



International  
Competition  
Network

## Competition Policy Implementation Working Group

### Subgroup 2 Lessons To Be Learnt From The Experiences Of Young Competition Agencies

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## I. INTRODUCTION

The challenges faced by young competition agencies as they seek to enforce competition law are well debated. There is however, no definitive body of work on the specifics of these challenges, and the approaches adopted by newer competition agencies to address them. It is expected therefore that the results of this survey alone should prove instructive to young agencies. It should also provide the older, more developed agencies with some additional insights that may facilitate future aid and assistance to the young agencies.

The report presented here simply catalogues the results of the survey and hence follows their design. The challenges as described or the measures adopted to address them are not critiqued. They are however compared in method and where possible in regard to their success. The immediate goal of the report is simply to describe the results of the survey, in the hope that the young agency is made aware of:

- a) The type of challenges other young agencies are experiencing, and
- b) The measures these agencies have applied to address these challenges.

In so doing the young agency therefore can identify from within this body of information, measures, or parts of measures that it can utilise to tackle its own comparable challenges.

The report outlines those concerns which affect the ability of young agencies to enforce their respective competition laws efficiently. The challenges identified tend to be those which are most common across jurisdictions, and which tend to be more enduring and difficult for young agencies to overcome. These challenges are categorised as generally being related to inadequate legislation, limited human and capital resource capacity, untrained judiciary, incoherent or inconsistent regulatory policies, and a vacuity of a competition culture.

The report also goes on to identify the various measures taken across the surveyed countries to combat and overcome these challenges. In assessing the responses to these

challenges, of immediate note is that the methods used to address them have tended to be very unique and innovative across countries. It is therefore in this context that competition agencies, younger and older can benefit from the knowledge of the initiatives taken by the various countries to manage their respective concerns and to see if these methods can be applied or tailored to suit their own immediate circumstances.

We have in this report attempted to address in no particular order the most common challenges identified by these emerging agencies. Each challenge is addressed while sharing the specific experiences of the individual countries. After identification of the challenges, the various measures adopted by the responding countries to address the particular challenge are set out. The report then attempts to assess the usefulness of the various approaches to the handling of these challenges and the success of these approaches.

**Background**

Following the last ICN Conference held in Bonn Germany, 2005 it was agreed by the members of the Working Group on Competition Policy Implementation that a comprehensive analysis of the challenges faced by young competition agencies would be useful in being able to identify and coordinate solutions to such challenges. It was against this background that the project “*Lessons to be learnt from Experiences of Young Competition Agencies*” was conceived. In developing the appropriate design to achieve the project objectives it was recognised that:

- The challenges faced by the young agencies are relatively similar in nature and can best be identified by assessing the experiences of a sizeable number of similarly developed agencies.
- The approaches used to address the problems facing the young agencies are best identified through the actual experiences of agencies which have already or are undergoing similar challenges, and which can describe the measures that they have successfully implemented to address them.
- In many cases, mistakes were and are being made which can be avoided by having access to practical strategies that have proven successful, and with the knowledge of the relevant country(s) which have shared their challenges, and with whom they might be able to communicate in arriving at their solutions.
- In addition, there are several countries which have not yet established competition regimes, but which are in the process of doing so and can benefit from experiences of other competition authorities.
- The approaches used to address the very many difficult challenges facing young competition agencies need to be more accessible to them.

To satisfy this objective it was agreed that a qualitative survey of all young competition agencies would be the best way to try to solicit the necessary information to carry out the required analysis.

### Methodology

In an attempt to facilitate the survey and gather the information discussed above, it was proposed that an open-ended questionnaire be developed and circulated to all young competition agencies i.e. those agencies fifteen (15) years or younger, to provide a framework for exploring their experiences. The questionnaire was kept open-ended to allow for ease of completion, as a detailed questionnaire would have been expensive given the need to be translated into several languages. Furthermore, competition agencies are already burdened by heavy workloads and may prefer not to have to complete another detailed questionnaire.

The survey was designed to gather information from young competition agencies on the most difficult challenges they faced, specifically identifying what they could have done differently, and what measures they applied in allowing them to overcome their challenges.

The Subgroup proposed that competition agencies prepare the responses internally and send the written responses by e-mail to the subgroup co-chair, rather than the sub-group organize oral interviews which may be time-consuming and costly for the responding agency. In any event, where an agency was desirous of facilitating a response by other means whether by oral interview, fax, or post, efforts were made to accommodate such.

The questionnaire prompted the responses of agencies by listing those challenges which in the past have proven most difficult to overcome for competition agencies. It was pointed out nevertheless that agencies also identify and include those difficulties not within the list of areas identified.

Agencies were advised to treat the survey as an item to be placed on the agenda of a routine staff meeting. The results of the meeting's discussion would then be written up by a staff member. The intention was to make the survey as easy and non-intrusive as possible, so as to minimize the burden placed on the agency in responding to the request for information. It was hoped that this approach would have provided the environment

for brainstorming the experiences of the agency, thus facilitating a prompt and thorough response, while increasing the overall response rate.

Information compiled prior to the start of the exercise suggested that they were nearly 60 countries who fit into the criteria of having established an agency within the past 15 years or younger. There were however a number of agencies whom we were unable to contact because of, limited contact information, and language barriers.

The project was officially launched on November 14<sup>th</sup> 2005. The questionnaire was sent via email to approximately 47 agencies all of whom are fifteen years and under. A Report on the Project as well as the 'Request for Information Form' was posted on the ICN website and the link was emailed to all potential participants. Telephoning proved to be more successful in soliciting responses, by the middle of March, 2006, twenty (20) responses were received.

The countries responding to the survey were, Armenia, Barbados, Belgium, Bulgaria, Costa Rica, Croatia, Estonia, Israel, Jamaica, Jersey, Jordan, Netherlands, Panama, Peru, South Africa, Switzerland, Tunisia, Turkey and two other agencies - one in Central Europe and one in South-western Europe who requested that their specific identities be kept confidential.

The information collected was collated based on the type of challenges identified by the staff of the subgroup co-chair and along with the full responses (giving consideration to confidentiality factors where requested) were sent to two academics - Professor Andrew Gavil (Howard University School of Law), and Dr. Michael Nicholson (IRIS, University of Maryland, Competition Adviser to the Armenian Competition Authority). Dr. Nicholson and Dr. Gavil assessed the information submitted and prepared a draft report along with general comments which they submitted to the subgroup co-chair. The subgroup co-chair was then responsible for the final editing, coordination and write-up of the final report presented here.

## **II. ANALYSIS OF ENFORCEMENT CHALLENGES**

The final report prepared by the co-chair of the subgroup now presented here, sets out in no particular order the most common challenges identified by these emerging agencies. Each challenge is addressed while sharing the specific experiences of the various countries. After identification of the challenges, the various measures adopted by the responding countries to address the particular challenge are set out. The report then attempts to summarize the success of the various approaches. No critique was done of the agencies in their assessment of what constitutes a pressing challenge or of the methods they have introduced or are seeking to introduce to address the identified challenges.

### **INADEQUATE LEGISLATION**

The similarity of provisions across jurisdictions suggests that several countries have borrowed heavily from the experienced nations in designing the provisions of their respective laws. The concomitant effect of this practice is having to now enforce legislation that does not properly address all of the realities of the jurisdiction they are called upon to regulate. In addition agencies have had legislation designed, and respective powers to investigate and prosecute certain practices assigned to them, without note having been taken of the challenges faced by other agencies in their attempt to regulate similar behaviour.

It is evident therefore that Competition policy often requires nuanced approaches in its application and direction. Most cases involve sophisticated analysis of producer efficiency and consumer welfare. There is rarely a “one-size-fits-all” policy that can be applied to competition policy within a single country, and this difficulty expands considerably when comparing legal statutes across jurisdictions.

### ***Failure of Legislation to address important anti-competitive conduct***

One difficulty commonly faced in regard to inadequacy of legislation is the extent to which the current legislation does not allow some agencies to address some forms of anti-competitive conduct which they believe routinely affect competition in their domestic markets.



The **Israel Antitrust Authority (IAA)** for instance found it challenging to determine the legal and economic framework for dealing with "Group Concentrations" (similar to "joint dominance" in the EU). Section 29A of its competition law refers to this topic, but the IAA does not have much experience in applying this section to specific cases. Recently, this issue has been of much interest, and the IAA is in the process of studying it and determining the framework for analysis.

**Peru** faces a number of weaknesses in its current competition legislation enacted in the early 1990s. With the current legislation, the authority cannot exert control over practices such as some predatory conducts and potentially anti-competitive mergers. Some of the markets in which the Peruvian agency, "Indecopi", has investigated price-fixing and abuse of dominance have recently become more concentrated because of mergers. The current law does not contain provisions for compulsory *ex ante* notification of concentration initiatives. Merger control is typically the kind of legislation incorporated into the competition law to anticipate market structures likely to constrain competition and adversely affect consumers and other competitors.

#### **Failure of Legislation to allow for effective enforcement**

Other countries had problems with provisions in their legislations which though addressing the more damaging forms of anti-competitive conduct, do not include the supporting provisions to effectively unearth and eliminate such conduct. Agencies indicated for instance that they were unable to impose fines, or to use particular powers to improve their ability to successfully investigate certain conduct.

Prior to 2003, the **Bulgarian Commission for Protection of Competition (CPC)** had no competency to use dawn raids in its investigations. In addition the CPC did not have legal authority to impose pecuniary sanctions during the period 1991-1997, which was a serious problem. The CPC only determined whether there was an infringement and the Supreme Administrative Court imposed sanctions.

The **Tunisian Competition Authority** has reported that private companies can be reluctant to introduce cases, as it is a small country where everyone knows each other. Companies prefer that the Authority introduce the case and conducts the investigation. Private firms may communicate the information they have but prefer not to appear in the case. The competition agency in Tunisia expects an increase of cases as it has now been empowered to start cases on its own initiative.

**Belgium's Competition Council** reported that its initial merger thresholds were very low, and as a result they saw more than 50 mergers a year, far more than they were able to handle. In 2004 they had to deal with approximately 70 mergers. Because of this investigating anti-competitive behaviour was almost out of the question. Belgium's Competition legislation has now been modified and the Council now investigates approximately 20 mergers per year.

**Armenia** has indicated that in conducting market research in regard to an investigation, the Commission needs to collect data directly from economic entities, other state bodies, and have full information on the target market. This process requires exact interactions between business community and legal society. The agency has indicated that one of its main challenges was its inability to collect certain information and evidence, including tax, customs and statistics, necessary for it to make a fair decision. In addition the Armenian authority indicated that businesses could conclude an oral agreement and the Commission would be powerless to find out and prove such behaviour.

The authority therefore felt it necessary to strengthen the competences and functions of Commission as determined by Law, to allow it to better enforce the law.

In the **Netherlands** undertakings and their advisers are familiar with the (Nederlandse Mededingingsautoriteit) **Netherlands Competition Authority (NMa)** and the Competition Act and they also know where the 'loopholes' are in the law. For instance, evidence is kept in private residences because undertakings and their advisers know

that NMa does not have the power to enter private residences. It is a challenge for NMa to close such 'loopholes' by asking the legislator for new powers.

The most difficult challenge facing the **Croatian Competition Agency** in the recent past was the harmonization of the Competition Law and bylaws with the EC (Acquis Communautaire) **Cotonou Agreement**, to bring them closer to the competition statutes of the European Union.

The **Jamaican Fair Competition Act** (FCA) allows its commissioners to investigate and hear matters in a quasi-judicial capacity. However, the Court of Appeal had no difficulty finding that the institutional structure of the Commission lends itself to a breach of the principles of natural justice.<sup>1</sup> This ruling has limited the agency's ability to bring cases before the courts and hence its ability to affectively enforce competition law.

#### **Measures adopted to treat the challenge of Inadequate Legislation**

The difficulties experienced with regard to inadequate legislation are generally the inability to prohibit particular types of anti-competitive conduct (e.g. merger control in Peru), or the inability to effectively enforce certain provisions, (e.g. Tunisia lacked the authority to undertake investigations on their own initiative). In most cases the measures adopted to address the issue of inadequate legislation have been amendments through parliament to directly insert or correct the particular provisions.

In **Jamaica**, appropriate legislative amendments are being considered to address the natural justice concerns, separating the role of investigation and adjudication into two separate authorities, but the process has been long and arduous and the timing is largely outside of the Commission's scope of authority.

In **Peru** the competition authority, having identified the need for revised legislation, has shaped and sponsored a bill intended to introduce some relevant changes into the competition law. This proposal contains an integral treatment of abuse of dominance,

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<sup>1</sup> See *Jamaica Stock Exchange v Fair Trading Commission*, CA 2001

but the main innovation of the law proposal is the inclusion of provisions to deal with mergers that are likely to adversely affect general welfare because they could eventually give rise to anti-competitive practices. The law proposal includes relatively high thresholds for a compulsory *ex ante* notification, so as to require notification only for those merger initiatives that potentially are likely to significantly lessen market competition. The law proposal has not yet been approved. It has been under debate for some time by the executive branch and it faces somewhat strong opposition from both the public and private sectors.

In the **Netherlands**, in addressing the legislative challenge of acquiring further powers to enable the NMa to detect cartels more efficiently and more effectively, the evaluation of the Competition Act was started in the autumn of 2001. The effectiveness and efficiency of enforcement of the Competition Act in the preceding three years (the Competition Act came into force on 1 January 1998) was reviewed. A bill is now before Parliament which aims to increase the effectiveness and efficiency of enforcement of the Competition Act.

The bill proposes extending NMa's investigative powers, including sealing, the power to impose higher fines for non-compliance with the obligation to cooperate, lifting the suspensive effect of administrative and judicial appeals against an interdict, the power to impose higher fines for infringements of the provisions in relation to merger control and the power to impose fines on a person who gives instructions to commit an infringement or provides leadership during the infringement.

**Bulgaria** has adopted a new Law on Protection of Competition (LPC) in 1998, which gives the CPC the right to impose pecuniary sanctions. In fulfilment of the EC recommendation on conducting more effective sanctioning policy, the Commission has adopted a Methodology on Setting the Pecuniary Sanctions and Fines under LPC, harmonized with the Community rules. In this, the Commission has introduced transparency on the sanction individualization criteria. After it has become effective, each decision establishing an infringement of LPC has a special chapter that

substantiates the amount of the sanction or fine levied as well as its duration and other liability attenuating and aggravating circumstances. This has resulted in pecuniary sanctions, envisioned under the LPC, ranging from BGN 5,000 to 300,000 (ca. € 2,500 - € 150,000), which in case of repeated infringement or non-fulfilment of the CPC decision, the fines shall increase from BGN 100,000 to 500,000 (ca. € 50,000 - € 250,000). This is considered a significant factor in preventing actions that have a negative effect on the competition. A new amendment of the Law on Protection of Competition is necessary in order to introduce turnover-related fines.

The last LPC amendment in 2003 introduced the possibility for the Commission to use its compulsory powers in collecting evidences when investigating cartels (Art. 9) or abuses of dominance (Art. 18). In 2004 the Commission adopted Procedural Rules on the implementation of Art. 41 (a) of LPC, regulating into details the way of conducting search (dawn raids), the seizure of proofs and the interviews, listing the persons who may take part in the search and seizure, as well as specifying the rights and duties of the persons searched. CPC has developed the so called "twinning light" small project, partnered with the Federal Cartel Service of Germany. The intent is training the staff to conduct dawn raids and inspections on the spot. As a result, the CPC is beginning to acquire experience with investigative tools such as dawn raids, but further improvement of both methods and legislation is necessary in order to increase their effectiveness.

The participation of the **Costa Rican Competition Agency (COPROCOM)** in international negotiations and forums related to free trade agreements and other events and regional seminars that have been organized by institutions such as UNCTAD, WTO, OECD, etc. has been an important achievement that is hoped to be maintained for the next years. Thanks to the international cooperation agreements that COPROCOM has managed in the last years with countries and institutions such as Spain, Chile, Mexico, Switzerland and lately World Bank and Canada, the agency has prepared a bill to amend the competition law in order to strengthen its facilities and expand its field of application.

The **Estonian Competition Authority** has had support from USA, Finland, EU Commission, France, Sweden, Germany, Denmark and UK. The agency reports that it would be almost impossible to establish competition policy in Estonia on the level it is today without the knowledge and experience of all these experts. The experts from all these countries provided assistance in drafting the first Competition Acts and secondary legislation, acted as lecturers at seminars and workshops on various competition topics (at first basic issues and later specific case law), gave advice on everyday cases, and hosted Estonian specialists in their home authorities. All these projects proved very successful; in addition to the direct assistance received during the projects, the agency has also maintained good relations with the previous experts and continued to use their assistance.

Estonia was of the view that it had been sufficiently successful in addressing its legal challenges, evidenced by its May 1, 2004 accession to the European Union. Its competition legislation is in constant development, but they have now achieved self-sufficiency with regard to drafting the necessary amendments. Competition issues are fairly well known in Estonian society and the country has developed its own case law on competition.

The **Armenian Commission** in addressing its concerns with regard to its restricted ability to collect information and to improve its enforcement capabilities has elaborated a draft law on amendments and changes to the Law of the Republic of Armenia "On the Protection of Economic Competition". They have since defined the concept and rules of notification to businesses, clarified provisions which define the abuse of dominant position, and determined rules of obligation for the submission of required information by businesses. Besides these amendments, the Commission within the scope of an anticorruption strategy continues to take appropriate steps on the legislative perfection of its tasks and functions.

On Government's legislative initiative, the mentioned proposals of the Law were adopted on May 4, 2005 and came into force on June 20, 2005. The Commission also

takes appropriate measures for long-term amendments on legislation of economic competition, in compliance with international advanced experience. In this case, the Commission has received consultative assistance from different international programs. Based on estimations of international expert and on its experience, the Commission intends to submit new package of legislative amendments in current year.

**Panama's competition agency** believes that modifications to its legislation will enable it to work more effectively, and the Courts could then indicate final decisions in less time and set the appropriate fines too.

The **Central European agency** in taking into account European and U.S. experience, has already proposed to its government the introduction of a leniency program which is considered as a key instrument for anti-cartel fight. Successive governments have been supportive of the agency initiatives, noting that the proposal for the introduction of a leniency program was well accepted. The proposal is expected to be approved in 2006. The Government is also receptive to any other adjustment which may be required as a result of the experience gained with the implementation of the 2003 competition law.

### Summary

It is generally recognized that over time, more mature agencies have been able to adapt their respective legislations to treat the more common modus operandi of the anti-competitive behaviour observed in their respective territories. As part of their learning curve newer agencies therefore must continue to review their individual legislations with each new experience to ensure that such legislations are effective and that they address the practicalities and peculiarities of their domestic business practices and industry circumstances.

Practically all agencies responding to the survey indicated that they were seeking to, or had over time incorporated certain amendments into their legislation. In effect one could argue that all agencies struggled at some point with inadequacies in their respective

legislations. The difficulties identified with specific legislation all however tend to reflect much deeper operational and procedural challenges.

In assessing the challenges reported, one recognizes that even within the grouping of young competition agencies, there are agencies that are still grappling with the need to have provisions in their legislation to enforce the most common anti-competitive behaviours. On the other hand there are young agencies that have had considerable experience in managing such activity and are now having to contend with more advanced challenges. For example Peru is seeking to sponsor a bill intended to prohibit predatory pricing, as well as introduce merger control regulation, in contrast Belgium's Competition Council and the South-Western European agency are reviewing their merger notification thresholds. Jamaica also in its struggle to develop legislation that would allow for the observance of the rules of natural justice, and like Peru is dealing with the very fundamental inadequacies in their legislation that could suppress their ability to undertake core anti-competition enforcement activities. On the other hand Bulgaria and the other young Central European agencies are reviewing their cartel enforcement capacity, by seeking to introduce leniency programmes, improving their ability powers to search and obtain information, improving their sanctioning policy and the their ability to conduct dawn raids. Both groups of nations are seeking to amend their respective legislations, but it is evident that those nations undertaking more fundamental corrections to their legislations, would do well to consider the experiences of their counterparts, and either incorporate or avoid the pitfalls that the more advance young agencies are presently encountering or have encountered. In effect those agencies now instituting merger control regulation for the first time would do well to, in advance, develop their notification procedures from the learned experiences of their colleagues, like Belgium, which had a threshold that created great difficulty for the agency.

Inadequate legislation can generally be remedied through changes to the inaccurate or incomplete legislation. Most agencies surveyed have indicated that they are in the process of either reviewing their individual legislations or currently having them amended. In several cases the time taken to have these amendments completed has been long as in Jamaica. It would be reasonable to conclude however, that the respective



amendments have been effective in correcting instances of inadequate enforcement provisions, and powers.

Several agencies in seeking to undertake revisions to their legislation (e.g. Estonia, Costa Rica), have already learnt from the lessons of their counterpart agencies, either by working with consultants and experts from international organisations, or by working with staff from mature agencies. This has been the approach taken quite rightly by most agencies seeking to make corrective amendments. It is hoped that a body of experiences as this provided here might add to the resources that young agencies can draw on to gain valuable lessons in seeking to overcome similar difficulties.

INCOHERENT POLICIES BETWEEN COMPETITION AUTHORITIES, REGULATORY REGIMES AND OTHER GOVERNMENT AGENCIES

One difficulty commonly reported by young agencies was the lack of cooperation and coordination of policy and effort with particular government ministries and other regulatory bodies in their attempt to enforce and promote competition. This problem appears to stem from the recent introduction of competition laws. In some cases the Competition law has been introduced without the requisite clauses to address conflicting prior legislation, or where the Competition law and other sector regulation have concurrent jurisdiction.

In **Jamaica** for instance, the only statute that recognises the Competition Authority or the Fair Competition Act (FCA) is the *Telecommunications Act of 2000*. This makes co-operation with other government agencies difficult. One result is that regulations are enacted without adherence to competition considerations, and business is conducted on behalf of the Government without due regard for FCA requirements.

In **Tunisia**, there is some inconsistency between competition policy and sectoral regulations. Laws and regulations that apply to some sectors (insurance, health, liberal services) may allow some practices that are incompatible with competition principles.

In **South Africa**, the competition statute has an economy-wide application regarding all competition matters. However, other acts that were passed prior to the Competition Act extend jurisdiction over competition matters to sectoral regulators. The upshot is that there is concurrent jurisdiction between the sectoral regulators and competition authorities in respect to many of the key 'natural monopoly' sectors - telecommunications, energy, airports, seaports and many other services. The concurrent jurisdiction model is fraught with challenges. Some of the jurisdictional problems were illustrated by the *Nedcor-Stanbic* case<sup>2</sup>, one of the first major cases to come up under the Competition Act. In short, some of the problems encountered in South Africa that are

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<sup>2</sup> 99Nov33

associated with concurrent jurisdiction include forum-shopping by industry players; duplication of resources; and inter-institutional conflict.

*Measures adopted to treat challenge of Incoherent Policies*

The measures taken to address this challenge have focussed largely on advocacy through negotiation, dialogue and lobbying with the relevant authorities (e.g. Jamaica, South Africa, Costa Rica). Other agencies have where it was possible been able to achieve legislative amendments that set clear standards and compulsory rules to govern the interplay between the Competition Authority and the other regulators.

The **Costa Rican Competition agency, COPROCOM**, in addressing this difficulty has been working with the Commission of Improvement of State Regulations in order to eliminate entry barriers or other regulations unnecessary for the effective functioning of the market and for the consumers.

In addition, COPROCOM has used its authority to give an opinion to make inquiries to the Constitutional Court or to the Office of the Government Counsellor (Procuraduría), to obtain a declaration of unconstitutionality in respect of rules that attempt to rig the competition process or are in violation of the principles of the Act 7472. The country is in electoral process, but the agency hopes to present for the consideration of the next congress (May 2006) through the Executive Branch, the bill of the Competition Act.

In **Jamaica** it is expected that an intensive communication strategy will seek to address this issue of coherence between the Competition authority and other regulatory agencies, as an important aspect of the agency's advocacy programme.

In **Tunisia** the last amendment of the law, in July 2005, addressed this issue. Now, before any new law or regulation impacting on the market is issued, it is compulsory to seek the opinion of the Competition Council. Moreover, the relationship between Competition authorities and regulators is addressed by the law. A positive impact is expected. The Competition Council is empowered to address competition issues in all sectors; and is expected to seek the opinion of other regulators before issuing its

decisions. A mechanism of information sharing and exchange therefore has been established.

In **South Africa**, a Memorandum of Understanding (MOU) is often drafted to affirm concurrent jurisdiction between the competition authorities and a sector specific regulator. This aims to ensure that an industry is not subjected to duplicative or conflicting intervention by regulators. The South African Competition Authority has entered into MOUs with the country's telecommunication regulator, ICASA, the Postal Regulator and the National Electricity Regulator.

In **Turkey**, certain practices of other government agencies which may distort competition might pose more risk than the practices of undertakings. Thus, it is particularly important that other government agencies have an awareness of the importance of competition. This problem was felt significantly during the early years of enforcement in Turkey, and it could be argued that the problem remains. Regarding building competition culture by other government agencies, the TCA has asked the Prime Ministry to circulate a general notice that demands that the other public agencies take regard of the competition law and policy and request the opinion of the TCA, if their practices affect competition in the market. Also, as part of a recent draft bill to amend the competition law, the TCA envisaged an Article which will reinforce the role of the TCA in the regulatory practices of the other government agencies.

### **Summary**

The issue of incoherent policies refer to the inconsistency between overall development policies and competition policy, which is often expressed as sector regulations being at variance with the competition legislation.

The most difficult aspect of this challenge is addressing those circumstances where other legislation that was passed prior to the introduction of the Competition Law have sanctioned or condoned practices inconsistent with the principles of competition and have also created conflict with regard to rightful jurisdiction for addressing related

matters. In such cases there may be substantial uncertainty for the business community and an unambiguous position must be ascertained. Most countries Jamaica, Costa Rica and South Africa have been able to achieve some success in such circumstances through advocacy in the form of dialogue. The efforts of South Africa are especially noteworthy in their MOU policy which they have developed with specific regulators.

In instances where other regulatory agencies are contemplating the introduction of policies at variance with competition law, there are clear lessons that can be learnt from those agencies which have been able to develop very bold and imaginative strategies for addressing this issue. Those countries which have been able to achieve greater success appear to be those which have developed legal undertakings in the form of guidelines, legislative amendments, and sector regulations that seek to incorporate the opinion of the Competition authority before other possibly conflicting procedures or policy are introduced. This represents a proactive approach to the management of this challenge. It also makes it more likely to be successful given the authority of the law in support of their strategy. Costa Rica can obtain a declaration of unconstitutionality in respect of rules that are anti-competitive, and Tunisia through an amendment of the law making it compulsory to seek the opinion of the Competition Council has also been able to achieve some measure of success, with regard to coherency of policy. Turkey's experience also is instructive in regard to their response to the issue of coherence of regulatory policies. The TCA has sought to adopt this proactive approach by having the requirement to take regard of the competition law written into a general notice and now seeking to have an amendment placed in the Competition Law.

This requirement where emulated by other young agencies, or countries seeking to introduce competition law would contribute substantially towards the development of regulatory policies coherent with healthy competition.

### LIMITED CAPITAL RESOURCES

Government agencies' concerns about their budgets are not limited to new competition agencies or to competition agencies in general. Every government agency in the world can express some reservations about its limited funds. However, the extreme limitations imposed by budgets of new agencies – often located in countries with relatively small public resources – are a leading and virtually unanimous complaint. This section details the impact that budget problems have according to survey responses from young competition agencies.

In **Jamaica**, there is limited budgetary support from the Government, and this is exacerbated by the fact that the Commission has no authority to impose fines. Only the Courts can impose fines and they are payable to the Crown. Any amount which might arise under a settlement agreement must relate to actual costs incurred in the conduct of an investigation. It was noted in the report following UNCTAD's fact-finding phase of Jamaica's peer review that a survey of the budgets of competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of their Governments' non-military expenditures. Were that to apply to Jamaica, the Commission's annual budget would move from its current J\$32M to J\$40M to between J\$90M and J\$120M. In addition in Jamaica given the absence of costly (but necessary) journal databases, the staff members often work without the proper tools. Financial assistance is being sought to acquire some much needed material of this type.

According to the survey, **Peru** devotes fewer financial resources towards the enforcement of the competition law, in absolute terms and in comparison to the situation of other developing economies of similar size, and the shortage of human and financial resources of the competition authority adversely affects competition law enforcement. The Peruvian competition agency, Indecopi, relies heavily on the proceeds from fines imposed and to a lesser extent, from fees charged. This revenue structure severely constrains the possibility of a wider scope for Indecopi's activities. The resource shortage poses severe constraints on its staff, and, consequently, on the possibility of a more extensive action in competition enforcement, particularly in *ex officio* cases. In

2005, Indecopi received a small share of fiscal budget to support its activities, which accounted for as little as 5% of the total of the agency's budget.

The **Armenian Commission** suffers from severe budget constraints. As an independent agency, the Commission is granted by the Law the right to determine its own financing needs. The actual funding is however far below that requested by the Commission. The financing was dramatically reduced, almost by half, in 2002. There was a slight increase in 2004, but it was still less than in 2001. There has been some positive progress in 2006. The Commission also has considerable difficulties in attracting and retaining staff as the salaries at the Commission are also well below the private sector.

Securing appropriate funding proved to be the most difficult institutional challenge for one transition agency in **Central Europe**. The survey described a "paradox" in which sector regulators received dedicated revenues from charges levied on the supervised industries, while the competition agency received funding through general revenue. According to the agency, this arrangement makes it very difficult, if not impossible, to recruit the minimum staff required for the Authority to effectively start operations.

#### **Measures adopted to treat challenge Limited Capital Resources**

The measures adopted to address the challenge of limited capital resources have been extremely varied. Several agencies have sought through their processes to reduce cost. They have achieved this by streamlining their enforcement processes, by prioritizing, and reorganising and in some cases relinquishing certain projects. Other agencies have sought to charge fees for work done, or sought the ability to impose fines and retain the proceeds.

In **Israel** in order to deal with budgetary constraints, the **(IAA)** sets a yearly agenda which points out the main topics to be dealt with in the following year. However, often certain projects must be relinquished in order to deal with ongoing issues that require immediate attention, such as mergers.

In a similar vein, the **Panamanian agency** has tried to reorganize its priorities in order to obtain effective results in its tasks. This includes the establishment of controls on various expenditures, including the purchase and use of office materials and national/international training courses.

In **South Africa** in order to overcome its capacity and resource constraints, relative to its counterparts in the United States and elsewhere, the South African competition authorities have streamlined their processes within the enforcement and mergers areas in order to improve turnaround times for investigations. For instance, merger applications are divided by the Competition Commission into three phases, with phase 1 types requiring less extensive analysis than phase 3 types.

**Bulgaria's** CPC believes the problem of its inadequate budget can be resolved through an amendment to the Law on Protection of Competition that would allow the CPC to retain a part of the pecuniary sanctions, fines and fees. They believe this will lead to more competitive salaries, which will decrease the turnover of staff. This amendment had not yet been adopted at the time of the survey.

In **Jamaica** it has been proposed that the Commission consider charging fees for providing opinions to private firms in order to help deal with the financial difficulties.

**Peru's Indecopi** reported that its organisational structure which concentrates several mandates in addition to competition enforcement within the agency, has kept down the administrative costs of small competition units.

The **South-western European Authority** reported that shortly after the creation of the competition agency, a dedicated funding arrangement was proposed and accepted by the government, on the basis that the Authority provides services to the regulated sectors of the economy. It was recommended that a defined proportion of charges levied by sector regulators on regulated undertakings should be directly transferred to the Authority. The decision was enacted that up to 7.5% of the charges collected by seven



sector regulators be regularly passed on to the agency. The precise share is defined annually by the Ministers who have the administrative tutelage of these sector regulators, as a function of the approved expenditure budget for the agency. These dedicated funding arrangements have apparently proved to be an effective tool. The agency claims that the availability of a well-identified, regular, and predictable source of funds has enabled it to meet growing funding requirements, as well as to plan further ahead in terms of staff recruitment and other operational activities. For instance, the approved expenditure budget for 2005 is € 7.8 million, a 24% increase over 2004. Moreover, the existing funding arrangements have also proved instrumental for the agency to discharge its competition enforcement functions in an autonomous way.

### Summary

Few of the reporting agencies appeared to be completely satisfied with the amount of capital resources it was afforded. Some agencies have determined objectively that their support relative to their peers or with regard to their country's budget is limited. The lack of support has meant generally that as reported by Jamaica, their staff often work without the proper tools. In several cases the lack of support has meant a refashioning of the enforcement operations of the agencies. The difficulty of overcoming this challenge is not only to achieve the appropriate level of funding, but to do so while retaining an image of independence and transparency.

Some agencies appear to have achieved a limited degree of success through the particular measures they have adopted; however for many agencies their options are limited because these agencies are not ultimately responsible for determining the size of their budget allocations. Agencies therefore may lobby their finance ministries for additional resources, but mostly, they must be prudent financial managers whilst finding innovative methods to manage their allocations in order to achieve the best results. South Africa for instance has developed a streamlining policy and an elaborate system of stages which have reduced turnaround time and consequent costs. Most other agencies (e.g. Israel) appear to have adopted some form of prioritization, often relinquishing certain projects in order to deal with issues that require immediate attention. This has worked to some degree, for example Panama has established controls

on various expenditures, including the purchase and use of office materials and national/international training courses.

The experience of retaining the proceeds of fines has been touted by some agencies as one method for addressing this challenge, but no agencies have confessed to any particular success in this regard. No mention was indeed made of the effects that such a policy might produce. The practice can in fact be fraught with danger. It can lead to a lack of trust by the business community which could assume that decisions to impose fines are premeditated or conveniently ordered by agencies primarily to support their operation, or boost their resources. This would be a damaging image for an emerging agency.

The experience of the South-eastern European Authority, in having a proportion of the charges levied on sector regulators passed on to the competition agency is interesting and demonstrates an extraordinary commitment to work of the agency. The extent to which this could be emulated by other young agencies is uncertain.

**LIMITED EXPERIENCED HUMAN RESOURCE CAPACITY**

Competition agencies generally spent more time identifying the challenge of limited experienced professionals than any other. There were several reasons reported as to why young agencies were often faced with this dilemma. Certain countries attribute the cause of this problem to an overall dearth of available persons qualified in competition law and policy. Other agencies attributed the lack of well qualified professionals to civil service salary structures that often restrict agencies from recruiting and maintaining highly-skilled staff members. Other agencies have indicated they simply do not have enough officers assigned to manage the assigned tasks.

The lack of skilled personnel has meant an inability of agencies to readily identify offending practices, and to handle complex matters. It also leads to extended delays and sometimes incorrect decisions. These may ultimately lead to a lack of confidence in the organizations by their respective business communities and stakeholders, and a lack of confidence by the staff of the organization in themselves and in their ability to enforce their legislations effectively.

In **Bulgaria**, the analyses of new and emerging markets are a substantive challenge for staff of the Commission for Protection of Competition.

**Tunisia** also faces the problem of a lack of qualified officials in competition law and policy in the early stages of the law enforcement.

The **Estonian** agency, at the time of its inception, had no people with knowledge and experience in competition law. In parallel with drafting the necessary legislation they had to start training staff whose educational background was designed for a planned economy, not for a market economy. In addition Estonia had serious problems recruiting high level staff when the agency first began, due to very low salaries in the civil service. This was especially true for lawyers, for one short period there was only one lawyer on the Board.

The **Israeli** authority (IAA) finds it difficult for professional staff, such as lawyers and economists to stay more than 3-4 years due to the fact that the maximum possible grading can be reached in such a time period. After this grade, IAA cannot improve their salary or benefits, and the private sector offers better employment terms.

A major challenge for the **Barbados Commission** was the sufficiency of technical staffing to manage broad and varied technical agendas. In addition, its commissioners are able to hear matters only on a part-time basis, which does not allow them quickly develop the specialist knowledge required for the enforcement of competition law. The Barbados Commission has three technical officers along with a Director of Fair Competition assigned to competition matters. The limited number of available staff is a challenge, because it places severe strain on the organisation's ability to respond readily to queries and complaints, requests for data, speaking engagements, and other appointments.

In **Armenia** many of the economic and social transformations that have taken place in the last five years have significantly affected the direction and shape the work of the Commission. The Commission has undergone four changes of its structure, the first beginning in 2000. The existing Organization Structure is not sufficient for the workload. The Challenge has to be overcome through the hiring of more staff. The Commission has a staff 66 instead of the required 147.

A related challenge for **Jamaica's Commission** remains the need to obtain authorization for the tutelage to get the required increases in staff. As the portfolio of anti-trust cases under active investigation develops and the number of decisions increases, so does the number of appeals in court. The implications are that additional case-handlers are required to accommodate case instruction within an acceptable time-frame, and additional lawyers are needed to ensure an appropriate interface with the judicial system. Yet, a prevailing across-the-board freeze in public service recruitment makes it mandatory that a case-by-case authorization for new staff is required at the highest level, even if budget funds are available. The Jamaican competition agency finds it extremely

difficult to attract and retain staff. Its salaries are uncompetitive and there is a dearth of training opportunities and the required skills in the region.

Administrative constraints have also prevented the Jamaican agency from a more agile recruitment of needed staff increases. The Tutelage has so far approved recruitment of new staff as proposed by the agency, although with a certain lag.

**Measures adopted to treat challenge of Limited Human Resource Capacity**

In seeking to treat the challenge of limited human resources agencies have generally sought out specific training programmes, or job attachments for their staff. Technical Assistance has also been a key means of addressing this challenge.

**In Bulgaria** the CPC has sought to increase the professional knowledge of employees in the area of competition law and policy through different training programmes and seminars. In order to strengthen its administrative capacity the CPC works in cooperation with the sector regulatory authorities. Some success has been observed in that the number of the decisions concerning for example, the telecommunications sector has increased from 7 in 2004 to 18 in 2005. Nevertheless, further efforts are needed.

The **Netherlands Competition Authority** invests in its own employees by offering internal and external educational programmes, for instance in the area of competition law, industrial property and administrative law. In addition, attention is paid to the organisational support of employees through planning and work processes. Part of the training is organised and delivered by NMa itself, which makes it possible to share the information available within the organisation.

Not only undergoing training, but also offering work placement exchanges facilitates the development of experience within the organisation. NMa's employees can participate in work placement exchanges with, amongst others; NMa's other directorates (offices), the Ministry of Economic Affairs, foreign competition authorities and the European Commission. In addition, NMa offers its employees the opportunity to do a work

placement with other competition authorities. This promotes co-operation and knowledge transfer.

The **Barbados Commission** has made a concerted effort to have its officers exposed and trained in competition law, and investigative techniques. These officers have been encouraged to participate in a number of workshops and training programmes.

In addition, in order to improve the capability of its officers the Barbados Commission has utilised the expertise of the Australian Consumer and Competition Commission (ACCC) during the first quarter of 2003. The ACCC provided an experienced officer trained in investigative procedures, which assisted the Barbados Commission in defining its procedures and guidelines for operation as well as assisting in managing ongoing investigations.

For the **Jamaican Commission**, training takes place on the job, as none of its educational institutions are equipping persons with the expertise required for competition enforcement. Jamaica has undertaken a substantial outside recruitment effort which required that a comprehensive training program be established. The intent was to keep professionals continuously abreast of new developments in their fields of knowledge and to foster the development of an internal corporate culture. This was achieved through a regular series of international seminars held at the Commission's premises and through the frequent participation of staff in international learning events abroad. Another training objective was the development of case-handling skills. One instrument used was the visit of a seasoned case-handler from a European Competition Authority, who spent four weeks sharing her experience with Authority staff at headquarters.

The Jamaican Competition agency also occasionally approaches international funding agencies for assistance. The United States Agency for International Development (USAID) has been particularly helpful. Jamaica benefits greatly from personal links forged with officers of authorities from a number of developed countries.

**Jordan** in responding to its human resource challenges has organised specialised in-house and abroad training courses for the benefit of the Directorate employees. It has also organised courses and joint workshops between the Directorate and other Commissions to benefit both sets of employees.

**Tunisia**, in order to remedy the problem of limited human resources has developed training programs in cooperation with competition authorities of some developed countries (French Belgium). All Competition council members and staff (20) have been trained. Tunisia has also developed an inside workshop for the staff of competition authorities (the directorate general for competition and the competition council) on some specific issues (techniques of investigation, economic analysis, and in-depth analysis of practical cases of collusion and abuse of dominant position). Staff and investigators of the Directorate General for Competition in Tunisia, and its regional offices, have been trained (more than 60 investigators). Technical assistance has also provided positive results, developing a better understanding of competition principles and analysis.

In **South Africa**, regulators have to compete for skills and expertise with the industries they are meant to regulate. In most instances they cannot match the packages offered by the private sector and have to grapple with high rates of staff turnover. This has been one of the biggest challenges of the South African competition authorities. As a means of retaining staff, the benefits of working in a regulatory environment, such as the satisfaction of directly affecting economic activity, and training and development opportunities, are elevated. Perhaps the authorities must also tout with the idea of attracting and employing more mature professionals who are through with job-hopping. The South African Competition Commission has also spent considerable effort in increasing the skills base of existing staff, by means of relevant training, in order that they can keep up with the pace of change in the environment and in order that their enforcement activities can be proactive and pre-empt the responses of the firms that are investigated.

The South African Competition Commission's commitment to a culture of continuous learning is reflected in the number of hours spent by their employees on training, as well as the percentage of the budget being invested in academic development. The South African Commission has invested in the training of its staff through its collaboration with international organisations like the OECD, UNCTAD, and the EU. South Africa has also had arrangements with foreign competition authorities such as the US Department of Justice (USDOJ), US Federal Trade Commission (USFTC), Australian Consumer and Competition Commission and Norwegian Competition Authority, in which staff from these agencies have been seconded to the South African Commission as mentors. South Africa has also entered into an arrangement with Kenya's Monopolies and Prices Commission, whereby staff are seconded to this institution for capacity building purposes.

For the **Central European Competition** agency, given their low average age and limited professional experience, staff training deserved the utmost priority. Per capita training in 2004 reached 1.7 weeks, as against the international benchmark of 2.0 weeks for leading international knowledge-based organizations. Overall, this investment is yielding its returns with a highly motivated staff producing an increasingly high quality output.

For the agency, securing clearance from the tutelage to establish a competitive salary structure above the regular civil service norm was also a main challenge. As a result, the proposal was made to the Government that highly-skilled staff should be paid above the regular civil service pay scales, in line with the policy already adopted for the Central Bank and key sector regulators. For existing staff seconded from the civil service, a five-year convergence period to the new pay scales has been adopted, with individual progress depending on performance. This salary structure was considered a key prerequisite to attract highly qualified staff, including economists and lawyers, as economists specialized in industrial organization and lawyers specialized in competition law are very scarce in the country. The agency competes for talent with international and domestic employers, including economic consulting firms and law offices.



Attracting high-calibre staff required competitive outside recruitment, with recruitment efforts often targeting nationals working abroad. The competitive outside recruitment effort was very successful, with a 50% increase in Authority high-level staff registered as a result of recruitment undertaken in mid-2004. As of mid-November 2005, the Authority employed 76 staff, of which almost 60 % had a qualification equal or above Masters level.

The **Estonian Competition Authority** applied for external assistance projects from many countries, in order to be able to start the drafting of necessary competition legislation and train its staff.

### Summary

The challenge of limited highly skilled human resources is quite common and most problematic across agencies, irrespective of geography. It has therefore been one of the areas to which agencies have paid the most attention. It has also been an area which because of high turnover, paucity of overall knowledge in the area, and the dynamics of the issues that sustained efforts to recruit, to retrain, and expose staff must continually be pursued.

Most countries have resorted to the use of training programmes, workshops and seminars in the necessary areas of competition law, and have achieved a measure of success in this regard. A few agencies like those in the Netherlands, and Tunisia have invested in their own internal educational programmes, which makes it possible to retain the information within the organisation. Tunisia indicated that it has witnessed quite laudable success, to the extent that their 'inside workshop' has been able to train all of their council members and staff. Bulgaria too has reported success in that they have realized an increase in the number of certain decisions made.

Technical assistance programmes have generally had their most incisive effect with regard to solving this challenge of training of local professionals. Most agencies, Barbados, South Africa, Jamaica, Netherlands, and Tunisia indicated that they have at some time utilised the expertise of foreign competition authorities such as the ACCC,

the US Department of Justice, the US Federal Trade Commission, and Norwegian Competition Authority. In some cases staff from these agencies have been seconded to the local agency as mentors. Most of these agencies have also relied heavily on the support of international organisations like the OECD, UNCTAD, and the EU. The South African Commission has been very successful in developing its staff in this way; they have vigorously pursued training programmes in collaboration with these international agencies. The Jamaican Competition agency also received assistance from the funding agencies. They indicated that the USAID has been particularly helpful. Tunisia's technical assistance has also provided positive results in developing a better understanding of competition principles and analysis.

Other agencies, (Jamaica and the Central European state) have indicated another approach to managing this challenge. They are seeking to undertake outside recruitment efforts. The young European agency reported success in this regard in that it has secured the tutelage for setting a competitive salary structure targeting nationals working abroad, and has been able to undertake a successful competitive outside recruitment drive, with a 50% increase in high-level staff registered as a result.

These measures adopted to address the lack of skilled personnel challenge are quite familiar to young agencies. Several of them have reported a degree of success by using these approaches. However most agencies even those which have realised continued support in this area have all still indicated continual limitations in regard to well trained and experienced staff. Tunisia, Turkey, the Netherlands, and the South-western European agency have reported variations of sustained training programmes, sometimes developed in collaboration with the local academic community, designed to bring some long term resolution to this problem. This is an approach that may be considered by young agencies in addition to the tried and tested approaches.

### UNTRAINED JUDICIARY

Those who responded to the survey indicated challenges relating to the interface between the competition authority and the judiciary. It is important to emphasize that the independent and effective review of competition agencies' decisions by courts is a necessary, critical and important aspect of many well-functioning competition regimes. A judiciary familiar with competition law and its economic aspects is an important element of a country's competition policy system. In several instances agencies reported that cases have taken years to process. In addition some agencies perceived some of the judgments handed down by the courts as questionable.

In **Estonia**, when some of its decisions were appealed in the court, they perceived that judges had problems understanding competition cases.

The **Panamanian Competition Agency** faces difficulties regarding a due process delay. At the time of the survey, there were nine (9) cases regarding monopolistic practices in the Court (from December, 1997 to November, 2005) and in only one of them has a final decision been given by the Court (including the fine to pay to the Panamanian Government). Due to various aspects within the legislation, opposing lawyers often can delay any single process or step during the trial.

The **Jamaican Competition Authority** has indicated that its judiciary would benefit from greater exposure to training on the subject of competition law and policy and it is in the process of providing the requisite opportunities.

### Measures adopted to treat Untrained Judiciary

The training of the local judiciary and public prosecutors, and attorneys, like that used to develop staff has been primarily centered on seminars and workshops. Some countries however, have been able to develop far more focussed and organised programmes to improve the skills of their local judiciary.

The **Jamaican Competition Authority** has developed a fairly sustained programme of training the officers of the local judiciary. On the very first occasion its training for judges took the form of a lecture presentation by Professor Richard Whish, Competition Law and Policy, scholar and author. This represented the inauguration of the Shirley Playfair Lecture Series; and was an exclusive affair. The public was not invited. The presentation explored the concepts of market definition and dominance. In 2004 Judge Diane Wood, Circuit Judge of the US Court of Appeals for the Seventh Circuit, conducted a two-and-a-half day Workshop for six members of the judiciary. Attempts are now being made to have the programme continued.

The **Competition Tribunal in South Africa** has not employed technical assistance programmes in the traditional sense, but does benefit from regularised workshop and seminars provided by leading academics and professionals to keep staff members, panel members and competition appeal court judges abreast of developments in US and European antitrust law. Interventions have also been provided by private consultants in areas such as corporate structuring of transactions to ensure the tribunal is kept updated on industry tools and business methods employed to structure transactions.

The **Central European Competition Authority** indicated that it is training judges, but they expect continued advocacy is needed to familiarize the courts with competition concepts.

The young **South-western European Competition Agency** stated that it must address a lack of familiarity of the judiciary in the application of EU competition law. This agency reports that any adjustment, if needed, will only be considered once further experience is gained in its application, *inter-alia* through case law from appeals of Authority decisions.

### Summary

Since the judiciary plays a role in competition matters in all jurisdictions, having a judiciary that understands competition policy's concepts, goals and instruments is of

great importance. The training of the judiciary represents a significant challenge to young agencies. This is an area of opportunity for competition authorities to conduct advocacy and training initiatives.

Several countries have indicated that in their attempt to create a competition culture they have involved their judiciary in their general promotional activities. However a few agencies, largely because of their negative experiences, have sought to develop quite detailed and targeted programmes for the improvement of their judiciary. Jamaica has communicated a deliberate and sustained programme which can be emulated. In addition South Africa has reported that its tribunal members are regularly exposed to workshops and seminars provided by leading academics and professionals to keep staff members, panel members and competition appeal court judges abreast of competition law developments.

### LACK OF A COMPETITION CULTURE

A culture of competition among stakeholders and the wider business community is *necessary* for the effective enforcement and promotion of competition law and policy. A culture of competition in this context refers to the awareness of, the business community, governmental agencies, non governmental agencies, the media, the judiciary, and the general public, of the rules of competition law, and their overall responsibility to ensure that such rules are observed in the interest of competition and overall economic development. For example Competition authorities depend on a continuous supply of evidential and supporting information to expose and make determinations with regard to the effect of certain business practices on domestic competition. Only a knowledgeable and aware community will provide such cooperation. The lack of such a culture has plagued practically all young agencies.

In **South Africa**, at the time of the drafting of the competition law there was a lot of opposition from business who saw competition law and policy as government interference into their operations. Competition policy in South Africa is still at its infancy stage and its institutions<sup>3</sup> are relatively young by international standards. As such, businesses and consumer communities are not always aware of the implications of the Competition Act.

**Jersey** indicated that its most challenging experience as a young competition agency has been increasing public understanding of the Law. Jersey falls outside of both the United Kingdom and the European Union; therefore competition law in these jurisdictions has largely had no binding effect within Jersey. Thus, local businesses and consumers for the most part have had little to no experience in working with competition law, or a competition law enforcement agency.

The **Netherlands** does not have a long tradition with regard to competition law. Up until 1998, the Netherlands had a fairly ineffective regime for enforcing competition. Up until 1998, the Netherlands was known as a "cartel paradise". When the Competition Act

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<sup>3</sup> These include the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

came into force, this paradise came to an end. However, the introduction of an Act on its own is not enough to bring about a (radical) change in attitudes to competition. Realising this change in mentality and developing an awareness of the existence of the Competition Act and the consequences of infringing the Competition Act was one of the greatest challenges.

The **Estonian Competition Board** began its work at the time when the country was shifting from a planned economy to a market economy, and thus the concept of competition was completely new in the society. The Competition Act was drafted without a deep knowledge of competition issues.

During the early years of enforcement of the **Turkish Competition Law (TCL)**, the lack of competition culture within the business community and society was a major challenge for competition agency. The gap in understanding the importance of having competition culture has created difficulties in many respects. The lack of competition culture and knowledge by society has also been a major problem, as the TCA lacked this public support during its early years.

In **Barbados**, the non-existence of an abiding culture of competition is regarded as one of the primary challenges facing the competition commission. The lack of an understanding among large segments of the business community with regards to the purpose of competition law, as well as the need for more effective business competition, leads to tacit resistance to the obligations and rules of competition law. Certain interest groups saw the implementation of a competition law and policy with its focus on the prohibition of anti-competitive practices such as bid rigging, exclusive dealing contracts, tied selling, and resale price maintenance as interference into their activities; in their view, business activity had worked efficiently and effectively for several years. In Barbados the Commission has enforcement powers to demand information from enterprises, especially those that are the subject of an investigation. However, unwillingness among competing firms, as well as stakeholder associations and

organisations, can sometimes lead to inordinate delays and difficulty in being able to complete an investigation expeditiously.

As with other emerging agencies, a recurrent issue for the **South-western European Competition** agency has been the trade-off between the fostering of national champions and the assessment of merger control under economic welfare standards, undertaken by the Authority as per the competition law. This has led to substantial public debate, particularly in the network industries. Awareness outreach to business and consumers on the benefits of competition remains a major challenge and has been at the forefront of the Authority's concerns.

According to the survey, it is still accurate to say that **Jamaica** has not yet developed a culture of competition, and advocacy efforts are met with little interest. Businesses do not attend workshops, seminars and conferences, and are quick to criticize the competition agency for not properly educating the public. The agency reports that for the better part of its eleven years, the Commission has focused largely on consumer-related matters, rather than complex competition cases that require significant expertise. Most matters end with consent agreements or simply with the rendering of staff reports; thus the Commission appears ineffectual. The budget does not allow for media campaigns and such activities as would help to enhance the profile of the Commission.

#### *Measures adopted to treat the lack of a Competition Culture*

The agreed remedy across the antitrust community for developing a greater awareness to the importance of competition law and policy is advocacy through the dissemination of information by means of seminars, workshops, press releases, fliers, and websites.

In **Costa Rica**, **COPROCOM** has been working on a serious promotion of competition culture through seminars, conferences and workshops. The main goal has been to train and transmit information on competition legislation and its principles. The agency has also spread the range of the antitrust legislation through the Antitrust News Guide, the



Glossary of Competition Terms and the Monthly Bulletin that contains jurisprudence, statistics and other important issues.

The **Jersey Competition Regulatory Authority (JCRA)** has engaged in extensive public outreach and educational activities. They have published ten guidelines that attempt to explain both the Law and our procedures in enforcing its provisions. They have participated in numerous public seminars and also regularly meet with companies, industry representatives and government officials to provide advice on particular matters.

**Jordan's Competition Authority**, in order to develop a greater awareness of competition policy has organised national forums to explain the Competition Law. They have implemented a media campaign and compiled and distributed an explanatory booklet, annual report and brochure about the Competition Law and the Directorate's activities. They have also designed a website for the Directorate as a tool to introduce the law, rights and duties of all parties.

In the **Netherlands** the NMa, to realise a change of mentality amongst undertakings/associations of undertakings/branch associations, has tried to provide more clarity about the content of statutory provisions by creating transparency. This includes, for instance, clarity about the way NMa interprets the Competition Act and what is and is not allowed. NMa has used the following methods to provide undertakings, associations of undertakings, branch associations and consumers with 'guidance': adopting and publishing guidelines; issuing informal opinions; press releases; website; drawing up and publishing brochures; maintaining contacts with organisations of undertakings; setting up an information line for consumers and undertakings; taking decisions and publishing these decisions (in particular, publication on NMa's website); and giving lectures during congresses and symposiums. In addition by imposing high fines on undertakings which have infringed the Competition Act, companies have become aware of the consequences of infringing the Competition Act.

**Peru** recognizes the challenge is to strengthen competition advocacy. Indecopi has undertaken the task of competition advocacy as an integral part of its functions, even though there is not an explicit mandate in the Peruvian competition law for competition advocacy. This advocacy includes such tasks as wide dissemination of information on legal proceedings,<sup>4</sup> explicit educational activities with different target groups, completion of a wide array of seminars and workshops dealing with a number of issues related to competition law and policy, and analyses and advice provided to governmental institutions on a number of topics. An important share of Indecopi's competition advocacy has been related to the analysis of to what extent public enterprises meet or fail to meet the constitutional provisions that prevent the government from entering an industry unless a number of legal requirements is met, namely, the need of an expressed authorisation by law allowing the state to play a subsidiary role in order to avoid possible grounds for unfair competition from the state.

The **South-western European Competition** agency's adopted strategy for developing a greater awareness of competition has emphasized three main targets. The first target is consumers and producers at large through a regular presence in the media, the second target is Judges and Public Prosecutors through education programs, and the third target is academia through encouragement for the development of new post-graduate programs in competition law and economics. The media has been important disseminators of the key messages of competition policy and have voiced wide support for key anti-trust decisions. Results of the regular monitoring by the agency of recently-liberalized markets, such as telecom and motor fuels, have also received an extended coverage by the media and proved an important instrument in outreach to consumers and producers alike. Regarding competition policy outreach to stakeholders, a wide recognition of the agency's role as the enforcer of the new competition legislation among economic agents has been achieved. This is partly the outcome of a very active media presence, leading to 140 mentions on broadcasted news and 2,000 columns (12.2x1.97

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<sup>4</sup> Recently, the second quasi-jurisdictional instance -the Defence of Competition Chamber- has launched a website containing the full texts of its resolutions in the last few years. [http://10.0.0.10/sdc\\_jurisprudencia/consultanew/principal.asp](http://10.0.0.10/sdc_jurisprudencia/consultanew/principal.asp)

inches) during 2004. In addition, considerable effort was put into the timely availability of information on the website has paid off, with a monthly average of 8,000 visits also in 2004.

In **Tunisia**, a program to promote competition culture has achieved good results as the agency gained experience in enforcement, and the role of competition authority is now better known and perceived. Its efforts included seminars; radio and TV programs; dissemination of copies of the law; and leaflets. The lawyers in Tunisia are better aware of the existence of competition authorities and their role, due to national seminars with the university and specialised courses at the university. There has been an increase of the number of cases and consultations introduced to the Council, with 19 cases in 2004 compared to four cases annually from 1990-2000. There has been advertising of some decisions of the competition council in the newspapers, and a dissemination of annual reports of the competition council, along with an annual press briefing.

Over the years, the **South African Competition authorities** have gained the credibility of the business and legal community through the consistent and transparent application of the Competition Act. The business community appears by and large to have accepted that competition law is a necessary part of business activity, so much so that some firms have an internal competition law compliance programme. Although they appear to have adapted to and embraced a competition culture, a lot of anticompetitive conduct still remains in the economy and a lot of businesses still attempt to stifle the objectives of competition law and policy. The South African competition authorities have addressed these challenges and legitimized their role in the economy, by recognizing the need to harness the media to highlight their intervention in high profile cases that have a high consumer-interest value. Furthermore, they have managed to secure the buy-in and participation of specific stakeholders, such as organised labour in their proceedings. However, it is the quality of the participation by organized labour that remains a challenge. Though frequently signifying an intention to participate, all too frequently there is none or inadequate representation by labour officials at tribunal hearings. The authorities are taking it upon themselves to train labour representatives in the procedural intricacies of competition law and administration. The Commission deals

with these challenges by continuing its advocacy efforts aimed at raising public awareness through presentations, workshops and meetings with business entities, labour, consumer groups and other affected stakeholders. These are arranged either directly or through the advisors and legal representatives of the stakeholders. These events inform companies about the implications of the Competition Act for their businesses and help in creating a culture of competition in the economy. The Commission also gives advisory where necessary. In this way it promotes voluntary compliance with the Competition Act and educates the general public to their rights under competition law.

The **Turkish Competition Authority** has been organizing events such as panels, conferences, regional seminars in order to increase awareness of competition by the public and the business community. Also, the TCA has extensively used media to inform the public and business community about its practices and has produced a great number of publications on competition law and policy accessible as soft and hard copies. The agency is in close contact with law and economics faculties in order for the Students to have a course on competition law and economics. It can be argued that the TCA has been quite successful in raising the awareness of the public and business Community. The success regarding building competition culture with other government agencies is remarkable, although they do recognize a further need for improvement. The agency believes that the accession process to the EU will also help it in this regard.

In **Barbados**, competition advocacy has been the response of the competition enforcement agency to the issue of the supply of evidentiary information, through informing and educating the public. Through several presentations, in workshops, discussion sessions, the internet and the news media, some education of the business community has taken place but there is still substantial work to be done in this area.

For the **South-western European Competition Authority**, most of its achievements in leadership and strategy, relations with stakeholders and human resource utilization have been acknowledged under a Pilot Project for the Institutional Assessment of the

Competition Authority undertaken in cooperation with the OECD Competition Committee. The OECD assessment also highlighted areas for improvement, particularly in internal operating procedures. As a result, a series of actions were identified and incorporated into the rolling three-year business plan. Overall, the assessment was instrumental in developing awareness of stakeholders' views and in internalizing them into the operations policies of the agency. A recent initiative of this agency yielded a wide impact on advocacy. This was the organization of a conference on Competition Law and Economics, which attracted leading experts from Europe and North America. The Conference attracted judges, academics and economic and law practitioners active in competition policy and enforcement. The strong support for this event, has led the Authority to organize a follow-up Conference in 2007. The agency views advocacy as an ongoing effort that will continue to be actively pursued in tandem with case decisions reached by the Authority Board.

### Summary

All young agencies experience a lack of competition culture of varying degrees. The depth of the challenge will vary depending on the level of development of the agency and the historical background from which it has to emerge. These factors set the scale of the mission, and determine the appropriate form of treatment.

Several agencies have developed quite elaborate and systematic programmes for public awareness. The European agencies have reported the best structured programmes, measured down to the number of mentions, on the broadcasted news, and the inches of columns attributed to their cause. Most other countries have set in place their specific programmes which could be compared and shared where appropriate with their counterparts. It is important to note that the all successful programmes have sought to embrace the media quite substantially.

Agencies operating from former command economies have had to undertake a more extensive and all embracing programme. These agencies have to work closely with other regulatory agencies to develop a new public mind set. Belgium for example, in its report

suggested that initially, with a tradition of consensus politics, and state monopolies there was little ideological attraction for competition among its leaders. The agency therefore struggled due to a lack of support and failed to develop a strong public awareness for competition. However with the decentralisation of European competition law, coupled with the realisation that antitrust laws could contribute to consumer welfare there has been greater commitment on the part of Government and hence the competition culture is improving fast. On the other hand agencies (like those in Latin America and the Caribbean, and in South Africa) which are operating against a background of previously dominant merchant class, while embracing the entire public as well have generally developed more focused campaigns. These agencies, not having to deal with the same ideological distractions among their leaders, could focus their promotion more specifically at the business community. The strategy and success of South Africa especially, is noteworthy in regard to their efforts at encouraging certain firms to develop an internal competition law compliance programme. This is a strategy that could be adopted by other young agencies if initially only at the level of business associations or other professional groupings.

It is evident that success in regards to the development of a competition culture is linked not only to the overall socio-economic development of the country, but also to a country's existing experience in regard to the observance of law and order. It is also dependent on the level of commitment of the government authorities and the agency's leadership towards achieving success in this regard. The inclusion of competition advocacy explicitly in the Competition Law is therefore a means of achieving this objective, because having the responsibility for the promotion of competition written into the law will ensure a greater level of commitment by the agency; it should attract specific budgetary support, and will require the explicit focus of the agency even in the face of demanding challenges..

Associated also with the development of a competition culture is the development of respect and trust for the competition authority and its mandate. These norms will enable the agency to be more effective and influential in being able to achieve its goals of

awareness and in generating greater support for its programmes. To achieve this, the competition agency must be careful with regard to the initial impression it emits in the community at large. It must be absolutely impartial, its motives must be unquestionable, it must be transparent in its operations, and it must exude competence and efficiency in its investigation and decision making procedures. In seeking to develop the 'right' image agencies must prudently choose the issues and cases with which they seek to become involved.

A measure that will work for all agencies, and may ultimately be the most effective means of developing an awareness of a competition culture, is that advocated by the Netherlands Competition Authority. The NMa indicated that it seeks to achieve greater awareness for the importance of competition by the announcement of its imposition of high fines on undertakings which have infringed the Competition Act. It suggests that companies have become more aware of competition by observing the consequences faced by others that infringe the Competition Act. This is certainly a measure that all agencies can benefit from, and is guaranteed to leave a lasting impression on all similar businesses.

The South African Authority has also been able to improve the awareness of the public to the importance of competition by securing the buy-in and participation of specific stakeholders to their cause. Stakeholders such as business associations and organised labour, because of their high profiles in the public would be useful agents that could be used by all young competition authorities to spread further their message of healthy competition.

There is certainly a quite varied and detailed list of strategies used by the different competition agencies for developing their respective competition cultures which could be studied and adapted by those young agencies which still need to achieve greater success in this regard.

### III. CONCLUSIONS

The challenges identified in this research study are those which the responding agencies have generally found most difficult to overcome. Several of these agencies have been operating for more than ten years but still have not developed any lasting success in regard to the areas identified. Most agencies are still seeking to develop the requisite competencies in their staff, their local judiciary, or to cultivate the appropriate level of awareness to the importance of competition. It is clear therefore that even though the measures so far applied to address these challenges, have admittedly achieved some success, these agencies will need to explore further measures to achieve the success they require.

In assessing the submitted responses it is important to note that although two agencies both have identified a particular challenge, the causes of that challenge may be different in different countries and hence the appropriate solutions are likely to be different. For example, a lack of funding is a frequently expressed issue; however where it is caused by a lack of resources as opposed to a lack of commitment to competition policy, the “solutions” will be quite different.

The challenge of reforming an inadequate legislation for instance tended to be a unique experience driven by the local business climate, the common domestic practices, the objectives of the agency, and its latent competencies. In addition the ability to obtain an amendment varies from country to country depending on the political support for the focus of the agency. For some countries the solution to an inept statute might be to amend and expand powers, for others a better strategy might be to reduce and focus responsibilities so that success is more reasonably attainable. More information would therefore be required to go further, “one size can’t fit all” the measures adopted in a specific country must be studied and analysed further including assessing its related success before it could be adopted or modified by another agency.



Even though the challenges faced by the young agencies and methods of responding to them are often unique, some types of challenges are frequently rooted in similar causes and can be treated with similar methods. The challenges of limited skilled staff and an untrained judiciary are often associated with a non-existent competition culture. The methods used to combat these challenges have consistently been training programmes, workshops, job attachments etc. The development of a sustained domestic training programme aligned to a long-term academic infrastructural arrangement, as adopted by some agencies, may result in real gains in addressing these issues. Such measures can again be studied for adaptation by young agencies.

It is also important to note that even though agencies have presented here their relative successes with respect to the management of certain challenges. No great attention has been paid in the study to the longer-term repercussions of some of the measures that have been adopted or proposed. Particular discussion was given to the suggested imposition of fines to address budgetary limitations, where it was noted that certain measures like this can have other negative implications for the overall goals of the young agency. In addition, policies to increase an agency's powers and responsibility for the prohibition of added practices will also require a subsequent increase in resources, and potential claims of under-capitalisation. Agencies should therefore note in general that all measures, even seemingly excellent ones, will have their associated positive and negative tradeoffs.

The value of the information presented here is in bringing awareness to the variety of strategies that have been adopted by peer agencies in managing similar challenges. This awareness should help those agencies contemplating similar strategies to be more comfortable and confident in the likely outcomes given the experiences of their counterparts. The measures identified are not theoretical recommendations, but are tried and tested strategies, utilised by young agencies from various geographic, social-economic and political backgrounds. They are therefore strategies that can be further researched by making contact with the relevant agencies, and can then be adapted and applied where required.

Given the vast number of experiences shared by the respondents to the survey, it is obvious that there is a wealth of information available from within the young agencies themselves, which could be most beneficial to their own development and success. This study entreats the young competition agencies to analyse in far greater detail the methods and successes of their counterparts and their predecessors who have achieved a measure of maturity. In doing so, the young agency even from these preliminary observations can fashion a range of prescribed measures that can be developed, and adopted to meet their respective challenges.

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**APPENDIX 1**

**List of Countries Responding - Their Population, Locations and Year agency was established**

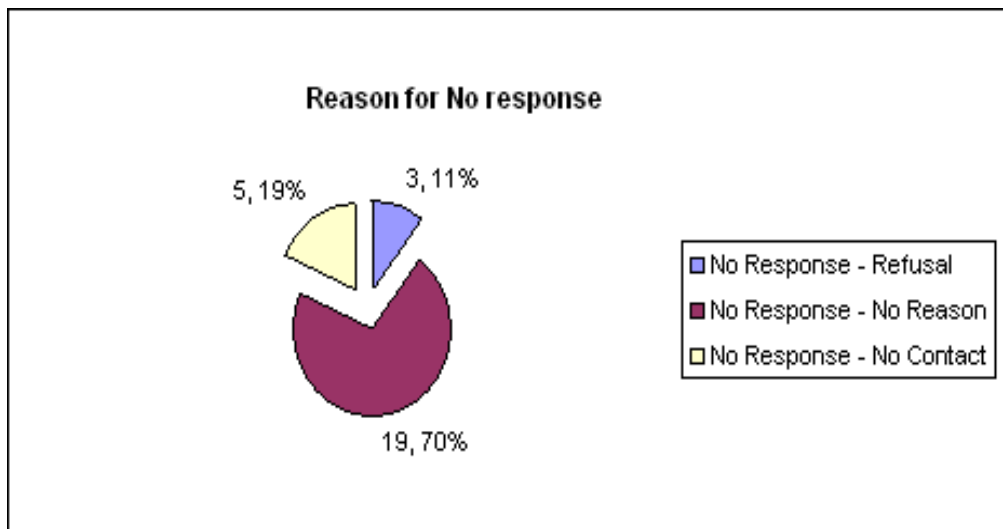
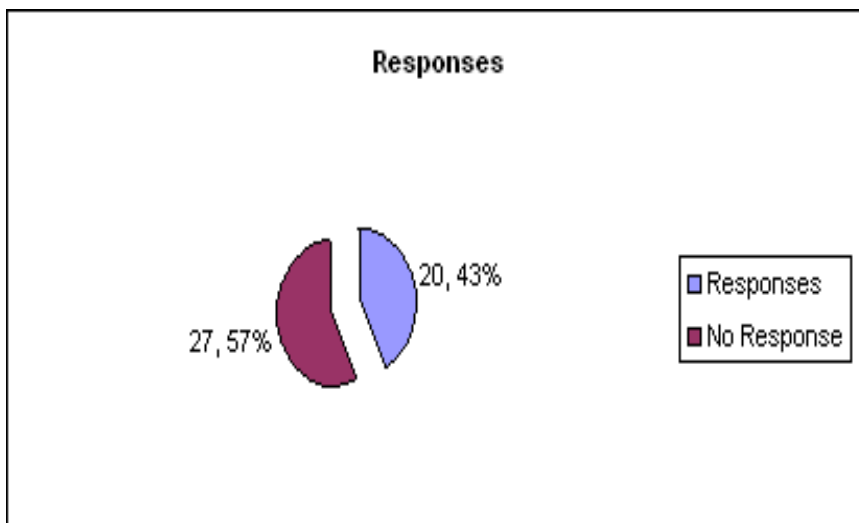
<b>No.</b>	<b>Country</b>	<b>Population</b>	<b>Response</b>	<b>Year Est.</b>	<b>Location</b>
1	Estonia	1,332,893	<b>Response</b>	<b>1993</b>	Eastern Europe
2	Turkey	69,660,559	<b>Response</b>	1994	South-eastern Europe and south-western Asia
3	Croatia	4,495,904	<b>Response</b>	1995	South-eastern Europe
4	Panama	3,140,232	<b>Response</b>	<b>1996</b>	Central America and the Caribbean
5	Israel	6,276,883	<b>Response</b>	1994	Middle East
6	Barbados	279,254	<b>Response</b>	<b>2003</b>	Central America and the Caribbean
7	CONFIDENTIAL	xxxxx	<b>Response</b>	1993	South-western Europe
8	Armenia	2,982,904	<b>Response</b>	2000	South-western Asia
9	Switzerland	7,489,370	<b>Response</b>	<b>1995</b>	Central Europe
10	Jordan	5,759,732	<b>Response</b>	2004	Middle East
11	Belgium	10,364,388	<b>Response</b>	1991	Western Europe
12	CONFIDENTIAL	xxxxx	<b>Response</b>	1993	Central Europe
13	Peru	27,925,628	<b>Response</b>	<b>1991</b>	Western South America
14	Tunisia	10,074,951	<b>Response</b>	1991	Northern Africa
15	Bulgaria	7,450,349	<b>Response</b>	1991	South-eastern Europe
16	Jamaica	2,735,520	<b>Response</b>	<b>1993</b>	Central America and the Caribbean
17	Netherlands	16,407,491	<b>Response</b>	<b>1997</b>	Western Europe
18	South Africa	44,344,136	<b>Response</b>	<b>1998</b>	Southern Africa
19	Costa Rica	4,016,173	<b>Response</b>	1994	Central America and the Caribbean
20	Jersey	90,812	<b>Response</b>	2005	Western Europe

**APPENDIX 2**

**RESPONSE RATES TO SURVEY**

	<b>Response Rate</b>		
Responses		20	0.43%
No Response		27	0.57%

	<b>Reasons for No Response</b>		
No Response - Refusal		3	0.11%
No Response - No Reason		19	0.70%
No Response - No Contact		5	0.19%



## APPENDIX 3

### SURVEY FORM

#### Objective:

To undertake an enquiry into the experiences of young competition agencies through a qualitative survey of the problems encountered and the practices that worked as young agencies established themselves. The findings of this qualitative survey will be compiled and published in a handbook that could be made available to interested agencies and countries.

#### General Instructions

- Please provide as thoroughly as possible, answers to the three questions below.
- The exercise may be treated as an agenda item of a routine staff meeting for general discussion. The results of that discussion would then be written up by a staff member. The intention is to make this survey as easy and non-intrusive as possible.
- Be specific in indicating to what extent the measures adopted in response to the challenges have worked.
- If no successful responses have been found to a particular problem please describe the challenge nevertheless and say what you would wish to do and why.
- Please mark all information that is to be treated as confidential, and which should not be identified with your country in the final document.
- Representatives of the subgroup will be in touch to monitor your progress and assist with any queries.
- The information can be submitted by e-mail, fax or post, or any other arrangements that may be more convenient to you.

#### **Questions**

- I. Please describe the most difficult challenges you have faced as a young competition agency in seeking to administer and enforce competition policy in your country.
  - II. Describe the measures you undertook or are undertaking to manage these challenges.
  - III. Indicate how successful you have been to date in addressing these challenges through the measures identified.
-

**In answering the questions you may refer to the set of challenges listed below as a guide to the type of issues normally faced by young competition agencies.**

1. *Legislation that does not allow for the application of workable standards of liability*
2. *Limited Political support for the work of the agency*
3. *An Unsupportive administrative structure to support sound decision-making based on law and economics*
4. *Inadequate budget*
5. *A civil service structure that does not allow the agency to attract good quality staff*
6. *An enforcement structure that does not allow the agency to obtain the evidence they need consistent with due process*
7. *The inability to impose remedies that will act as a serious deterrent to anti-competitive conduct*
8. *A judiciary that is incapable of enforcing orders and applying meaningful judicial review*
9. *Limited initial and ongoing training system for staff*
10. *Limited Support of the business and consumer communities for the work of the agency.*