implementation of projects and activities that would support AMSs in developing advocacy strategies, approaches and programs for CPL.

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PART I: INSTITUTIONAL BUILDING

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